

Case Summary for:
DITTA ALLAH v DIRECTOR OF IMMIGRATION

1. DITTA ALLAH v DIRECTOR OF IMMIGRATION – Court of First Instance¹

Court:	Court of First Instance (Hong Kong)
Judges:	Hon Chow J in Court
Applicant (and Counsel):	Ditta Allah (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr Gilbert Mok, Government Counsel, of the Department of Justice)
Date heard:	7 April 2021
Date promulgated:	13 April 2021
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2021/935.html

ABSTRACT: The Applicant is a Pakistani national who remained in Hong Kong past his limit of stay. He served a 2-year prison sentence for the offence of handling stolen goods, and was detained after release from prison, during which a deportation order was made against him. The Applicant was released on recognizance after 5 months of detention, but was subsequently arrested due to the offence of taking employment when a deportation order was in force against him. He was sentenced to 15 months' imprisonment, and detained after his release. During his detention, the Applicant pursued a non-refoulement claim that was rejected and sought judicial review for such rejection, but leave for judicial review was rejected. The Applicant then made the Application for a writ of habeas corpus. The Court of First Instance (the "CFI") held that the Applicant's detention was *prima facie* lawful and *Hardial Singh* compliant, and dismissed the action.

2. DITTA ALLAH v DIRECTOR OF IMMIGRATION – Court of Appeal²

Court:	Court of Appeal (Hong Kong)
Judges:	Hon Au JA, G Lam JA and Coleman J
Applicant (and Counsel):	Ditta Allah (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr Sunny Li, Senior Government Counsel and Mr Gilbert Mok, Government Counsel, of the Department of Justice)
Date heard:	26 January 2022
Date promulgated:	29 July 2022
Full text:	https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2022/779.html?stem=&synonyms=&query=title(DITTA%20ALLAH%20and%20DIRECTOR%20OF%20IMMIGRATION)%20OR%20ncotherjcitationtitles(DITTA%20ALLAH%20and%20DIRECTOR%20OF%20IMMIGRATION)

ABSTRACT:

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

¹ [2021] HKCU 1592

² [2022] HKCU 3659

After the CFI dismissed the Applicant’s habeas corpus application in [2021] HKCU 1592, the Applicant appealed and was heard by the Court of Appeal (the “CA”) in [2022] HKCU 3659.

The CA upheld the CFI’s decision, stating that the detention was *prima facie* lawful and was *Hardial Singh* compliant.

Key words:

Administrative Law; Habeas corpus; Detention; Pending removal; Whether unlawful; Balancing exercise

SUMMARY:

Facts and Procedural History:

The Applicant is a Pakistani national whose father was a Hong Kong permanent resident. On 7 March 2008, the Applicant first entered Hong Kong for residence as a dependant of his father. The Applicant's limit of stay in Hong Kong was last extended until 17 February 2012. His father died in 2011, and his extension of stay was rejected. The Applicant was convicted of the offence of handling stolen goods and on 11 July 2013 he was sentenced to two years' imprisonment.

Between 17 April 2014 (the date of the Applicant's release from prison) and 15 September 2014, the Applicant was detained under the Immigration Ordinance Cap 115 (the "IO"). During this period:

- (1) A deportation order (the "**Deportation Order**") was made against the Applicant on 17 June 2014 under section 20(1)(a) of the IO.
- (2) An emergency passport was issued on 26 June 2014 by the local Consulate General of Pakistan for the Applicant's return to his home country.
- (3) By letters dated 16 June, 7 and 23 July and 11 September 2014, the Applicant signified an intention to make a non-refoulement claim (the "**NRC**").
- (4) On 3 September 2014, the Applicant's repatriation to Pakistan was not successful by reason of his resistance.

On 15 September 2014, the Applicant was released on recognizance. On 30 April 2019, the Applicant was arrested while on recognizance for taking employment with a deportation order, and sentenced to 15 months' imprisonment.

On 23 March 2020, the Applicant was discharged from prison.

- (1) From 23 March 2020 to 25 March 2020, the Applicant was detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
- (2) On 25 March 2020, the Applicant requested to pursue the NRC. The Director of Immigration (the "**Director**") resumed processing of the NRC.
- (3) From 25 March 2020 to 28 May 2020, the Applicant was detained under section 37ZK of the IO pending the final determination of the NRC.
- (4) On 22 April 2020, a completed Non-refoulement Claim Form was received by the Director.
- (5) On 6 May 2020, a screening interview of the Applicant in respect of NRC was conducted.
- (6) On 14 May 2020, the Director rejected the NRC.
- (7) On 28 May 2020, the Director treated the NRC as having been finally determined under section 37V of the IO in view of the fact that no notice of appeal/petition was

received by the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “**Board**”).

- (8) From 28 May 2020 to 16 July 2020, the Applicant was detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
- (9) On 9 June 2020, the Board informed the Director that it had received the Applicant’s late filing of a notice of appeal/petition (“**Petition**”) on 8 June 2020. The Board accepted the late filing of the Petition, and decided to give priority to the Applicant’s case.
- (10) From 16 July 2020 to 14 September 2020, the Applicant was detained under section 37ZK of the IO pending the final determination of the NRC.
- (11) On 14 September 2020, the Board dismissed the Petition (“**Board’s Decision**”). From 14 September 2020 onwards, the Applicant has been detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
- (12) On 28 September 2020, the Applicant sought leave to apply for judicial review of the Board’s Decision (“**JR Application**”). The JR Application, and subsequent attempts to apply for judicial review, were rejected.
- (13) On 26 March 2021, the Applicant made the Application for a writ of habeas corpus. The CFI held that the Applicant’s detention was prima facie lawful, and *Hardial Singh* compliant.
- (14) The Applicant appealed the CFI decision.

Issues:

- (1) The relevance of the likelihood of absconding and reoffending, and whether the CFI had overstated such relevance, especially since the previous offenses were non-violent;
- (2) Whether the Judge should give weight to the assessment of the Director and/or Secretary for Security (the “**Secretary**”) that the Applicant may reoffend and/or pose a threat to the community, especially since the notices of detention did not raise such issues;
- (3) Whether prolonged period of detention by reason of the JR Application should be given full weight, because seeking a JR Application against the decision of the Board is the Applicant’s legal right;
- (4) Whether the merits of the JR Application should be taken into account;
- (5) Whether there are sufficient reasons to believe that the JR Application could be finalized within a reasonable period of time in light of the enormous number of outstanding applications; and
- (6) Whether the Secretary and/or Director had acted with reasonable diligence and expedition to effect removal.

Judgment:

The CA upheld the CFI's judgment. The Applicant was unable to show that what the CFI judgment was inconsistent with findings of primary facts, or was based on an incorrect understanding of the law, or was one that was not sensibly open to him.

Reasons for Judgment:

(1) On the relevance of the likelihood of absconding and reoffending: the Court accepted that the risk or likelihood of absconding needs to be weighed against all other considerations, particularly the length of detention, but provides that the CFI judgment demonstrated that the non-violent nature and seriousness of the previous offenses have been considered when assessing future risks. (*para 63*)

(2) On whether the Judge should give weight to the assessment of the Director and/or secretary: the Court held that the CFI judge did not simply leave matters to the Secretary or Director; the CFI specifically noted that the Applicant's first conviction took place seven to eight years before, and second conviction did not involve violence or dishonesty. (*para 64*)

(3) On whether prolonged period of detention by reason of the JR Application should be given full weight: the Court held that the weight to be given was for the CFI judge to assess in light of all factors. While the Applicant is entitled to exhaust all remedies against the rejection of the NRC, such process is a relevant factor regarding how long it is reasonable for a person to be detained pending deportation. The CFI pointed out that the obstacle to removal was not the result of default of the Secretary or the Director, but did not base the judgment on the argument that any delay in the progress of the JR Application was caused by the Applicant, nor penalize the Applicant for the existence of the JR Application; it merely considered it as one of the factors in the overall assessment of reasonableness. (*para 67*)

(4) On whether the merits of the JR Application should be taken into account: the Court held that the CFI was entitled to take into account the merits of the JR Application, and that there were sufficient materials available for the CFI to form a provisional view, limited to the purpose of deciding whether the period of detention had become unreasonable. (*para 68*)

(5) On whether there were sufficient reasons to believe that the JR Application could be finalized within a reasonable period of time: a specific date by which removal could reasonably be expected is not necessary; the general principle is that there is some sense of a timescale. The CFI considered that the Applicant could be removed within a reasonable time, especially since the CFI gave direction that the JR Application would be prioritized. (*para 69*)

(6) On whether the Secretary and/or Director had acted with reasonable diligence and expedition to effect removal: no evidence to show that the Secretary had not acted with reasonable diligence and expedition. (*para 70*)

Legal Provisions considered:

1. Ss. 32(3), 37ZK, 37V Immigration Ordinance [Cap 115](#)
2. [RHC](#) Order 54 rule 1.

Key Cases cited:

1. *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB) (an applicant would be entitled to a writ of habeas corpus or an order for release if he/she was not able to be deported or removed by the immigration authority within a reasonable time)
<https://www.bailii.org/ew/cases/EWHC/QB/1983/1.html>