

Case Summary for:
MUNIR AHMAD V THE GOVERNMENT OF HKSAR¹

Court:	Court of First Instance (Hong Kong) (the “CFI”)
Judge:	Hon Chow J
Applicant (and Counsel):	Munir Ahmad (acting in person)
Respondent (and Counsel):	The Government of the Hong Kong Special Administrative Region (Mr Louie Chan, Government Counsel, instructed by Department of Justice)
Date heard:	13 April 2017
Date promulgated:	13 April 2017
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2017/678.html
ABSTRACT: The Applicant sought an order that a writ of habeas corpus <i>ad subjiciendum</i> be issued in respect of his detention by the Director of Immigration (the “Director”). The CFI found that the Applicant’s detention was lawful, compliant with the <i>Hardial Singh</i> principles (as summarised in <i>Ghulam Rbani</i>) and he had been detained for a period that was reasonable in all the circumstances, and therefore dismissed the application.	
Key words:	Judicial review; habeas corpus; unlawful detention

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

¹ [2017] HKCFI 678; HCAL 130/2017.

SUMMARY:

Facts and Procedural History:

The Applicant was a Pakistani national who entered Hong Kong on 22 January 2003 under another name and overstayed. He was convicted of an offence of breach of condition of stay by overstaying since 6 February 2003, contrary to section 41 of the Immigration Ordinance, Cap.115 (the “**Ordinance**”) and a removal order was subsequently issued on 9 September 2004, pursuant to which he was repatriated to Pakistan on 21 September 2004. He returned to Hong Kong with no record of entry and on 15 July 2009 was arrested for the offence of remaining in Hong Kong without the authority of the Director under section 38(1)(b) of the Ordinance. He lodged a torture claim on 20 July 2009, which was rejected by the Director on 23 July 2010. On 29 July 2010, the Applicant lodged a petition against the rejection, which was dismissed by the Torture Claims Appeal Board on 2 September 2010. He was subsequently convicted of the section 38(1)(b) offence under the Ordinance, failure to surrender to custody after having been admitted to bail by a court contrary to section 9L of the Criminal Procedure Ordinance, Cap.221, and an offence of attempting to knowingly mislead a police officer. After he was discharged from prison, he was transferred to Castle Peak Bay Immigration Centre on 9 January 2017, where he was detained under section 32(2A) of the Ordinance until a removal order was issued on 20 February 2017. Since then, the Director was still waiting for an emergency travel document to be issued by the Pakistani Consulate for the Applicant to be removed from Hong Kong. Mr Louie Chan told the Court that such emergency travel document would normally take at least 3 months (from February 2017).

The Director reviewed the detention on 12 April 2017 but refused to release the Applicant on recognizance, on the bases that (i) it was possible to remove the Applicant from Hong Kong within a reasonable time, (ii) there was a risk of absconding by the Applicant in light of his case history, and (iii) the Applicant’s true identity had not yet been fully resolved.

The Applicant argued that he would like to return to Pakistan voluntarily due to personal and family circumstances, including amongst others that his family members were not well, and that he has been detained for over 3 months pending the issuance of his travel document by the Pakistani Consulate.

Issues:

Whether a writ of habeas corpus should be issued, i.e., whether the detention was unlawful.

Judgment:

The detention was lawful; the application a writ of habeas corpus was dismissed.

Reasons for Judgment:

In determining whether an application for the issue of a writ of habeas corpus should be issued, the central question is whether the detention was unlawful. (para 17)

A detention is unlawful where it was made without proper lawful authority. A detention initially made with proper lawful authority could subsequently become unlawful if such detention does not comply with the *Hardial Singh* principles, summarised as follows:

“(i) *The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

(iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.” (para 18)

In determining whether a period of detention is reasonable in all the circumstances, the Director has discretion in relation to the continued detention of a person pending deportation. So long as the Director intends to remove a person at the earliest possible moment and reasonably believes that he can do so within a reasonable period of time, the Director can continue to detain such person. (para 19)

The Applicant’s then-current detention was *prima facie* lawful because (i) there was a removal order under section 19(1)(b) of the Ordinance against the Applicant that was in force and (ii) the Applicant was being detained pending removal from Hong Kong under section 25 of the Ordinance. (para 21)

The period of detention was reasonable in all the circumstances and compliant with the *Hardial Singh* principles. There was no evidence suggesting that the Director was using the power of detention for any purposes other than for removal for the Applicant, or that the Director knew that it would not be possible to effect the removal within reasonable time. There was also no evidence suggesting that the Director had failed to act with reasonable diligence to effect the Applicant’s removal, which was subject to the issuance of an emergency travel document by the Pakistani Consulate. The Director’s view that the Applicant could be removed within a reasonable period of time was reasonable. (paras 21 to 22)

Legal Provisions considered:

1. Sections 19(1)(b), 25, 32(3A), 38(1)(b) and 41 of the Ordinance
<https://www.hklii.hk/eng/hk/legis/ord/115/>

Key Cases cited:

1. *Fidelis Ahuwaraezeama Emen v Superintendent of Victoria Prison* [1998] 2 HKLRD 448, at 453C-D (legal principles governing an application for the issue of a writ of habeas corpus)

<https://www.hklii.hk/eng/hk/cases/hkcfi/1998/25.html>

2. *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138 (para 23) (summary of the *Hardial Singh* principles)
<https://www.hklii.hk/eng/hk/cases/hkcfa/2014/21.html>
3. *Bhullar Angad Singh v HKSAR*, HCAL 134/2014 (21 October 2014), (para 17) (whether a period of detention is reasonable in all the circumstances)
<https://www.hklii.hk/eng/hk/cases/hkcfi/2014/1873.html>