

Case Summary for:
HARJANG SINGH V HONG KONG SAR GOVERNMENT¹
HARJANG SINGH V SECRETARY FOR SECURITY AND ANOTHER²

1. HCAL 2025/2018 [2018] HKCFI 2234:

Court:	Court of First Instance (Hong Kong)
Judges:	Hon Chow J
Applicant (and Counsel):	Harjang Singh (acting in person)
Respondent (and Counsel):	Hong Kong SAR Government (Mr Louie Chan, Government Counsel, of the Department of Justice)
Date heard:	28 September 2018
Date promulgated:	2 October 2018
Full text:	http://www.hkii.org/eng/hk/cases/hkcfi/2018/2234.html
<p>ABSTRACT: The Applicant, who was subject to a deportation order for life, was detained under Section 32(3) of the Immigration Ordinance, Cap 115 (the “IO”) pending removal from Hong Kong. The Secretary for Security (the “Secretary”) reviewed the Applicant’s detention but decided that it should be maintained. The Applicant made an application for a writ of <i>habeas corpus ad subjiciendum</i> (“habeas corpus”). At the time of the hearing, the Applicant had been detained for less than 1.5 months. The court reviewed the Applicant’s detention against the <i>Hardial Singh</i> principles (as defined below) and ruled that the Applicant had been detained for a period that is reasonable in all the circumstances, dismissing the application.</p>	

2. HCAL 1540/2019 [2019] HKCFI 1486:

Court:	Court of First Instance (Hong Kong)
Judges:	Hon Chow J
Applicant (and Counsel):	Harjang Singh (Mr Francis Ngan, instructed by KCL & Partners)
Respondent (and Counsel):	Secretary for Security and another (Mr Sunny Li, Senior Government Counsel, of the Department of Justice)
Date heard:	3 June 2019
Date promulgated:	4 June 2019
Full text:	http://www.hkii.org/doc/judg/word/vetted/other/en/2019/HCL001540M_2019.doc
<p>ABSTRACT: After the Court of First Instance (the “CFI”) dismissed the Applicant’s first habeas corpus application in HCAL 2025/2018 [2018] HKCFI 2234, the Secretary had carried out three reviews of the Applicant’s detention and, at each instance, maintained the Applicant’s detention. The Applicant then made a second application for a writ of habeas corpus. At the time of the hearing, the Applicant had been detained for about 9.5 months. The CFI considered that the Applicant had been detained for a period that was reasonable in all the circumstances, dismissing the second habeas corpus application.</p>	

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

¹ HCAL 2025/2018 [2018] HKCFI 2234.

² HCAL 1540/2019 [2019] HKCFI 1486; HCAL 224/2021 [2021] HKCFI 705; CACV 183/2021 [2022] HKCA 781.

3. HCAL 224/2021 [2021] HKCFI 705:

Court:	Court of First Instance (Hong Kong)
Judges:	Hon Chow J
Applicant (and Counsel):	Harjang Singh (Mr Tim Parker and Mr Josh Baker, instructed by Mohnani & Associates)
Respondent (and Counsel):	Secretary for Security and another (Mr Sunny Li, Senior Government Counsel, of Department of Justice)
Date heard:	12 March 2021
Date promulgated:	19 March 2021
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2021/705.html
ABSTRACT: After the Applicant's first and second habeas corpus applications were dismissed by the CFI in HCAL 2025/2018 [2018] HKCFI 2234 and HCAL 1540/2019 [2019] HKCFI 1486, respectively, the Applicant applied to the CFI for leave to apply for judicial review of his detention and sought relief including (1) his release from detention or, alternatively, a writ of habeas corpus; (2) a declaration that his detention was unlawful; and (3) damages. At the time of the hearing, the Applicant had been detained for some 30 months. The CFI considered that the detention was for a reasonable period and the Applicant could be removed before the expiry of a reasonable period, refusing the application.	

4. CACV 183/2021 [2022] HKCA 781:

Court:	Court of Appeal (Hong Kong)
Judges:	Hon Barma JA, Hon G Lam JA and Hon Coleman J
Applicant (and Counsel):	Harjang Singh (Mr Timothy Parker and Mr Josh Baker, instructed by Mohnani & Associates)
Respondent (and Counsel):	Secretary for Security and another (Ms Leona Cheung, Principal Government Counsel (Ag.) and Mr Sunny Li, Senior Government Counsel, of Department of Justice)
Date heard:	7 December 2021
Date promulgated:	29 July 2022
Full text:	http://www.hklii.hk/eng/hk/cases/hkca/2022/781.html
ABSTRACT: At the time of the hearing, the Applicant had been detained for 1,208 days (i.e., almost three years and four months). The Applicant's applications for leave to apply for judicial review and a writ of habeas corpus had been refused by the CFI in HCAL 224/2021 [2021] HKCFI 705, and the Applicant appealed to the Court of Appeal (the "CA"). The CA considered the question of whether there was, and continued to be, lawful authority for the Applicant's detention. The CA ruled that the detention was no longer compliant with the <i>Hardial Singh</i> principles, allowed the Applicant's appeal, and ordered his release from detention.	

Key words:	Habeas corpus, detention pending removal, person subject to deportation order, judicial review, whether detention has become unlawful, period of detention becoming unreasonable, steps taken by applicant that have lengthened procedures in other proceedings, reoffending risk, whether removal be achieved within reasonable time
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SUMMARY:

Facts and Procedural History:

In March 1991, the Applicant, an Indian national born on 15 January 1973, entered Hong Kong as a visitor and was subsequently in August 1991 allowed to remain in Hong Kong as a dependent of his sister, a Hong Kong resident. The Applicant was last permitted to remain in Hong Kong until 28 April 1999. Between 1994 and 2000, the Applicant was convicted of several offences and was detained at Victoria Prison after the completion of prison term in July 2003. On 22 July 2003, by reason of certain of his criminal convictions, the Secretary issued a deportation order for life (the “**Deportation Order**”) pursuant to Section 20(1)(a) of the IO and gave authorization for the Applicant’s detention under Section 32(3) of the IO. In December 2003, the Applicant’s application to rescind the Deportation Order was refused.

In November 2004, the Applicant was released on recognizance. The Applicant was paid about HK\$100,000 in compromise of an unlawful detention claim in respect of the period from July 2003 to November 2004. While on recognizance, the Applicant committed two more offences in 2011 and 2017 and was sentenced to terms of imprisonment. Since 17 August 2018, after having served his prison terms, the Applicant was transferred to the Immigration Department for detention at the Castle Peak Bay Immigration Centre under Section 32(3) of the IO pending removal from Hong Kong. Subsequently, between September 2018 and March 2021, the Applicant had made multiple applications for release on recognizance, all of which had been rejected by the Secretary (for 13 times) and/or the Director (for 31 times). The main concerns of the Director related to the risks of re-offending and/or absconding should the Applicant be released in light of his eight criminal convictions (two of which were incurred while the Applicant had been released on recognizance) and his previous failures to report under recognizance.

In 2004, the Applicant lodged a torture claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (the “**Convention Against Torture**”). In 2012, the Torture Claim Assessment Section of the Immigration Department rejected the Applicant’s torture claim and, in 2013, the Torture Claims Appeal Board (the “**Board**”) dismissed the Applicant’s appeal against the rejection.

In 2013, the Applicant lodged a claim for non-refoulement protection on the grounds of cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights, which was treated by the Director as a claim under all applicable grounds and processed under the unified screening mechanism. In September 2018, the Director assessed and rejected the claim. The Applicant subsequently in October 2018 lodged a petition to the Board (which also served as the Non-refoulement Claims Petition Office) against such rejection and the Board eventually dismissed the petition in November 2019 after two adjournments of hearing. In December 2019, the Applicant further sought leave to apply for judicial review of the Board’s decision and the relevant hearing had been adjourned for several times and had yet been re-fixed.

The Applicant also applied for legal aid for said proceedings but the application had been refused. His appeal against such refusal was eventually dismissed in June 2021 (after the hearing had been adjourned once).

Subsequent to his detention on 17 August 2018, the Applicant (i) applied for a writ of habeas corpus on 24 September 2018, which was dismissed by the CFI in HCAL 2025/2018 [2018] HKCFI 2234; (ii) made a second application for a writ of habeas corpus on 29 May 2019, which was dismissed by the CFI in HCAL 1540/2019 [2019] HKCFI 1486; (iii) applied for leave to apply for judicial review of his detention on 24 February 2021, which was refused by the CFI in HCAL 224/2021 [2021] HKCFI 705; and (iv) appealed against the CFI's decision in HCAL 224/2021 [2021] HKCFI 705, which was eventually allowed by the CA in CACV 183/2021 [2022] HKCA 781.

In terms of personal background, the Applicant was married to (i) his widowed sister-in-law Ms. Kulwinder Kaur in India in 1994 (allegedly pursuant to a forced marriage) and (ii) Ms. Wong in April 2016 (with whom the Applicant had a step-daughter who was born in September 2002), both of whom were Hong Kong permanent residents. The Applicant applied for a dependant visa sponsored by Ms. Wong in March 2019.

Issues:

In CACV 183/2021 [2022] HKCA 781, the Applicant raised three broad grounds of appeal: (1) there was unreasonably long detention; (2) the CFI failed to give proper consideration as to whether removal could be effected within a reasonable time; and (3) the CFI failed to attach weight to the effect of the detention on the Applicant's family. (*para 71*)

The grounds were framed into three issues: (1) what significance attaches to the steps taken by the Applicant that have lengthened the procedures in the non-refoulement proceedings (the "**Adjournment Issue**"); (2) whether the likelihood and seriousness of the Applicant's reoffending risk is capable of justifying a period of detention this long (the "**Reoffending Issue**"); and (3) how much certainty is required about the probability of removal and its proximity when evaluating whether removal can be achieved within a reasonable time (the "**Time for Removal Issue**"). (*para 72*)

The CA considered the overarching question of whether there was, and continued to be, lawful authority for the Applicant's detention in accordance with the *Hardial Singh* principles set out in *R v Governor of Durham Prison, ex parte Hardial Singh*³, as summarized in *R(I) v Secretary of State for the Home Department*⁴ and adopted in *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration*⁵ (the "**Hardial Singh principles**"). (*paras 44 and 51*)

³ [1984] 1 WLR 704

⁴ [2003] INLR 196

⁵ [2014] 17 HKCFAR 138

Judgment:

The CA allowed the Applicant's appeal against the CFI's decision in HCAL 224/2021 [2021] HKCFI 705. It held that the detention was no longer compliant with the *Hardial Singh* principles and ordered the Applicant's release from detention on terms of recognizance acceptable to the Director.

Reasons for Judgment (given by the CA in CACV 183/2021 [2022] HKCA 781):

Applicable Principles

The CA clarified that an initially lawful detention may be turned into an unlawful detention if it fails to meet the *Hardial Singh* principles, and the Secretary bears the burden of proving the lawfulness of the detention. There is no 'red line' in terms of months or years beyond which time when detention would become unreasonable. A review of the reasonableness of the length of detention will depend upon the circumstances of each case and all relevant factors, including at least (1) the length of the period of detention; (2) the nature of the obstacles which stand in the path of the Director preventing a deportation; (3) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (4) the conditions in which the detained person is being kept; (5) the effect of detention on him and his family; (6) the risk that if he is released from detention he will abscond (which may have the effect of defeating the deportation order); and (7) the danger that, if released, he will commit criminal offences. (*paras 51 to 55*)

The CA also summarized a list of non-exhaustive factors to be considered in a habeas corpus application. Please refer to Appendix A for more details. (*para 164*)

Reasonable Period

The CA acknowledged that although in the majority of the cases it may not be possible to predict accurately in advance the date on which continued detention would become unlawful by being unreasonable, in some cases it might be able to say, looking backwards, that the period of detention must have become unreasonable. The CA agreed that the line had been crossed by the date of the first instance hearing and the correct thing for the CA to do was to order the release of the Applicant. (*paras 75 to 82*)

Issue 1: The Adjournment Issue

The question concerned how the court should make a qualitative assessment of the time taken in the nonrefoulement proceedings, including any delay caused by adjournments. (*para 83*)

The CA agreed with the approach taken in *R (WL)(Congo) v Home Secretary*⁶ ("**Lumba**") that whether there is a realistic prospect for the deportation to take place is the starting point. If there is no realistic prospect that deportation will take place within a reasonable time, then continued detention is unlawful. In determining whether a period of detention has become unreasonable in all the circumstances, much more weight should be given to detention during

⁶ [2012] 1 AC 245

a period when the detained person is pursuing a meritorious appeal than to detention during a period when he is pursuing a hopeless one. Some assessment should be made as to the apparent merits of the challenge to deportation and, unless the court considers the challenge to be hopeless, frivolous or abusive or there is some special reason to accord minimal weight to the time taken for determination of that challenge, the court will take the period into the overall consideration of reasonableness. In assessing the time taken by adjournments, reliance on the mere fact of adjournment would be wrong and it may be appropriate for adjournments to be considered if, on the facts, the applications were seen to be unreasonable or bound to fail or time-wasting, seen individually or as a whole. As the CFI judge did not find the adjournments unjustified or unwarranted, the Applicant's judicial review application improper or an abuse, nor were the judicial review proceedings hopeless or frivolous, the CA held that it was unfair and in error for the CFI judge to take into account the mere fact of adjournments or to give discounts in the consideration of the reasonableness of the period of detention. (*paras 84 to 89, 92 to 93, 95 and 98*)

The CA emphasized the court's role to review on a primary decision maker basis the claimed justification for the continued detention and to make its own assessment on the evidence (including new materials which became available after the previous hearing given that detention is an ongoing phenomenon) but it should not come up with its own or a new basis or justification for the detention. The CA found that the CFI fell into error in offering a reason which was not a basis underlying the original detention decision and which was not sustainable on the materials, which simply identified the fact of adjournments and nothing more. (*paras 101 to 103 and 105*)

Issue 2: The Reoffending Issue

The risk of reoffending is a relevant circumstance in the consideration of the reasonableness of the length of detention. The CA adopted *Orlando Polanco v Secretary of State for the Home Department*⁷ and accepted that the proper principles to be applied on an assessment of the risk and seriousness of reoffending include: (1) the consideration of the chance of reoffending and the potential gravity of the consequences of reoffending if it were to occur. A proper assessment includes the consideration of the extent of the risk and the seriousness were it to occur; (2) the rigorous scrutiny of the executive's assessment of risk on both the risk and the gravity of offending, and that the weight to be given to that assessment depends on how convincing the reasoning is. The court shall review not only the assessments performed by the Secretary and by the Director but also the appropriate contemporaneous documentation illustrating how convincing their reasoning was; (3) the longer the detention the greater the risk necessary to justify it, and the particular level of risk becomes of less weight in the balance as the period of detention drags on; and (4) there will ultimately come a time when detention becomes unreasonable however high the risk of reoffending. The first task of the court and the Secretary and the Director is to identify the period of detention already served and any likely further period of detention so as to assess whether the period of detention is too long by the time of the assessment, so that any balancing can be performed against that period. That assessment shall also involve balancing (a) the gravity of any risks arising from release from detention against (b) the breach of the principle of liberty. (*paras 111 to 120*)

⁷ [2009] EWHC 826

The CA reviewed documentation recording the Secretary's and the Director's review of the Applicant's continued detention. This included a memo from the Director to the Secretary dated 2021, in which the Director opined that the Applicant's detention should continue because: (a) his removal was going to be possible within a reasonable time; (b) he may constitute a threat/security risk to the community; (c) he may abscond and/or reoffend; and (d) that there were no other circumstances in favor of his release, in light of the fact that (1) there was no sufficient reason to believe that his case could not be finalized in the near future or his claim / legal proceeding could not be completed within a reasonable period of time; (2) he was likely to pose a threat / security risk to local community; (3) he had convictions associated with crimes of serious or violent nature; (4) he failed to comply with the terms/conditions of recognizance; (5) he was rearrested during recognizance; and (6) he had a series of previous convictions of criminal and/or immigration offences or re-committed the same offence in respect of his previous arrest. The form was provided to the detained person so that he would know the particular elements that had led to the decision for his continued detention. The CA particularly remarked that the tick box form used by the Secretary and the Director was a "highly reductive tool" as it tended to identify the mere presence or absence of a feature and not the precise circumstances. This discouraged any actual assessment or evaluation of the likelihood, severity and the underlying causes of the factors which may vary from time to time. The documentation (i) did not contain evidence as to whether or how the factors had been considered; (ii) did not identify any real analysis or reasoning or show what had gone into the process in relation to any individual factor when reaching the conclusion; (iii) did not promote any recognition that as time went on the weight to be given to some factors may change; and (iv) did not identify the period of detention against which the other factors were to be weighed. In addition, as one of the review forms was signed by a total of four immigration officers on the same date, this led to the question as to how the more senior officers could have performed any real assessment or analysis via independent and critical thought process. The CA found that the Secretary and the Director had made rote assertions copied and pasted on a number of occasions and made no real ongoing and varying analysis of the factors that may shift in the balance. The analysis must change as time moves on but, in this case, there was not much internal variation from one review to the next or thereafter and nothing showed that the passage of time had been really brought into consideration. The CA also recognized that the most serious offences committed by the Applicant occurred over 20 years ago and the evaluative materials did not have persuasive or detailed reasons showing a fresh and robust, up-to-date, current and reliable assessment. The CA held that the CFI judge had fell into error in placing conclusive weight on the views of the Secretary and the Director with regard to the potential risks of absconding and reoffending. (*paras 123 to 142*)

Issue 3: The Time for Removal Issue

The question related to the degree of certainty that was required for the assessment as to (1) the probability that removal could be effected at all and (2) the proximity of the time to removal.

Citing *MH v Secretary of State for the Home Department*⁸ and *R (Muqtaar) v Home Secretary*⁹, the CA held that the proper emphasis is the determination of whether, and if so when, removal will be possible. That does not necessarily mean a specific pinpointed date or range of dates, but there must at least be some sense at a broad level of what sort of timescale is being canvassed. Unless there is some idea as to what sort of timescale is being suggested, it is not possible to qualify it as reasonable. Whether the possibility of an appeal is a factor, and what

⁸ [2010] EWCA Civ 112

⁹ [2013] 1 WLR 649

weight should be given to it, depends on all the circumstances, in particular the period of detention to date. The CA held that the Applicant should have been released as there was a lack of sufficient clarity as to when his legal aid appeal and judicial review application might be heard. The possibility of an appeal may take on more significance if it arises after an already lengthy period of detention. (*paras 143 to 153*)

Other Considerations:

In terms of family ties, the CA accepted that family shall be one of the matters to be taken into account in considering the continued reasonableness of detention, but agreed that the family circumstances might be considered to have little impact in this case, as the Applicant had been detained pending deportation, namely to be removed from his family in Hong Kong in any event, so that this factor might be of little significance when weighed against matters overall. (*paras 154 to 156*)

In terms of the appropriate approach towards the lower court's judgment and subsequent new evidence, the CA explained when hearing an appeal from a habeas corpus case, the CA should as a starting point consider the first instance judge's point of view. The first instance judge conducts an objective review to determine the lawfulness of the decision made by the Secretary and the Director, and examines the decision on the basis of the evidence as known to the decision makers when the decision was made. While the court does not usually take into account matters that subsequent occurred, where (1) the liberty of the Applicant is concerned; (2) there is either significant time between the last review and the hearing; or (3) something of real significance has occurred in the meantime, it may be necessary for the court to consider the position up to the date of the appeal and, in such a case, the court should not ignore subsequent relevant new materials. The CA emphasized that the court would order the release of the Applicant if by the date of the appeal the Applicant's detention had become unreasonable. An appellate court will not interfere with the first instance judge's decision unless it can be shown that the judge's exercise of judgment (a) was inconsistent with his findings of primary fact; (b) was based on an incorrect understanding of the law; or (c) was one that was not sensibly open to the judge on the basis of the facts. (*paras 81, 101 and 158 to 161*)

Legal Provisions considered:

1. Sections 20(1)(a), 25, 29(1), 32(3), 32(3B), 32(3C), 32(3D) 32(4A) and 36(1) of the IO:
<https://www.elegislation.gov.hk/hk/cap115>

Key Cases cited:

1. *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 (principles to consider in determining the lawfulness of an immigration detention)
https://www.refworld.org/cases,GBR_HC_QB,3ae6b6ce1c.html
2. *R (WL)(Congo) v Home Secretary* [2012] 1 AC 245 (whether the time taken to resolve legal challenges brought by a person against his deportation should be left out in considering whether a reasonable period of his detention has elapsed)

[https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2011/12.html&query=\(Con go\)+AND+\(v\)+AND+\(Home\)+AND+\(Secretary\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2011/12.html&query=(Con+go)+AND+(v)+AND+(Home)+AND+(Secretary))

3. *Orlando Polanco v Secretary of State for the Home Department* [2009] EWHC 826 (Admin) (the longer the detention is the greater the risk will have to be in order to justify it; there will ultimately come a time when detention becomes unreasonable however high the risk of reoffending and absconding)
<http://www.bailii.org/ew/cases/EWHC/Admin/2009/826.html>
4. *MH v Secretary of State for the Home Department* [2010] EWCA Civ 112 (how much certainty is required for the assessment as to the probability that removal can be effected at all and the proximity of the time to removal)
https://www.refworld.org/cases,GBR_CA_CIV,4d2b16e02.html
5. *R (Muqtaar) v Home Secretary* [2013] 1 WLR 649 (continued detention is unlawful if there is no realistic prospect that deportation will take place within a reasonable time)
<https://vlex.co.uk/vid/r-mohammed-muqtaar-v-793821641>

Appendix A

List of Non-exhaustive Factors to be Considered in a Habeas Corpus Application

- (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 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 scrutinise 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.