

Case Summary for:  
**DIAWARA ANSOUMANE ALIAS ONUOHA DICKSON EMEH v. DIRECTOR OF IMMIGRATION<sup>1</sup>**

<b>Court:</b>	The Court of First Instance
<b>Judges:</b>	Hon Chow J in Court
<b>Applicant (and Counsel):</b>	Diawara Ansoumane alias Onuoha Dickson Emeh (acting in person)
<b>Respondent (and Counsel):</b>	Director of Immigration (Ms. Liesl Lai (instructed by the Department of Justice))
<b>Date heard:</b>	8 June 2020
<b>Date promulgated:</b>	15 June 2020
<b>Full text:</b>	<a href="http://www.hklii.hk/eng/hk/cases/hkcfi/2020/1152.html">http://www.hklii.hk/eng/hk/cases/hkcfi/2020/1152.html</a>
<p><b>ABSTRACT:</b> The Applicant was detained under Section 32(3A) of the Immigration Ordinance Cap. 115 (the “<b>Ordinance</b>”), pending his removal from Hong Kong. On 1 June 2020, the Applicant made the present application for a writ of <i>habeas corpus</i> be issued in respect of his current detention. The Court applied relevant legal principles governing an application for a writ of <i>habeas corpus</i> and was of the view that the original detention was lawful and that the continued detention remained <i>Hardial Singh</i> compliant and lawful. The application was dismissed.</p>	
<b>Key words:</b>	Administrative law; <i>habeas corpus</i> ; detention pending removal; whether detention had become unreasonable; security risk

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

<sup>1</sup> [2020] HKCU 1660. Also cited as: [2020] HKCFI 1152, and HCAL 1090/2020.

## SUMMARY:

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### Facts and Procedural History:

The Applicant, who has been confirmed to be a Nigerian national, arrived in Hong Kong in his assumed identity as “Diawara Ansoumane” on 17 January 2010. He was intercepted at Customs Clearance and suspected of internal concealment which upon examination confirmed to be of heroin hydrochloride. The Applicant was then convicted of the offence of trafficking in dangerous drugs, and sentenced to 14 years’ imprisonment.

While serving his sentence in prison, the Applicant raised a non-refoulement claim on 13 April 2018, which was rejected by the Director of Immigration (the “**Director**”) on 20 September 2018. The Applicant then appealed against such decision to the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “**Board**”) on 2 October 2018. On 22 June 2019, the Applicant completed his sentence, and was transferred to the Immigration Department of Hong Kong for detention at Castle Peak Bay Immigration Centre under Section 32(2A) of the Ordinance pending a decision as to whether or not a removal order should be issued. On 24 June 2019, the detention authority under Section 37ZK of the Ordinance was invoked pending the final determination of the Applicant’s non-refoulement claim.

On 29 July 2019, the Adjudicator rejected the Applicant’s appeal/petition for lack of credibility in his evidence. The Board concluded that the Applicant would not face a real risk of serious harm if he were to return to Nigeria or Guinea and, as such, Hong Kong’s non-refoulement obligations were not enlivened. The detention of the Applicant under Section 37ZK of the Ordinance has therefore ceased, and he was henceforth detained under Section 32(2A) of the Ordinance from 16 August 2019 to 25 September 2019 pending a decision as to whether or not a removal order should be made against him.

On 25 September 2019, the Applicant sought leave to apply for judicial review of the Board’s decision (HCAL 2815/2019). Also on 25 September 2019, a removal order under Section 19(1)(b) of the Ordinance was made against the Applicant, and the Applicant was detained pursuant to Section 32(3A) pending his removal from Hong Kong. There had been 4 reviews of the Applicant’s detention under Section 32(3A), where it was decided on each occasion that the Applicant’s detention should continue.

On 1 June 2020, the Applicant made the present application for a writ of *habeas corpus* in respect of his current detention under Section 32(3A).

### Issues:

The Court considered whether there was, and continued to be, lawful authority for the Applicant’s detention in compliance with the *Hardial Singh* principles set out in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, as summarized in *R(I) v*

*Secretary of State for the Home Department* [2003] INLR 196 and adopted in *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138.

## **Judgment:**

The Court dismissed the application.

## **Reasons for Judgment:**

First, to determine whether the Applicant's detention was *prima facie* lawful, the Court looked at whether there was lawful authority for detention. At the time of the hearing, the Applicant was detained under Section 32(3A) of the Ordinance, which provides as follows: "A person in respect of whom a removal order under section 19(1)(b) is in force may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending his removal from Hong Kong under section 25." In view of the facts that (1) a removal order under Section 19(1)(b) in respect of the Applicant was in force; and (2) the Applicant was being detained pending his removal from Hong Kong under Section 25, the Court held that the Applicant's detention was, *prima facie*, lawful. (*paras 18 to 20*)

Second, to determine whether the Applicant's detention was *Hardial Singh* compliant. The Court has to consider, amongst other factors, the following matters in determining whether a person has been detained for a period that is reasonable in all circumstances, which is a fact-sensitive exercise: (i) the length of the period of detention; (ii) whether, and if so when, there was a realistic prospect that deportation would take place; (iii) the nature of the obstacles standing in the path of a deportation; (iv) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (v) the conditions in which the Applicant was being kept; (vi) the effect of detention on him and his family; (vii) the risk that if he was released from detention he would abscond; and (viii) the danger that, if released, he would commit criminal offences. (*paras 21 to 22*)

When determining whether a period of detention has become unreasonable, the relevant considerations include (i) the merits of the judicial process pursued by the detainee which impedes his removal; and (ii) the risks of absconding and reoffending. (*para 23*)

The Court considered the relevant principles and held that (1) there was no evidence which suggested that the Director was using the power of detention for any purposes other than for the removal of the Applicant; (2) the only obstacle to the Applicant's removal was his pending application for leave to apply for judicial review of the Board's decision, which was assessed by the Court to be a weak one; and (3) there was also nothing to suggest that the Director had failed to act with reasonable diligence or expedition to effect the Applicant's removal. The Director intended to remove the Applicant at the earliest moment and believed that the Applicant could be removed within a reasonable period of time. (*paras 24 to 26*)

The Applicant also argued that he could be prosecuted again in Nigeria for the same offence for which he had been convicted in Hong Kong. The Court pointed out that it was well established that the “double jeopardy” argument is not a ground against the deportation of the Applicant. (*para 28*)

In arriving at the decision to reject the application, the Court also considered the fact that the Director had consistently come to the view that the Applicant constituted a threat/security risk to the community due to the serious nature of his conviction and that his release would not be conducive to the public good. The Court was entitled to place weight on the Secretary for Security’s and the Director’s assessment on factual matters such as the risks of absconding or reoffending, and whether the Applicant, if released, may pose a threat or security risk to the community. In addition, the Applicant was unable to provide any guarantor in support of his application for release on recognizance and had no obvious connection with Hong Kong. (*paras 30 to 33*)

Overall, the Court was of the view that the Applicant had not been detained for a period that was unreasonable in all the circumstances, and his current detention was in compliance with the *Hardial Singh* principles. (*para 35*)

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

1. Sections 19(1)(b), 32(2A), 32(3A), and 37ZK of the Ordinance:  
<https://www.hklii.hk/eng/hk/legis/ord/115/s32.html>

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

1. *Fidelis Ahuwaraezeama Emen v Superintendent of Victoria Prison* [1998] 2 HKLRD 448 (the central question for an application for a writ of *habeas corpus* is whether there is lawful authority for a detention)  
<https://v2.hklii.hk/en/cases/hkcfi/1998/25?hl=Fidelis%20Ahuwaraezeama%20>
2. *Harjang Singh v Secretary for Security and Another* [2019] HKCFI 1486 at 29 (the Court is entitled to place weight on the Director’s assessment of fact-sensitive issues)  
<https://v2.hklii.hk/en/cases/hkcfi/2019/1486?hl=Harjang%20Singh>
3. *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 (relevant principles to determine whether a reasonable detention has become unreasonable)  
[https://www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6ce1c.html](https://www.refworld.org/cases,GBR_HC_QB,3ae6b6ce1c.html)
4. *Simona Mundia v Director of Immigration* [2020] HKCFI 741 (relevant principles for determining whether a person’s detention is *Hardial Singh* compliant)  
<https://v2.hklii.hk/en/cases/hkcfi/2020/741?hl=Simona%20Mundia>

5. *Ubamaka Edward Wilson v Secretary for Security and Another* [2012] HKCFA 87 (the “double jeopardy” argument is not a ground against the deportation of the Applicant)  
<https://v2.hklii.hk/en/cases/hkcfa/2012/87?hl=%282012%29%2015%20HKCFAR%20743>