

Case Summary for:
HUSSEINI YAWUZA v. DIRECTOR OF IMMIGRATION¹

Court:	The Court of First Instance
Judges:	Hon Coleman J
Applicant (and Counsel):	Husseini Yawuza (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr. Felix Lee, Government Counsel, (instructed by the Department of Justice))
Date heard:	17 and 26 November 2021
Date promulgated:	30 November 2021
Full text:	https://v2.hklii.hk/en/cases/hkcfi/2021/3442?hl=HUSSEINI%20YAWUZA%20V.%20DIRECTOR%20OF%20IMMIGRATION
<p>ABSTRACT: The Applicant is a Ghanaian national, currently detained in the Tai Tam Gap Correctional Institution. He married his wife (a Hong Kong resident) in 2015, and has three children. On 21 October 2021, the Applicant launched this application for <i>habeas corpus</i> on the grounds of (1) suggested failures on the part of the Director of Immigration (the “Director”) regarding (a) the time of the Applicant’s removal, (b) the Applicant being a threat/security risk to the community, (c) the chances of the Applicant absconding, (d) the Applicant’s close connection and fixed abode in Hong Kong, (e) the high standard of fairness to be attained by the Director, and (f) the consideration of the Applicant’s request to be released on recognizance; (2) his desire to gather evidence for his judicial review application relating to his non-refoulement claim; and (3) his desire to be re-united with and to assist his family in Hong Kong. The Court determined that the original detention was lawful and that the continued detention remained <i>Hardial Singh</i> compliant and lawful. The application was dismissed.</p>	
Key words:	Administrative law; <i>habeas corpus</i> ; detention pending removal; lawful authority; whether detention has become unreasonable; realistic prospect of removal within reasonable time

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

¹ [2021] HKCU 5797. Also cited as: [2021] HKCFI 3442, and HCAL 1548/2021.

SUMMARY:

Facts and Procedural History:

The Applicant is a Ghanaian national who arrived in Hong Kong in 2009 by boat from Shenzhen. On 29 July 2009, the Applicant was arrested for being a suspected illegal immigrant, and was transferred to the Immigration Department of Hong Kong (the “**Immigration Department**”) and detained on 31 July 2009 under Section 26(a) of the Immigration Ordinance Cap. 115 (the “**Ordinance**”) for inquiry. On 1 August 2009, the Applicant was detained under Section 32(1)(a) of the Ordinance pending his removal. On 14 September 2009, the Applicant was released on recognizance.

On 19 December 2012, the Applicant was convicted of the offence of trafficking in dangerous drugs and was sentenced to 4 months’ imprisonment. On 18 January 2013, the Applicant completed his sentence, was transferred to the Immigration Department and detained under Section 32(2A) of the Ordinance pending a decision as to whether a removal order should be made against him. On 4 February 2013, a removal order was made against the Applicant, and he was then detained under Section 32(3A) of the Ordinance pending his removal from Hong Kong. On 18 February 2013, the Applicant was released on recognizance.

On 28 June 2013, the Applicant was convicted of the offence of possession of a dangerous drug and was sentenced to 4 weeks’ imprisonment suspended for 30 months.

On 19 May 2014, the Applicant indicated his intention to lodge a non-refoulement claim, on the ground that if refouled, he would be harmed or killed by a group of people in Ghana or be the subject of the group’s curse or hex.

On 30 March 2015, the Applicant was convicted of the offence of inflicting grievous bodily harm and was sentenced to 2 years’ imprisonment, which activated the suspended sentence of 4 weeks’ imprisonment of his previous conviction. On 22 July 2016, the Applicant completed his sentence, and was transferred to the Immigration Department for detention under Section 32(3A) of the Ordinance pending removal from Hong Kong. On 31 August 2016, the Applicant was released on recognizance.

On 27 February 2018, the Applicant’s non-refoulement claim was refused by the Director, and the Applicant lodged an appeal/petition against the Director’s decision with the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “**Board**”). The Board later dismissed the appeal/petition on 24 July 2019, on the grounds that the Applicant’s story lacked credibility and that there was no real risk or substantial grounds for believing that the Applicant would suffer harm if he returned to Ghana.

On 19 November 2019, the Applicant failed to report recognizance and absconded. On 5 June 2020, he was arrested and referred to the Immigration Department for detention under Section 32(3A) of the Ordinance.

On 18 June 2020, the Applicant filed an application for leave to apply for judicial review against the Board's decision under HCAL 1226/2020 (the "**JR Leave Application**"). On 16 November 2021, the JR Leave Application was dismissed by the District Court in [2021] HKCFI 3342.

On 7 July 2020, the Applicant was arrested for the suspected offence of arson at the Castle Peak Bay Immigration Centre (the "**CIC**"). He was convicted of arson on 26 February 2021 and was sentenced to 11 months and 14 days' imprisonment. On 27 March 2021, the Applicant completed his sentence and was transferred to the CIC for detention under Section 32(3A) of the Ordinance. The detention continued until the time of the hearing. The Director conducted four reviews throughout this period of detention, namely on 27 May 2021, 19 August 2021, 10 November 2021 and 24 November 2021, and decided on each occasion that the Applicant's detention should be continued, on grounds including: (1) the Applicant's removal would take place within a reasonable time; (2) the Applicant may constitute a security risk to the community; (3) the Applicant may abscond and/or re-offend; and (4) there being no other circumstances in favor of the Applicant's release.

On 21 October 2021, the Applicant lodged the present application for a writ of *habeas corpus*. During an in-person interview on 18 November 2021, the Applicant expressed his strong unwillingness to return to his home country, showing reluctance for the phone interview with the Embassy of Ghana to verify his identity as a Ghanaian national. He refused to fill in a re-entry application form and a consent form for release of information. On 23 November 2021, the Applicant filed a Notice of Appeal from the refusal of his JR Leave Application.

Issues:

The Court considered whether the Applicant's detention was unlawful, including (1) whether there was lawful authority for a detention, and if so (2) whether the continued detention remained lawful 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 this application.

Reasons for Judgment:

First, to determine whether the Applicant's detention was lawful, the Court looked at 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." There was apparent authority to detain the Applicant pending removal as both the removal order and the authorization for detention had remained extant at all times. (*paras 56 to 58*)

Second, the Court considered the fact that an initially lawful detention might become an unlawful detention if it fails to meet the *Hardial Singh* principles: (1) the Director must intend to deport the Applicant and can only use the power to detain for that purpose; (2) the Applicant may only be detained for a period that is reasonable in all the circumstances; (3) if, before the expiry of the reasonable period, it becomes apparent that the Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and (4) the Director should act with reasonable diligence and expedition to effect removal. (*para 51*)

The burden of demonstrating the detention (and the continuation of it) as lawful rests on the respondent to the application for *habeas corpus*. (*para 52*)

A review of whether a period of detention might be regarded as reasonable includes at least the following matters: (i) the length of the period of detention; (ii) the nature of the obstacles standing in the way of deportation; (iii) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (iv) the conditions in which the detained person is being kept; (v) the effect of detention on him and his family; (vi) the risk that if he is released from detention he will abscond; and (vii) the danger that, if released, he will commit criminal offences. Further, the new Section 32(4A) of the Ordinance stipulates circumstances under which the length of detention would be justified as reasonable and lawful, in conforming to the *Hardial Singh* principles. (*paras 54 to 55*)

The Court considered that: (1) the Director had throughout exercised due diligence to effect the Applicant's removal; (2) the JR Leave Application, which the Court considered to be a weak one, had been disposed of by its dismissal; (3) the other relevant principles had been complied with, specifically in light of the security risk posed or likely to be posed by the Applicant; (4) the Director was in a better position to consider matters such as the risks of absconding or re-offending and whether the Applicant may pose a security risk to the community if released from detention (the Court was entitled to place weight on the Director's assessment; the Applicant was a repeated offender of serious crimes and an absconder who had offered inconsistent explanations as the reasons he had failed to report recognizance); and (5) the Applicant's desire to reunite with his family in Hong Kong was

considered by the Director who decided that this was not sufficient to outweigh the other factors (including the security risk posed and that the removal was going to be possible within a reasonable time). (*paras 59 to 60*)

Applying the *Hardial Singh* principles, the Court held that (1) there was no evidence suggesting that the Director used its power of detention for any purposes other than for the removal of the Applicant; (2) the obstacles to the Applicant's removal, caused by his pending JR Leave Application and by his expired passport (a self-imposed obstacle), was removed and was removable, respectively, and the Director intended to remove the Applicant at the earliest moment and was of the view that he could be removed within a reasonable period of time; and (3) the Director had acted with reasonable diligence or expedition to effect the Applicant's removal. (*para 62*)

The Court concluded that the Applicant's detention was under lawful authority and was *Hardial Singh* compliant and, as such, remained lawful. (*para 67*)

Legal Provisions considered:

1. Sections 32(2A), 32(3A) and 32(4A) of the Ordinance:
<https://www.hkii.hk/eng/hk/legis/ord/115/s32.html>

Key Cases cited:

1. *Harjang Singh v Secretary for Security* [2019] HKCFI 1486 (the Court is entitled to place weight on the Director's assessment of fact-sensitive issues)
<https://v2.hkii.hk/en/cases/hkcfi/2019/1486?hl=Harjang%20Singh>
2. *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 (applicable principles to determine whether a reasonable detention has become unreasonable)
https://www.refworld.org/cases,GBR_HC_QB,3ae6b6ce1c.html
3. *Simona Mundia v Director of Immigration* [2020] 2 HKLRD 1205 (applicable principles to an application for the issue of a writ of *habeas corpus*)
<https://v2.hkii.hk/en/cases/hkcfi/2020/741?hl=Simona%20Mundia>