

Case Summary for:
JUM ALIE v. HONG KONG SAR GOVERNMENT¹

Court:	The Court of First Instance
Judges:	Hon Chow J in Court
Applicant (and Counsel):	Jum Alie
Respondent (and Counsel):	Hong Kong SAR Government (Ms. Vivian Kao (instructed by the Department of Justice))
Date heard:	3 February 2017
Date promulgated:	3 February 2017
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2017/652.html
<p>ABSTRACT: The Applicant was detained under Section 32(3) of the Immigration Ordinance Cap. 115 (the “Ordinance”), pending his removal from Hong Kong. On 26 January 2017, the Applicant made the present application for a writ of <i>habeas corpus</i> to be issued in respect of his detention by the Director of Immigration (the “Director”). 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>	
Key words:	Administrative law; <i>habeas corpus</i> ; detention pending removal; unlawful detention; whether detention had become unreasonable

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

¹ [2017] HKCFI 652. Also cited as HCAL 20/2017.

SUMMARY:

Facts and Procedural History:

The Applicant, a Gambian national, surrendered to the Immigration Department on 7 January 2015 for having overstayed and was released on recognizance under Section 36(1) of the Ordinance.

On 6 February 2015, the Applicant was arrested by officers of the Immigration Department for the suspected offence of “breach of condition of stay”. The Applicant was released on recognizance under Section 36(1) of the Ordinance on the same day. As the Applicant claimed that he would be in danger should he return to Gambia, his claim for non-refoulement protection was referred to the Removal Assessment Section of the Immigration Department (the “**Section**”) for further handling.

While on recognizance, the Applicant was arrested by the Police on 28 May 2015. He was convicted of two counts of “trafficking in a dangerous drug” on 25 September 2015 and sentenced to a total of 16 months of imprisonment. At the same time, deportation proceedings were initiated against the Applicant by reason of his convictions.

The Applicant objected to the deportation on, *inter alia*, the ground that his life would be in danger in Gambia and that he had lodged a torture claim. On 16 April 2016, the Applicant was released from prison and was informed that whether a deportation order would be made against him depended on the screening of his non-refoulement claim, but in the meantime the Director might consider the issuance of a removal order against him.

On 4 July 2016, the Director refused the Applicant’s non-refoulement claim. The Applicant’s appeal/petition against the Director’s decision was dismissed by the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “**Board**”) on 4 October 2016. On 17 October 2016, the Applicant made further written submissions to re-open his non-refoulement claim based on the ground of his absolute and non-derogable rights under the Hong Kong Bill of Rights. Meanwhile, a removal order was issued against the Applicant pursuant to Section 19(1)(b) of the Ordinance on 26 October 2016. The Applicant’s further non-refoulement claim was refused again by the Director on the next day. His appeal/petition against this decision was dismissed by the Board on 6 December 2016.

On 29 December 2016, a deportation order was issued against the Applicant. On 16 January 2017, the Section refused the Applicant’s further requests to make another non-refoulement claim based on the same or similar grounds as previously advanced by him. However, the repatriation exercise on 21 January 2017 failed due to the Applicant’s emotional and uncooperative behaviour all the way to the boarding gate. He was then escorted back to the Ma Tau Kok Detention Centre pending further arrangement for his removal under Section 25 of the Ordinance.

The Applicant requested to re-open his non-refoulement claim on 30 January 2017, but such request was rejected by the Section on 2 February 2017.

Pending approval by Ethiopian Airlines, the Applicant was scheduled to be removed from Hong Kong on 11 February 2017. While the approval process might take around two to four weeks, it was nevertheless confirmed by an immigration officer that the Applicant's deportation would take place as soon as practicable.

Since his release from prison on 16 April 2016, the Applicant had been detained by the Director under various provisions of the Ordinance, including Sections 29(1), 29(2), 32(2A)(a), 32(2A)(b), 32(3A) and 37ZK. On 26 January 2017, the Applicant made the present application for a writ of *habeas corpus* in respect of his current detention under Section 32(3).

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(3) of the Ordinance, which provides as follows: "A person in respect of whom a removal order under section 19(1)(a) or a deportation order is in force may be detained under the authority of the Secretary for Security pending his removal from Hong Kong under section 25." In view of the facts that (1) a deportation order 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 28 to 29*)

Second, to determine whether the Applicant's detention was *Hardial Singh* compliant, the Court applied the statement of principle by Au J in *Bhullar Angad Singh v HKSAR* HCAL 134/2014, which confirms the Director's discretion in respect of the continued detention of a person pending his deportation. As long as the Director is intent upon removing a person at the earliest possible moment and the Director remains reasonably of the view that he can do so within a reasonable period of time and that it will not be impossible for him to remove the

person within that reasonable period of time, then the Director is entitled to continue to detain in the exercise of his discretion. (*para 27*)

The Court considered the relevant principles and held that (1) there was no evidence to show that it had become apparent to the Director or the Secretary for Security at any time that it would not be possible to effect the Applicant's deportation within a reasonable time; (2) priority had been given to the assessment of the Applicant's non-refoulement claim considering his detention; (3) the Applicant's non-refoulement claim had been processed expeditiously; (4) the Director had acted with reasonable diligence and expedition to effect removal; (5) the Director had remained reasonably of the view that he could do so within a reasonable period of time and (6) there had been periodic review of the Applicant's detention. Overall, the Court was of the view that the Applicant had been detained for a period that was reasonable in all the circumstances, and his current detention remained in compliance with the *Hardial Singh* principles. (*para 30*)

Legal Provisions considered:

1. Sections 29(1), 29(2), 32(2A)(a), 32(2A)(b), 32(3), 32(3A), and 37ZK of the Ordinance:
<https://www.hkii.hk/eng/hk/legis/ord/115/s32.html>

Key Cases cited:

1. *Bhullar Angad Singh v HKSAR* [2014] HKCFI 1873 (relevant principles on whether the Director of Immigration has discretion in light of the continued detention of a person pending his deportation)
<https://v2.hkii.hk/en/cases/hkcfi/2014/1873?hl=BHULLAR%20ANGAD%20SINGH%20V.%20HONG%20KONG%20SAR%20GOVERNMENT>
2. *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.hkii.hk/en/cases/hkcfi/1998/25?hl=Fidelis%20Ahuwaraezeama%20>
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