

**Case Summary for:**  
**BUTT WAQAS ARIF v DIRECTOR OF IMMIGRATION<sup>1</sup>**

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<b>Court:</b>	Court of First Instance (the “ <b>Court</b> ” or the “ <b>CFI</b> ”)
<b>Judges:</b>	Hon Coleman J
<b>Applicant (and Counsel):</b>	Butt Waqas Arif (acting in person)
<b>Respondent (and Counsel):</b>	Director of Immigration (the “ <b>Director</b> ”) (Mr Rex Cheung, Senior Government Counsel, of the Department of Justice)
<b>Date heard:</b>	6 October 2022
<b>Date promulgated:</b>	6 October 2022
<b>Full text:</b>	<a href="http://www.hklii.hk/eng/hk/cases/hkcfi/2022/3062.html">http://www.hklii.hk/eng/hk/cases/hkcfi/2022/3062.html</a>
<p><b>ABSTRACT:</b> The Applicant was subject to a removal order and detained under section 32(3A) of the Immigration Ordinance pending removal from Hong Kong. The Applicant made an application for a writ of habeas corpus. At the time of the hearing, the Applicant had been detained for 396 days. The Court reviewed the Applicant’s detention against the <i>Hardial Singh</i> principles and ruled that the Applicant had been detained for a period that was reasonable pending removal, dismissing the application.</p>	
<b>Key words:</b>	administrative Law; habeas corpus; detention pending removal; whether continuing detention unreasonable; reasonable diligence and expedition to effect removal

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

<sup>1</sup> [2022] HKCFI 3062; also cited as HCAL 900/2022; [2022] HKCU 4946

## SUMMARY:

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### Facts and Procedural History:

The Applicant, a Pakistani man, was intercepted by the Hong Kong police as an illegal immigrant on August 9, 2009 and was made subject to a removal order. He lodged a non-refoulement claim in 2009 and it took 11 years to exhaust all available administrative and judicial avenues for his non-refoulement claim:

- (i) the Director's and the Board's rejection of his non-refoulement claim;
- (ii) the CFI's refusal of leave to challenge the Board's decision by way of judicial review;
- (iii) the Court of Appeal's and the Court of Final Appeal's dismissal of his applications for leave to appeal;
- (iv) the Director's rejection of his request to make a subsequent claim; and
- (v) the CFI's refusal of leave application against the Director's rejection and issue of a restricted proceedings order.

The Applicant was detained pursuant to s.32(3A) of the Immigration Ordinance and applied for a writ of habeas corpus.

### Issues:

Whether the detention of the Applicant had become unlawful when looking at the *Hardial Singh* principles as outlined at §164 of the judgment in *Harjang Singh v Secretary for Security*<sup>2</sup> as set forth in the [Appendix](#) to this summary.

### Judgment:

The detention of the Applicant continued to be lawful and the application for a writ of habeas corpus was dismissed.

### Reasons for Judgment:

The Court reviewed the Applicant's detention against the *Hardial Singh* principles as set forth below and ruled that the Applicant had been detained for a period that was reasonable pending removal:

- (HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;

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<sup>2</sup> [2022] HKCA 781

(HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;

(HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and

(HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.

The Court was satisfied that the Director intended to deport and Applicant and was only using the power to detain for that purpose, because the only impediment preventing the Applicant's removal throughout the detention was the need to obtain re-entry permission for the Applicant from Pakistan, and the Director had been liaising with the Pakistan Consulate General for this purpose. HS1 was satisfied. (*para 30*)

The Court was satisfied that the Director had acted with reasonable diligence and expedition to effect the Applicant's removal, because the Immigration Department had persistently been trying to enable the Applicant's re-entry into Pakistan. HS4 was satisfied. (*para 31*)

The Court was satisfied that the Applicant's removal could likely be effected within a reasonable period of time, because there was no live non-refoulement claim or related judicial review proceedings at the time of the hearing, and the only obstacle was for the Applicant to obtain a replacement travel document, and that the Pakistan Consulate General had issued an emergency passport to the Applicant. HS3 was satisfied. (*para 32*)

While the period of detention of 396 days was substantial, the Court was satisfied that the Applicant's past detention and the continuing detention remained reasonable, in light of all the circumstances discussed above. HS2 was satisfied. (*para 34*)

The Court held that the detention continued to be lawful and the Applicant's application for writ of habeas corpus was accordingly dismissed.

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#### **Legal Provisions considered:**

1. Section 32(3A) of the Immigration Ordinance Cap 115  
<https://www.elegislation.gov.hk/hk/cap115>

#### **Key Cases cited:**

2. Harjang Singh v Secretary for Security [2022] HKCA 781  
<https://v2.hklii.hk/en/cases/hkcfi/2019/1486?hl=Harjang%20Singh>

## Appendix

### *Hardial Singh principles as outlined in Harjang Singh v Secretary for Security*

- (1) The central question on an application for habeas corpus is whether there is, and continues to be, lawful authority for a detention.
- (2) An originally lawful detention may cease to be lawful if it continues for an unreasonable period in the particular circumstances.
- (3) What is a 'reasonable time' will therefore depend upon the circumstances of the particular case, taking into account all relevant factors.
- (4) The lawfulness of detention, or continuing detention, is subject to potential objective review by the Court. But the review is not a review as to *Wednesbury* unreasonableness, or on other public law grounds.
- (5) Either continuing detention is reasonable and so lawful, or it is not. Though the Court's review involves an exercise of judgment and balance, that is not a discretionary decision.
- (6) Hence, the Court is the judge of, and the primary decision maker as to, the reasonableness of the detainee's continued detention.
- (7) The burden of showing that detention is lawful lies upon the Secretary and Director.
- (8) The assessment will be made in line with the 'Hardial Singh principles', namely that:
  - (HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;
  - (HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;
  - (HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and
  - (HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.
- (9) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative.
- (10) A review of what might be regarded as a reasonable period of detention will include at least: (a) the length of the period of detention; (b) the nature of the obstacles which

stand in the path of the Director preventing a deportation; (c) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (d) the conditions in which the detained person is being kept; (e) the effect of detention on him and his family; (f) the risk that if he is released from detention he will abscond (which may have the effect of defeating the deportation order); and (g) the danger that, if released, he will commit criminal offences.

- (11) It is helpful first to identify and have firmly in mind the period of detention to date, before balancing the various other factors and risks against that period. This is because the weight to be given to the other factors and risks will vary as the period of detention increases in length.
- (12) Though it might seem attractive to set guideline periods or a red line (in terms of months or years) applicable to all cases, as to the circumstances in which a lawful detention becomes unreasonable and hence unlawful, no such guidelines can be set. Indeed, any attempt to do so is unhelpful. Reference to the facts of other cases is also likely unhelpful.
- (13) Nor would it be correct to think that the longer any period of detention, the greater the scrutiny that would be applied to it. Every deprivation of liberty pending deportation requires proper scrutiny of all the facts, in accordance with the Hardial Singh principles, which are the sole guidelines.
- (14) The risks of absconding and reoffending are of critical and paramount importance in the assessment of the lawfulness of the detention.
- (15) This is because if a person absconds, it will defeat the primary purpose for which the power to detain has been conferred, and for which the detention order was made in the particular case.
- (16) However, a very careful assessment of the risk must be made in each case, as the magnitude and potential impact of that risk will vary according to the circumstances.
- (17) The risk of absconding is distinct from the risk of committing further offences, and not dependent on that further risk
- (18) The risk of reoffending requires its own distinct assessment, by reference to both its likelihood and seriousness.
- (19) Neither risk can justify detention of any length, as that would permit indefinite detention.
- (20) The longer the detention, the greater the risk necessary to justify it.
- (21) The Court will rigorously scrutinize the Secretary/Director's assessment of risk on both grounds, and the weight to be given to that assessment will include consideration as to how convincing the reasoning is.

- (22) When assessing (a) the probability that removal can be effected at all and (b) the proximity of the time to removal, a real sense of the timescale likely to be involved must be identified to be able to qualify it as reasonable.
- (23) There must be a sufficient prospect of removal to warrant continued detention, having regard to and balanced against the weight of all other circumstances of the case.
- (24) As the period of detention gets longer, the greater the degree of certainty and proximity of removal would be expected to be required in order to justify continued detention.
- (25) On any appeal from a first instance decision of the Court, the appellate court will not interfere with the judge's decision unless it can be shown that what is a difficult exercise of judgment is inconsistent with his findings of primary fact, or was based on an incorrect understanding of the law, or was one that was not sensibly open to him on the basis of those facts. The leeway given to the first instance judge is not as a result of the view that he has made a discretionary decision, but rather as a reflection that the balancing exercise can be difficult.