

Case Summary for:
NGO QUANG DUY v. DIRECTOR OF IMMIGRATION¹

Court:	The Court of First Instance
Judges:	Hon Coleman J in Court
Applicant (and Counsel):	Ngo Quang Duy (acting in person)
Respondent (and Counsel):	Director of Immigration (Ms. Angel Zhi (instructed by the Department of Justice)) (skeleton submissions also signed by Mr. Sunny Li)
Date heard:	13 January 2022
Date promulgated:	13 January 2022
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2022/177.html
<p>ABSTRACT: At the time of the hearing, the Applicant was detained in Tai Tam Gap Correctional Institution, pending his removal from Hong Kong. On 24 December 2021, the Applicant filed an originating summons applying for a writ of <i>habeas corpus</i> on the grounds that he wished to (1) seek medical treatment outside of detention; (2) stay with his younger sister in Hong Kong; and (3) wait for the result of his application for leave to apply for judicial review of the refusal of his non-refoulement claim (HCAL 1317/2019). The Court held 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; length of detention

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

¹ [2022] HKCU 227. Also cited as: [2022] HKCFI 177, and HCAL 1753/2021.

SUMMARY:

Facts and Procedural History:

The Applicant is a Vietnamese national. The Applicant was arrested for being a suspected illegal immigrant on 26 December 2013, and was removed from Hong Kong to Vietnam on 22 January 2014. On 8 May 2014, the Applicant was again arrested for being a suspected illegal immigrant and was referred to the Immigration Department of Hong Kong (the “**Immigration Department**”).

Subsequently, the Applicant lodged a claim for non-refoulement, which was rejected by the Director of Immigration (the “**Director**”) on 12 February 2018. The Applicant’s appeal/petition against that refusal was further dismissed by the Torture Claims Appeal Board/Non-Refoulement Claims Petition Office (the “**Board**”) on 13 December 2018.

On 28 March 2018, the Applicant was convicted of the offence of possession of a dangerous drug. On 10 January 2019, the Applicant failed to report recognizance and absconded. He was arrested on 1 February 2019 and, on the following day, referred to the Immigration Department. On 3 February 2019, a removal order was made against the Applicant, who was thereafter detained under Section 32(3A) of the Immigration Ordinance Cap. 115 (the “**Ordinance**”) pending removal from Hong Kong.

On 16 May 2019, the Applicant sought leave to apply for judicial review of the refusal of his non-refoulement claim in HCAL 1317/2019.

On 1 July 2019, the Applicant was released on recognizance, but was then, whilst on recognizance, arrested six times for committing shoplifting offences. On 24 July 2021, after having completed his latest sentence, the Applicant was referred to the Immigration Department for detention under Section 32(3A) of the Ordinance. That detention continued until the time of the hearing. The Director had conducted reviews on 26 August 2021, 21 October 2021, 30 November 2021, 24 December 2021 and 10 January 2022, but had on each occasion decided to continue the Applicant’s detention.

As at the date of the hearing, the only hurdle to the Applicant’s removal from Hong Kong was his outstanding application for leave to apply for judicial review.

Issues:

The Court considered whether the detention was, and continued to be, lawful in compliance with the *Hardial Singh* principles, as set out in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 and adopted in Hong Kong by the Court of Final Appeal in *Ghulam Rbani v SJ for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138.

Judgment:

The application was dismissed.

Reasons for Judgment:

First, at the time of the hearing, the Applicant was detained under Section 32(3A) of the Ordinance following the making of the removal order against him. Section 32(3A) of the Ordinance 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.” As both the removal order and the authorization for detention under Section 32(3A) had remained in force against the Applicant at all times during his detention, there was *prima facie* lawful authority for the Applicant’s detention. (para 28)

Second, to decide on whether an initially lawful detention had turned unlawful, the Court considered the Applicant’s detention in the light of the *Hardial Singh* principles: (1) the Applicant could be removed at any time except for the current impediment of the outstanding application for leave to apply for judicial review, and the power to detain was being used pending the intended deportation; (2) the period of detention had been reasonable in all the circumstances (reasons see below); (3) it was reasonable to expect that the Applicant’s application for leave to apply for judicial review could be disposed of soon; and (4) the Director had exercised due diligence to effect the Applicant’s removal, by expeditiously issuing the removal order, promptly providing relevant documents to the Court and actively conducting liaison with the Vietnamese authorities. (para 29)

The Court was of the view that the period of detention in question had been reasonable in all the circumstances after considering the following matters. Although the exact timing for determining the Applicant’s application for leave to apply for judicial review was not within the control of the Director, to the extent that the merits of such application were relevant, the Director was entitled on the available information to consider the application as a weak one. The Director was also entitled in the circumstances to consider that the Applicant posed risks of absconding and re-offending. The Applicant’s medical condition also did not tip the balance so as to suggest that the detention had become unreasonable, where appropriate medical treatment was available at the Correctional Institution or could be arranged at a hospital. (paras 29 to 30)

In conclusion, the Court was satisfied that the original detention of the Applicant was lawful and that the continued detention remained *Hardial Singh* compliant and lawful. (para 31)

Other Considerations:

The Court outlined 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 25*)

A review of how long a period of detention might be regarded as reasonable includes at least the following factors: (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 Applicant 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. The new Section 32(4A) of the Ordinance similarly specifies that the detention under Section 32 of the Ordinance shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances that justify its length. (*paras 26 to 27*)

The Court endorsed the position that there is no general rule that costs of similar *habeas corpus* applications should follow the event. A more liberal approach should be taken and the Court should exercise discretion depending on the facts and circumstances. For example, even though the Court in the present case acknowledged that the Applicant raised no arguable grounds and that the application was plainly unmeritorious, it made no order as to costs in the light of the “practical realities”. (*paras 33 to 34*)

Legal Provisions considered:

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

Key Cases cited:

1. *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