JUSTICE CENTRE | HONG KONG

Case Summary for:
ARANGO CASTANO JOHNY RICARDO v HONG KONG SAR GOVERNMENT[1]

Court:	Court of First Instance (the "**CFI**")
Judges:	Hon Chow J
Applicant (and Counsel):	Arango Castano Johny Ricardo (acting in person)
Respondent (and Counsel):	Hong Kong SAR Government (Mr. Felix Lee, Government Counsel of the Department of Justice)
Date heard:	25 May 2020
Date promulgated:	June 3 2020
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2020/936.html

ABSTRACT: The Applicant had been in detention after serving his prison sentence and a removal order was made against him. The Applicant's non-refoulement claim was rejected by the Director of Immigration (the "**Director**") and by the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the "**Board**") on appeal. His appeal for leave to apply for judicial review of the Board's decision was, as at the date of the judgement, still pending. After unsuccessful reviews in respect of his detention pending removal from Hong Kong, he applied for a writ of *habeas corpus* in respect of his detention under section 32(3A) of the of the Immigration Ordinance (the "**IO**").

The CFI held that the detention was prima facie lawful, because a detention order in respect of the Applicant was in force and the Applicant was detained pending his removal from Hong Kong. In addition, the CFI held that the detention was in compliance with the principles set forth in *R v Governor of Durham Prison, ex parte Hardial Singh*[2] which were set out in *Simona Mundia v Director of Immigration*[3] (the "***Hardial Singh* principles**"), because (1) there was nothing to show that the Director was using the power to detain for any purposes other than for the removal of the Applicant; (2) there was nothing to suggest that the Director failed to act with reasonable diligence or expedition to effect the Applicant's removal; and (3) the period of detention was reasonable and had not become unreasonable in all the circumstances.

Regarding the reasonableness of the detention period, the CFI considered (a) the length of the period of detention already elapsed was substantial (commenced in March 2020); (b) the Applicant's application for leave to apply for judicial review was weak and therefore the Applicant had to bear some responsibility for his prolonged detention; and (c) the CFI was entitled to place weight on the Director's view that there were risks of the Applicant absconding and reoffending.

Key words:	Non-refoulement; Non-refoulement Claims Petition Office; habeas corpus; Hardial Singh; detention; Immigration Ordinance; torture; Torture Claims Appeal Board; persecution; removal order

The Justice Centre is grateful for the assistance rendered by Morrison & Foerster on this case summary.

[1] [2020] HKCU 1369. Also cited as: HCAL 940/2020, [2020] HKCFI 936
[2] [1984] 1 WLR 704
[3] [2020] HKCFI 741

SUMMARY:

Facts and Procedural History:

The Applicant was a Columbian national. The Applicant arrived in Hong Kong on 29 May 2014 and had overstayed since 8 June 2014. In November 2015, the Applicant was convicted of breach of condition of stay for overstaying in Hong Kong. He was later repatriated to Columbia. In July 2018, the Applicant was arrested for suspected drug trafficking and it was found that he entered Hong Kong unlawfully. He was convicted of drug trafficking on 16 July 2019. After his release on 9 September 2019, he had been detained at the Castle Peak Bay Immigration Centre (i) under section 32(2A) of the IO pending a decision as to whether or not a removal older should be made against him, (ii) under section 32(3A) pending his removal after a removal order against him was made by the Director under section 19(1)(b) of the IO on 25 October 2019 (against which the Applicant gave notice that he did not intend to appeal), and (iii) under section 37ZK pending the final determination of his non-refoulement claim, which he made and was rejected by the Director before his conviction of drug trafficking.

The Applicant made a late filing for an appeal against the Director's decision to the Board which was accepted in October 2019. The Board finally dismissed the Applicant's appeal on 5 March 2929, finding that the Applicant's claim was vague or inconsistent, that his claim that he escaped from working for a "paramilitary group" in Columbia was not credible and untrue, and that his claim of past and future harm had no basis.

On 11 March 2011, the Applicant applied for leave to apply for judicial review of the Board's decision, but his application did not state any ground on which relief was sought, and merely stated that the Board's decision was unfair. As at the date of the judgement, the leave application was pending determination.

There had been two reviews of the Applicant's detention under section 32(3A) of the IO, which decided that the Applicant's detention should continue on the grounds that (i) the Applicant's removal was going to be possible within a reasonable time, (ii) he might constitute a threat/security risk to the community, and (iii) there were no other circumstances in favour of his release. The Applicant then made the present application for a writ of *habeas corpus*. At the hearing, the Applicant complained about the length of his detention and that he was treated differently from other detainees who were released after lodging applications for judicial review.

Issues:

The CFI considered: (1) whether the Applicant's detention was lawful; and (2) whether the Applicant's detention was in compliance with the *Hardial Singh* principles.

Judgment:

The CFI dismissed the Applicant's *habeas corpus* application, ruling that the Applicant had been detained for a period that was not unreasonable in all the circumstances, and his detention was in compliance with the *Hardial Singh* principles.

Reasons for Judgment:

The CFI noted that the central question of a *habeas corpus* application was whether there was lawful authority for the detention. Under section 32(3A) of the IO, the Director may detain a person in respect of whom a removal order under section 19(1)(b) of the IO is in force, pending his removal from Hong Kong under section 25 of the IO. Given that a removal order in respect of the Applicant was in force, and that the Applicant was detained pending removal from Hong Kong, his detention was prima facie lawful. (*paras 18 to 20*)

The CFI noted that the *Hardial Singh* principles are set out in *Simona Mundia v Director of Immigration*[4]. The CFI held that there was nothing to show that the Director was exercising his power of detention for any purposes other than for the removal of the Applicant. There was nothing to suggest that the Director had failed to act with reasonable diligence or expedition to effect the Applicant's removal. The CFI considered that the Applicant's pending application for leave to apply for judicial review was the only obstacle to this removal. The CFI opined that the Director had the intention of removing the Applicant at the earliest moment, and was of the view that the Applicant could be removed within a reasonable period of time and that it would not be impossible to do so. (*paras 21 and 24*)

The CFI confirmed that the determination of whether a period of detention is reasonable in all the circumstances is a fact sensitive exercise. Relevant considerations include the length of the period of detention; whether there is realistic prospect that deportation will take place; the nature of the obstacles impeding the deportation; the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; the conditions of detention; the effect of detention on the Applicant and his family; and risks of absconding and reoffending. In determining whether a period of detention has become unreasonable in all the circumstances, the CFI should have regard to the merits of the judicial process pursued by the Applicant which impeded his removal, and the risks of absconding and reoffending (which are of "paramount importance"). (*paras 22 and 23*)

In assessing whether the period of detention had become unreasonable in all the circumstances, the CFI considered the following:

- The Applicant had been detained for a substantial period of time (commenced in March 2020) under section 32(3A) of the IO, and even longer taking into account his previous detention under sections 32(2A), 32(3A) and 37ZK of the IO. (*para 25*)

- The CFI also considered the merits of the Applicant's application for leave to apply for judicial review of the Board's decision which impeded his removal. The CFI noted it was

[4] [2020] HKCFI 741

not appropriate to examine the merits in detail, but on provisional assessment, the CFI concluded that the Applicant did not have a good prospect of success. The Applicant's mere assertion that the Board's decision was unfair was not sufficient ground for judicial review. He would have been removed earlier but for his appeal to the Board and application for leave to apply for judicial review, thus the Applicant had to bear some responsibility for his prolonged detention. (*paras 26 and 27*)

- The CFI confirmed it was entitled to place weight on the Director's assessment as to whether risks of absconding and reoffending exist and whether the Applicant may pose a threat or security risk to the community if released. The Director was of the view that the Applicant might constitute a threat/security risk to the community, taking into account the serious nature of the offence for which the Applicant was convicted. The Applicant said that he had no family in Hong Kong but had a friend who could act as his guarantor, and this friend and his family in Columbia would support him to rent accommodation pending the determination of his application for judicial review. In that regard, the CFI noted that the fact that the Applicant could find a guarantor and afford accommodation was only one factor. The fact that the Applicant had no family in, and no close connection with, Hong Kong, supported his continued detention. (*paras 28, 30 and 31*)

Lastly, the CFI commented that in an application for a writ of *habeas corpus*, the CFI should focus on the "legality" of the detention, not the "reasonableness" of the Director's decision to detain. (*para 33*)

Other Considerations:

The CFI noted that there had been a large number of applications for leave to apply for judicial review of the Board's decision, there was no reason to believe that the determination of the Applicant's application would be unduly delay. (*para 32*)

Legal Provisions considered:

1. Section 32(3A) of the IO:
   https://www.hklii.hk/eng/hk/legis/ord/115/?stem&synonyms&query=prabakar

Key Cases cited:

1. *Fidelis Ahuwaraezeama Emen v Superintendent of Victoria Prison* [1998] 2 HKLRD 448 (purpose of an *habeas corpus* application is to determine whether there is lawful authority for a detention, not to determine the reasonableness of any decision or any failure to observe the rules of natural justice)
   https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/1998/25.html

2. *Harjang Singh v Secretary for Security [2019] HKCFI 1486* (the Director is much better placed than the court to consider the risks of absconding or reoffending, and whether the

detainee poses a threat or security risk to the community if released, which are fact-sensitive; the court is entitled to place weight on the Director's assessment)
https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2019/1486.html

3. *Simona Mundia v Director of Immigration* [2020] HKCU 957 (sets out the *Hardial Singh* principles)
https://www.hklii.hk/eng/hk/cases/hkcfi/2020/741.html