

Case Summary for:
NKOKWO ANDRE AKA v HONG KONG SAR GOVERNMENT DIRECTOR OF IMMIGRATION¹

Court:	Court of First Instance
Judges:	Hon Au J
Applicant (and Counsel):	<i>Nkokwo Andre Aka (appeared in person)</i>
Respondent (and Counsel):	<i>Hong Kong SAR Government Director of Immigration (Jesse Yu instructed by the Department of Justice)</i>
Date heard:	5 September 2016
Date promulgated:	14 September 2016
Full text:	https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2016/1541.html
<p>ABSTRACT: The Applicant, a US national, was arrested and charged with the offence of “possession of offensive weapon” during his stay in Hong Kong as a visitor in 2016. At the same time, the Director of Immigration’s (the “Director”) had decided to apply for a removal order against the Applicant, considering the public security and safety risk that the Applicant might post to Hong Kong. Even though the charge against the Applicant was later withdrawn, a removal order was issued against the Applicant. The Applicant lodged a non-refoulement claim pending his deportation, followed by a <i>habeas corpus</i> application. The Applicant was under detention since the date of his arrest under the Immigration Ordinance (Cap. 115) (the “Ordinance”).</p> <p>The Applicant relied on several grounds which essentially challenged the removal order in his <i>habeas corpus</i> application. The Court dismissed the application, as it was not open to the Applicant to challenge a removal order in a <i>habeas corpus</i> application, and in any case the detentions were lawful.</p>	
Key words:	<i>habeas corpus</i> , unlawful detention, judicial review, Immigration Ordinance

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¹ [2016] HKCFI 1541; Also cited as [2016] 5 HKLRD 126 and HCAL 157/2016

SUMMARY:

Facts and Procedural History:

On 21 July 2016, the Applicant, a national of the United States, entered Hong Kong as a visitor and was allowed to remain in Hong Kong until 19 October 2016. On 23 July 2016, the Applicant was arrested and charged with the offence of “possession of offensive weapon”. At the same time, based on the Director’s assessment, he was of the view that the continued presence of the Applicant in Hong Kong would post risks on security, public safety or public order to Hong Kong. As a result, on 6 August 2016, the Director applied to the Chief Executive (the “**CE**”) for a removal order against the Applicant under s.19(1)(a) of the Ordinance. The Applicant was then detained under s.32(2)(a) and s.32(2)(b) of the Ordinance pending the making of the application and the CE’s consideration thereof (the “**Initial Detention Period**”).

On 8 August 2016, the charge against the Applicant was withdrawn. On 10 August 2016, the CE issued the removal order against the Applicant (the “**RO Decision**”), who was then detained under s.32(3) of the Ordinance pending his removal (the “**Subsequent Detention Period**”). The Applicant’s return to the United States was promptly scheduled on 20 August 2016.

On 15 August 2016, the Applicant lodged a non-refoulement claim, and as a result of which his intended departure on 20 August 2016 was suspended. From 18 August 2016 onwards, the Applicant was detained under s.37ZK of the Ordinance pending the determination of the non-refoulement claim (the “**Last Detention Period**”, for each of the Initial Detention Period, Subsequent Detention Period and Last Detention Period, a “**Detention Period**”).

On 18 August 2016, the Applicant was served a non-refoulement claim form to be due on 15 September 2016. The Applicant had not submitted the claim form as of the hearing date. A screening interview had been tentatively scheduled on 22 September 2016.

On 29 August 2016, the Applicant filed an application for a writ of *habeas corpus*.

Issues:

In a *habeas corpus* application, it is trite that the court is only concerned with the lawfulness of the detention. However, the Applicant relied on several grounds which in substance seek to challenge the RO Decision. (*paras 14 to 16*)

With this in mind, the Court considered the two issues below:

- (1) whether the court could review the RO Decision in a *habeas corpus* application;
and
- (2) in any case, whether the detentions were lawful.

Judgment:

The Court dismissed the Applicant's *habeas corpus* application, as it was not open to the Applicant to challenge the RO Decision in a *habeas corpus* application, and the Applicant's detention was a lawful one.

Reasons for Judgment:

It was well established in Hong Kong that a court in *habeas corpus* proceedings could not review the decisions which underlined the relevant detention orders. Although the court might examine whether "necessary objective facts" surrounding the detention decision were established, such an examination could not go beyond to the review of an administrative decision, which involved an exercise of discretion. (*paras 18, 19*)

By quoting Bokhary PJ's judgment in *Thang Thieu Quyen v Director of Immigration* [1998] 2 HKLRD 179, the Court further commented that "[t]he partnership between *habeas corpus* and judicial review is a natural one born of symbiosis. *Habeas corpus* has long been a metaphor for **liberty**. And more recently judicial review has become a metaphor for **rule of law**." (*para 20*)

The Court then moved on to examining the lawfulness of the detention orders. In determining whether the detention was a lawful one, the Court examined two aspects: (i) whether a legal authority existed to make the challenged detention; and (ii) whether the initially lawful detention was rendered unlawful due to an unreasonably long period of time of detention. (*para 14*)

First, lawful powers existed to support the making of relevant detentions. For each Detention Period, the relevant objective facts required to invoke the government's power to detain were established and were not in any dispute. (*para 23*)

Second, neither of the Detention Periods could be said unreasonably long for the respective purposes of those detentions. The Court reaffirmed the *Hardial Singh* principle, and held that the Director was entitled to continue to detain in exercising his or her discretion, as long as the Director (a) was intended to remove a person "at the earliest possible moment" and (b) was of a reasonable view that s/he could do so within a reasonable period of time and it would not be impossible for that person to be removed within that period of time; what was reasonable was dependent on the circumstances of each case. (*paras 24 to 27*)

Applying the principles above, the Court found that as the detention period for the Initial Detention Period and the Subsequent Detention Period were only three days and nine days respectively, they could not be objectively said to be unreasonably long; for the Last Detention Period, as the Applicant might submit the non-refoulement claim form before the deadline and request an earlier screening interview, the Director had good reasons to believe that the non-refoulement claim could be determined within a reasonable time. (*para 28*)

Other Considerations:

This case shows that it is not advisable to an applicant to include any grounds which challenge the removal order in a *habeas corpus* application.

In other parts of the judgement, the Court also considered the possibility of converting the *habeas corpus* application to a leave application for judicial review of the RO decision. (*paras 30 to 36*)

Based on the evidence submitted by the Respondent, the Court was satisfied that it was reasonably open to the Director to form the view that if the Applicant was allowed to stay in Hong Kong, he *might* post security risk to Hong Kong. In turn, the CE might reasonably regard the Applicant as an undesirable person and thus issued a removal order against him. The Court further commented that “*the court should give a due margin of appreciation to the decision-maker for matters concerning public order or national security.*” On this basis, the Court concluded that it was not necessary to direct the *habeas corpus* application to be converted to a leave application for judicial review. (*paras 33, 37*)

Legal Provisions considered:

1. Immigration Ordinance (Cap.115) sections 13E, 19(1)(a), 19(4), 32(2), 32(2)(a), 32(b), 32(3), 37ZK, 25.
<https://www.elegislation.gov.hk/hk/cap115>

Key Cases cited:

1. *Fidelis Ahuwaraezeama Emem v Superintendent of Victoria Prison* [1998] 2 HKLRD 448 (a court in *habeas corpus* proceedings cannot review the decisions underlying the relevant detention orders)
<https://www.hkii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/1998/25.html>
2. *Thang Thieu Quyen v Director of Immigration* [1998] 2 HKLRD 179 (the proper route for challenging the removal orders is judicial review instead of *habeas corpus* application)
<https://www.hkii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/1998/7.html>
3. *Mahesh Rai v Secretary for Security and the Director of Immigration* [2009] HKCA 612 (In the context of a deportation order, the Director is entitled to continue the detention of a person pending his deportation, as long as he is intent upon removing that person at the earliest possible moment, and he is of a reasonable view that the deportation can be done within a reasonable period of time and it will not be impossible for that person to be removed within that reasonable period of time)
<https://www.hkii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2009/612.html>