

**Case Summary for:**

**GHULAM RBANI V SECRETARY FOR JUSTICE FOR AND ON BEHALF OF THE DIRECTOR OF IMMIGRATION**<sup>1</sup>

<b>Court:</b>	Court of Final Appeal (the “CFA”)
<b>Judges:</b>	Ma CJ, Ribeiro PJ, Tang PJ, Bokhary NPJ, Lord Walker of Gestingthorpe NPJ
<b>Applicant (and Counsel):</b>	Ghulam Rbani (Mr. Philip Dykes SC, Mr. Hectar Pun and Ms. Christine Yu (instructed by Yip & Liu and assigned by the Legal Aid Department))
<b>Respondent (and Counsel):</b>	Secretary for Justice for and on behalf of the Director of Immigration (Mr. Anderson Chow SC and Ms. Grace Chow, instructed by the Department of Justice)
<b>Date heard:</b>	25 February 2014
<b>Date promulgated:</b>	13 March 2014
<b>Full text:</b>	<a href="http://www.hkii.hk/eng/hk/cases/hkcfa/2014/21.html">http://www.hkii.hk/eng/hk/cases/hkcfa/2014/21.html</a>

**ABSTRACT:** The Applicant had been repeatedly convicted of overstaying in Hong Kong. He was last convicted in 2005 and upon his release from prison, he was placed under administrative detention under section 32(2A)(a) of the of the Immigration Ordinance (the “IO”). A removal order was issued against him, but it was revoked when the Removal Section of the Immigration Department of Hong Kong (the “Immigration Department”) learned that the Applicant lodged a claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”) against refoulement. After the removal order was revoked, the authorized period of detention was extended for a further 21 days. The CAT assessment process started 13 days after the CAT claim was lodged, at which point the Director of Immigration (the “Director”) considered the Applicant’s release on recognizance and asked the Commissioner of Police whether he had any objections. Three days after the Commissioner of Police commented that he had no objection, the Applicant was asked to nominate a guarantor. The recommendation for the Applicant’s release was made five days after the Applicant secured a guarantor, and there was a further delay in securing an Urdu interpreter to explain the terms of release to the Applicant. The Applicant was eventually released approximately six weeks after he was first placed under administrative detention and three weeks after revocation of the removal order. The Applicant commenced proceedings against the Director for damages for false imprisonment, which were dismissed by the lower courts.

On appeal, the CFA allowed the appeal and held that:

- 1) *Hardial Singh* principles

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

<sup>1</sup> [2014] HKCFA 21. Also cited as: (2014) 17 HKCFAR 138, [2014] 3 HKC 78, FACV 15/2013

The principles set forth in *R v Governor of Durham Prison, ex parte Hardial Singh*<sup>2</sup> (the “**Hardial Singh principles**”) were applicable to detention pending a decision whether to make a removal order under section 32(2A) of the IO. Applying the *Hardial Singh* principles, the CFA found that the detention period from the release from prison up to revocation of the removal order was lawful, given he repeatedly overstayed, used multiple identities, breached his conditions of stay and presented a real risk of absconding. It was also found that the Director acted diligently and expeditiously to enable the Applicant’s return to Pakistan, and after the CAT claim came to light, it was proper to revoke the removal order. However, the CFA found that the CAT assessment and the steps taken to effect the Applicant’s release should have been taken with greater urgency, and held that the actual detention period was excessive and inconsistent with the *Hardial Singh* principles. The CFA held that the Applicant was detained for 10 days more than what was justifiable in all the circumstances and awarded damages for false imprisonment for 10 days.

## 2) Legal basis

The CFA held that the Applicant’s argument that there was no legal basis for detaining the Applicant under section 32 of the IO after revocation of the initial removal order was not made out, because the Director still had intention to make a removal order and made arrangements to release the Applicant on recognizance after it became clear that the removal order cannot be made within the statutory time limit.

## 3) Publication of policy

The CFA noted that the Applicant’s argument of a lack of published policy identifying the criteria for the Director’s exercise of its powers of detention was not made out. The CFA noted that there was no public law duty requiring publication of policies setting out criteria for exercising discretionary powers, but where interference with personal freedom is involved, such duty may be necessary to provide transparency and safeguard against arbitrary detention.

## 4) Article 5(1) of the BOR

The CFA considered that the right against arbitrary detention provided under article 5(1) of the Hong Kong Bill of Rights (the “**BOR**”) was no different from the common law right, but the Applicant was precluded from relying on article 5(1) of the BOR by virtue of the reservation under section 11 of the Hong Kong Bill of Rights Ordinance (the “**BORO**”). Section 11 of the BORO precluded the application of article 5(1) of the BOR on the exercise of detention powers under section 32 of the IO in respect of persons not having the right to enter and remain in Hong Kong.

## 5) Articles 28 and 41 of the BL

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<sup>2</sup> [1984] 1 WLR 704

Articles 28 and 41 of The Basic Law of Hong Kong Special Administrative Region (the “**the BL**”) together extend constitutional right against arbitrary detention to persons in Hong Kong who are not residents. The CFA concluded it was not necessary to consider this ground further as the right under the BL is no different from the common law right.

**Key words:**

Non-refoulement; habeas corpus; Hardial Singh; detention; Immigration Ordinance; torture; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; removal order; false imprisonment; Bill of Rights; Basic Law; publication of policy; damages

## SUMMARY:

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### **Facts and Procedural History:**

The Applicant was a Pakistani national. The Applicant had been repeatedly convicted of overstaying in Hong Kong and was last convicted in 2005 of a gambling offence and for breaching his condition of stay. He was sentenced to seven months' imprisonment. As his release date approached, the Applicant made several requests to the Director to be repatriated to Pakistan to be with his sick son and aged mother.

After his release on 23 August 2005, he had been placed under administrative detention at the Castle Peak Bay Immigration Centre pursuant to section 32(2A)(a) of the IO pending a decision as to whether or not a removal order should be made. On 24 August 2005, the Applicant repeated his request to be repatriated. As the initial seven-day period of his detention was about to expire, the Director sought authority to detain him for a further period of not more than 21 days from 30 August 2005 under section 32(2A)(b) of the IO, which was granted on 29 August 2005. On 2 September, the Pakistani Consulate issued an emergency passport to the Applicant at the request of the Director, and the Director procured an air ticket for him.

The Applicant's file minute recorded that he had assumed four different identities, and refused to answer questions about his multiple identities.

Meanwhile on 8 September 2005, the Applicant lodged a CAT claim against refoulement, which reached the Immigration Department's Removal Section on 12 September 2005. The removal order against the Applicant was made on 10 September 2005, but it was revoked on 15 September 2005 because it was made without taking the Applicant's CAT claim into consideration. The removal order had not been served and the case was passed to the CAT section. On 16 September 2005, the period of detention was extended for a further 21 days under section 32(2A)(c) of the IO.

On 21 September 2005, the CAT assessment process started. The Director considered the Applicant's release on recognizance, and asked the Commissioner of Police whether he had any objections, to which the Commissioner replied he had no comment on 23 September 2005. On 26 September 2005, the Applicant was asked to nominate a guarantor for his release, which he was unable to do until 28 September 2005. A file minute on 3 October 2005 recommended his release on recognizance considering his removal order had been withdrawn. His release was authorized on 5 October 2005. On the next day he was informed that he would be released on the next day when an Urdu interpreter would be available to explain the terms of release. He was released on recognizance on 7 October 2005, approximately six weeks since he was first placed under administrative detention and three weeks since revocation of the removal order.

The Applicant then commenced proceedings against the Director for damages for false imprisonment on 11 February 2010, claiming that: (a) he was unlawfully detained once it was clear that his intended removal from Hong Kong could not be achieved within the time limits for detention under section 32(2A) of the IO; (b) the Director failed to publish any statement of policy identifying criteria justifying detention under section 32 of the IO; (c) article 5(1) of BORO; and (d) articles 28 and 41 of the BL on freedom of the person of non-Hong Kong residents. His claim was dismissed by the District Court and the Court of Appeal and his leave to appeal to the CFA was allowed given there was a point of law of requisite importance regarding the extent that the detention powers under section 32(2A) of the IO are subject to an applicable principle of law barring arbitrary or unlawful detention.

## **Issues:**

The CFA considered whether the Applicant's detention constituted false imprisonment, which had two prongs: (i) whether there was imprisonment, and (ii) whether there was lawful authority to justify the imprisonment. In considering the latter, the CFA considered (1) whether the Applicant's detention was in compliance with the *Hardial Singh* principles; (2) whether the Director had legal basis to detain after the removal order was revoked; (3) whether the entire period of detention was unlawful due to the Director had not published any statement of policy identifying the criteria in exercising powers under section 32 of the IO; (4) whether there was breach of article 5(1) of the BOR; and (5) whether there was breach of articles 28 and 41 of the BL. The CFA also considered the amount of damages applicable to false imprisonment.

## **Judgment:**

The CFA allowed the Applicant's *appeal*, ruling that the Applicant had been unlawfully detained for 10 days since 15 September 2005 when it became clear that the CAT claim had to run its course, it would have been obvious that no decision to make a removal order could have been arrived at within the maximum period of detention permitted under section 32 of the IO. Applying the third *Hardial Singh* principle, the CFA found that steps should then have been taken without delay to effect the Applicant's release. The Applicant was awarded damages of HK\$10,000 for false imprisonment.

## **Reasons for Judgment:**

### *False Imprisonment*

The CFA noted that it was held in *R v Deputy Governor of Parkhurst Prison, ex p Hague*<sup>3</sup> that the two ingredients in the tort of false imprisonment are (i) the fact of imprisonment, which is any restraint within defined bounds, and (ii) the absence of lawful authority to justify it. The CFA held that the executive detention in the present case constituted imprisonment, so the question was whether the Director can justify the detention was lawful. (*paras 9 to 10*)

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<sup>3</sup> [1992] 1 AC 58

In determining whether there was lawful authority to justify imprisonment, the CFA considered the following five arguments:

1. Non-compliance with the *Hardial Singh* principles after it became clear that the Applicant's intended removal could not be achieved within the statutory time limit or within a reasonable time;
2. Lack of legal basis for continued detention after the removal order was revoked;
3. Lack of published policy identifying criteria justifying detention;
4. Breach of article 5(1) of the BOR; and
5. Breach of articles 28 and 41 of the BL. (*paras 12 and 14*)

The CFA commented that the right to personal freedom and to be protected from arbitrary arrest or detention form part of the bedrock of the common law, which, as emphasized in *R v Secretary of State for the Home Department, ex p Khawaja*<sup>4</sup>, is of particular importance where an individual is subjected to executive detention without trial. The CFA noted that these fundamental values are safeguarded by the writ of *habeas corpus*. (*paras 18 to 20*)

## 1. The *Hardial Singh* Principles

The *Hardial Singh* principles were summarized in *R (I) v Secretary of State for the Home Department*<sup>5</sup> as follows:

- (i) The Secretary of State must have intention to deport the person and only use the power to detain for such purpose (the "**1st Principle**");
- (ii) The period of detention is reasonable in all the circumstances (the "**2nd Principle**");
- (iii) The Secretary of State should not exercise the power of detention if it became apparent that deportation could not be effected within a reasonable period (even if the reasonable period has not yet expired) (the "**3rd Principle**"); and
- (iv) The Director should act with reasonable diligence and expedition to effect removal (the "**4th Principle**"). (*paras 23 to 24*)

The Director relied on section 32(2A) of the IO (detention pending decision as to whether a removal order should be made) and section 32(3A) of the IO (detention pending removal). The CFA noted that while section 32 of the IO confers discretionary executive detention powers to the Director, the exercise of such powers is subject to the following statutory limitations:

- (a) Specific persons: the detention powers are only exercisable against persons who can be made subject to a removal order under section 19(1)(b) of the IO (such as persons who landed unlawfully, breached a condition of stay, made false statements or used false documents);

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<sup>4</sup> [1984] AC 74

<sup>5</sup> [2003] INLR 196

- (b) Time limits: for section 32(2A) of the IO, authority of the Secretary for Security (the “**Secretary**”) is required where detention is extended for 21 days beyond the initial seven-day period, and for a further extension of 21 days where inquiries have not been completed; section 32(3A) of the IO does not specify a time limit but the detention pending removal can only be for a period that is reasonable having regard to all the circumstances, and reasonableness is a matter to be determined by the court; and
- (c) Purpose: the exercise of powers is implicitly limited to detention for the purpose of taking steps to reach the decision whether to make a removal order. (*paras 26 to 29, 31 to 33*)

The CFA further noted that the *Hardial Singh* principles, though arose under section 32(3A) of the IO, were also applicable to the detention period pending a decision whether to make a removal order under section 32(2A) of the IO. (*para 36*)

Applying the *Hardial Singh* principles, the CFA considered the periods of the Applicant’s detention:

- (i) Detention from release from prison up to revocation of the removal order (from 23 August to 15 September 2005)

The Director’s initial decision to detain the Applicant was lawful because he repeatedly overstayed, used multiple identities and refused to answer questions about such identities, had been convicted of breaching his conditions of stay, and presented a real risk of absconding. (*para 49*)

During the first seven-day period (between 23 and 29 August 2005) pursuant to section 32(2A)(a) of the IO, the Director acted diligently and expeditiously to enable the Applicant’s return to Pakistan. As the arrangements for the Applicant’s voluntary repatriation was still ongoing, the grant of the extension of the detention for not more than 21 days commencing on 30 August 2005 pursuant to section 32(2A)(b) of the IO was also proper. (*paras 50 to 51*)

The CFA noted, but did not explore further, that it was somewhat odd that it took four days for the news of the Applicant’s CAT claim to reach the Removal Section, which raised the question as to whether the Director acted diligently and expeditiously as required by the 4th Principle. (*para 52*)

After the Applicant lodged the CAT claim, it was proper to refer the case to the CAT Section, and for the Removal Section to keep in view the CAT assessment before deciding whether to release the Applicant, given the Applicant had been back and forth between Hong Kong and Pakistan but had never suggested a fear of torture, and had been pressing for his return to Pakistan. (*para 53*)

The CFA concluded that the detention up to 15 September 2005 was lawful. (*para 58*)

- (ii) Detention after revocation of the removal order (from 16 September to 7 October 2005)

After revocation of the removal order, a decision on removal could not be reached before the then authorized period of detention, so authority was obtained from the Secretary to further extend the detention period for 21 days commencing on 20 September 2005. (*para 55*)

However, the CFA considered that the CAT assessment and steps taken to effect the Applicant's release should have taken place sooner. The CFA noted the following delays: (i) the first CAT interview did not take place until 13 days after the claim was lodged; (ii) the Applicant was only asked to nominate a guarantor three days after the Commissioner of Police commented that he had no objection to his release; (iii) the recommendation for his release was not made until five days after the Applicant secured a guarantor; and (iv) delay in securing the Urdu interpreter. The CFA noted that the Director was obligated to process the CAT claim with a sense of urgency and to promptly decide whether detention should continue, given that the Applicant was being deprived of personal freedom. (*paras 55 to 57*)

The CFA concluded that the actual period of detention was excessive and inconsistent with the 2nd, 3rd and 4th Principles. The CAT Section should rapidly conduct a first assessment on the claim. Once it became clear that the CAT claim had to run its course, the CFA considered that it would have been obvious that no decision to make a removal order could have been arrived at within statutory time limit. Applying the 3rd Principle, steps should then have been taken without delay to effect the Applicant's release, and applying the 4th Principle, the entire process should have been completed 10 days sooner. The CFA concluded that the Applicant's detention was 10 days more than what was justifiable in all the circumstances and was therefore entitled to damages for false imprisonment for 10 days. (*paras 58 to 60*)

## *2. Lack of Legal Basis*

The Applicant argued that after the removal order was revoked on 15 September 2005, there was no legal basis for detaining the Applicant under section 32 of the IO because the Director no longer had the intention of making a removal order within the statutory limit. The CFA concluded that this ground failed because the Director still had the intention to make a removal order after it was revoked, and when it became clear that it was not possible within the time limit, arrangements were made to release the Applicant on recognizance. (*para 61*)

## *3. Lack of Published Policy*



The Applicant argued that the entire period of his detention was unlawful because at the time he was detained, there was no published policy identifying the criteria for exercising the power to detain under section 32 of the IO. The Applicant relied on two United Kingdom Supreme Court decisions concerning powers of detention, *R (Lumba) v Secretary of State for the Home Department*<sup>6</sup> and *R (Kambadzi) v Secretary of State for the Home Department*<sup>7</sup>. The CFA distinguished from these two cases on the basis that (i) the corresponding UK legislation did not lay down any conditions or criteria for the exercise the powers of detention, unlike section 32 of the IO which was applicable to certain persons, subject to time limitations, approval from the Secretary and for certain purposes; and (ii) the unlawfulness from these two cases arose out of failure to adhere to a published policy, rather than a lack of policy. (*paras 68 to 74*)

The CFA noted that there was no public law duty generally to publish policies setting out the criteria for exercising statutory discretionary powers. However, particularly where executive detention is involved, if the powers are so broad and lacked specificity giving rise to genuine doubts as to the basis of their exercise, published policies may provide transparency and safeguard against arbitrary detention. (*paras 66 and 77*)

Applying to the present case, the CFA held that the complaint of lack of policy was not made out. Based on the Applicant's history of evading immigration control and repeated immigration offences, the Applicant could not have been in any doubt as to why and on what basis he was detained pending repatriation. (*para 78*)

#### 4. Breach of article 5(1) of the BOR

Article 5(1) of the BOR provides that no one shall be subjected to arbitrary detention or be deprived of his liberty except on grounds and in accordance with the law, which mirrors the common law right. The CFA quoted from the case *Al-Nashif v Bulgaria*<sup>8</sup> that the law must be formulated with sufficient precision to enable a person to regulate his conduct, and it must indicate the scope of any discretion conferred on the authorities and the manner of its exercise with sufficient clarity in order to protect against arbitrary detention. (*paras 79 to 81*)

However, the Applicant could not rely on article 5(1) of the BOR by reason of immigration reservation in section 11 of the BORO which provides that the BORO works to preclude the application of the BOR on the exercise of detention powers under section 32 of the IO in respect of persons not having the right to enter and remain in Hong Kong. Applying *GA v Director of Immigration*<sup>9</sup>, the CFA rejected this ground and noted that the detention powers were designed to regulate termination of a person's stay in Hong Kong and to ensure his enforced departure where a decision to remove was taken. (*paras 82 to 86*)

#### 5. Breach of articles 28 and 41 of the BL

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<sup>6</sup> [2012] 1 AC 245

<sup>7</sup> [2011] 1 WLR 1299

<sup>8</sup> (2003) 36 EHRR 37

<sup>9</sup> (2014) 17 HKCFAR 60

Article 28 of the BL provides that no Hong Kong resident shall be subjected to arbitrary detention, and article 41 of the BL extends this right, in accordance with law, to persons present in Hong Kong who are not residents. The right under the BL is no different from the common law right, therefore the CFA held that it was not necessary to consider further this ground. (*paras 87 to 88*)

Regarding the relationship between articles 28 and 41 of the BL, the CFA commented that the question arose as to whether the Applicant, who was not a Hong Kong resident, can rely on article 41 of the BL to bring himself within article 28 of the BL; in particular, whether the words “in accordance with law” would operate to preclude the Applicant, who does not have the right to enter and remain in Hong Kong, from relying on article 41 of the BL by virtue of section 11 of the BORO. The CFA concluded in the affirmative. While the object of article 41 of the BL was to extend the constitutional guarantees to non-residents in Hong Kong, section 11 of the BORO precludes the Applicant from relying on article 41 of the BL by virtue of article 39 of the BL. Article 39 of the BL gave constitutional status to the BORO and the International Covenant on Civil and Political Rights, including the reservation contained in section 11 of the BORO and giving effect to the words “in accordance with law” in article 41 of the BL. (*paras 89, 92 to 97*)

## *Damages*

While not every breach of public law duty would found a cause of action in damages for false imprisonment, when it involves interfering with the common law right to personal freedom, causation is not required to be proved. However, causation should be found if the detainee is to be awarded more than nominal damages for false imprisonment. As stated in *R (Kambadzi) v Secretary of State for the Home Department*<sup>10</sup>, substantial damages are payable only for the loss and damage caused by the wrongful act, and causal connection is established if the breach of public law duty “bears directly on the discretionary power that the executive is purporting to exercise”. In the present case, the CFA held that the detention period was excessive and inconsistent with the *Hardial Singh* principles, which had a direct bearing on the Applicant’s continued detention for some 10 days more than had the *Hardial Singh* principles been complied with. Looking at the position broadly and robustly, the CFA assessed damages for unlawful detention over 10 days in the sum of HK\$10,000. (*paras 101 to 107*)

## **Other Considerations:**

N/A.

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## **Legal Provisions considered:**

1. Articles 28, 39 and 41 of the BL:

<https://v2.hklii.hk/en/legis/instrument/A101/longTitle>

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<sup>10</sup> [2011] 1 WLR 1299

2. Section 8 of the BORO (Article 5(1) of the BOR):  
<http://www.hklii.hk/eng/hk/legis/ord/383/s8.html>
3. Section 11 of BORO:  
<http://www.hklii.hk/eng/hk/legis/ord/383/s11.html>
4. Section 19(1)(b) of the IO:  
<http://www.hklii.hk/eng/hk/legis/ord/115/s19.html>
5. Section 32 of the IO:  
<http://www.hklii.hk/eng/hk/legis/ord/115/s32.html>

## Key Cases cited:

1. *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 (explains the phrase “in accordance with the law” implies that legal basis must be accessible and foreseeable)  
<http://www.bailii.org/eu/cases/ECHR/2002/502.html>
2. *GA v Director of Immigration* (2014) 17 HKCFAR 60 (section 11 of the BORO is intended to except immigration legislation that deals with each stage of a person’s stay in Hong Kong, from entry to departure)  
<http://www.hklii.hk/eng/hk/cases/hkcfar/2014/14.html>
3. *R(I) v Secretary of State for the Home Department* [2003] INLR 196 (sums up the *Hardial Singh* principles)  
<http://www.bailii.org/ew/cases/EWCA/Civ/2002/888.html>
4. *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299 (to be lawfully justified, the power to detain must be exercised reasonably and in a manner which is not arbitrary; unlawful detention arose out of failure to adhere to published policy)  
<http://www.bailii.org/uk/cases/UKSC/2011/23.html>
5. *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 (unlawful detention arose out of failure to adhere to published policy)  
<http://www.bailii.org/uk/cases/UKSC/2011/12.html>
6. *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 (the two ingredients of the tort of false imprisonment are (i) the fact of imprisonment and (ii) the absence of lawful authority to justify it)  
<http://www.bailii.org/uk/cases/UKHL/1990/8.html>
7. *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704 (sets out the limitations to which the powers of detention are subject which are known as the *Hardial Singh* principles)  
<http://www.bailii.org/ew/cases/EWHC/QB/1983/1.html>

8. *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74 (the common law right to personal freedom is of particular importance where an individual is subjected to executive detention)

<http://www.bailii.org/uk/cases/UKHL/1983/8.html>