

Case Summary for:

**SAFDER TEHSEEN v. SECRETARY FOR SECURITY AND ANOTHER<sup>1</sup>**

<b>Court:</b>	Court of First Instance (Hong Kong) (the “CFI”)
<b>Judge:</b>	Mr. Justice Coleman J
<b>Applicant (and Counsel):</b>	Safder Tehseen (Mr. Timothy Parker and Mr. Josh Baker (instructed by Daly & Associates))
<b>Respondent (and Counsel):</b>	Secretary for Security (the “Secretary”) and Director of Immigration (the “Director”) (Ms. Karen Ngai (instructed by the Department of Justice))
<b>Date heard:</b>	11 August 2022
<b>Date promulgated:</b>	12 August 2022
<b>Full text:</b>	<a href="http://www.hklii.hk/eng/hk/cases/hkcfi/2022/2472.html">http://www.hklii.hk/eng/hk/cases/hkcfi/2022/2472.html</a>
<b>ABSTRACT:</b> The Applicant, being subject to a detention order, was previously released on recognizance, but he was later arrested in connection with a shooting incident and he was detained pending removal from Hong Kong. The Applicant had previous convictions and had applied for torture claims, non-refoulement claims and appeals on refusal of these claims which were all refused or dismissed. The Applicant challenged the lawfulness of the detention order and the present detention on the grounds of unreasonableness under the <i>Hardial Singh</i> principles, and applied for a writ of <i>habeas corpus</i> . The CFI finally ruled that the detention order and the present detention were lawful under the <i>Hardial Singh</i> principles and dismissed the <i>habeas corpus</i> application.	
<b>Key words:</b>	Administrative law, <i>Habeas Corpus</i> , detention pending removal or deportation

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

<sup>1</sup> HCAL 707/2022. Also cited as [2022] HKCFI 2472

## SUMMARY:

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### Facts and Procedural History:

The Applicant is a Pakistan national, born in Pakistan on 10 April 1982. He came to Hong Kong as a visitor on 16 May 1997 with his father. He was permitted to retain (as a dependant of his father who was on unconditional stay in Hong Kong) up to 16 June 2005. However, such permission to remain was invalidated on 25 April 2005 by virtue of section 20(7) of the Immigration Ordinance (Cap. 331) (the “**IO**”) when a deportation order (the “**Deportation Order**”) was made against him pursuant to section 20(1)(a) of the IO in connection with his conviction of the offence of conspiracy to steal the property of a deceased person on 16 March 2005 (when he was sentenced to seven months’ imprisonment).

At the time of making the Deportation Order, detention was authorized under section 32(3) of the IO. The Applicant was released on recognizance by the Immigration Department of Hong Kong (the “**Immigration Department**”) thereafter but failed to report to the Director for four times. The previous three occasions occurred between 2007 and 2012. The third occasion occurred in February 2012, when the Applicant was wanted by the police for a case of wounding. The Applicant was detained in May 2012. Subsequently, the Applicant made an application for leave to apply for judicial review against the Deportation Order<sup>2</sup> and at the same time an application for a writ of *habeas corpus*<sup>3</sup>. These applications were dismissed by Fung J on 19 July 2012 (with reasons given on 25 July 2012). The Applicant also applied for entry for residence as a dependant of his wife (a Hong Kong permanent resident, who he married on 13 January 2012) on 25 May 2012, but this application was not considered by the Immigration Department because he was subject to the Deportation Order.

The Applicant was last released on recognizance by the Immigration Department under section 36 of the IO on 27 August 2012. Since then, the Applicant had reported properly and had not absconded until a failure to report on 13 June 2022. He only reported at Shatin police station on 23 June 2022 after he became aware that he was being sought by the police on 14 June 2022 in connection with a shooting incident occurred at Central on 10 June 2022. He explained his failure to report as being due to back pain, supported by medical certificates. The Applicant was arrested when he presented himself at the police station on 23 June 2022.

On 24 June 2022, (i) the Applicant was interviewed by the police, and then released subject to further case investigation; (ii) the Police Commissioner (the “**Commissioner**”) sent two memoranda to the Director informing that the Applicant was subject to the investigation for conspiracy to wounding with intent in connection with the shooting incident; and (iii) having considered the case, the Applicant’s recognizance was revoked by the Immigration Department. The Applicant had been provided with a Notice of Detention listing the authority for and grounds for detention and detained at the Castle Peak Bay Immigration Centre under

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<sup>2</sup> HCAL 75/2012

<sup>3</sup> HCAL 89/2012

section 32(3) of the IO pending deportation in accordance with the Deportation Order. He had been detained since then for a period of 49 days until the date of the hearing.

From June 2022 to August 2022, the Commissioner, the Director and the Secretary had exchanged internal memos to discuss the Applicant's case. The Commissioner continually stated that the Applicant posed security risks to Hong Kong should he be released on recognizance, referring to the Applicant's previous convictions and criminal records and "his current adverse connection with criminal gangs." The Principal Assistant Secretary for Security continually concluded that there were grounds for continued detention. The Director also wrote on 14 July 2022 to the Consulate General of Pakistan requesting the issue of a replacement travel document to the Applicant for his repatriation. (paras 30 to 55)

On 10 August 2022, the Notice of Review of Detention provided to the Applicant that the decision not to grant release on recognizance was on the basis of the following factors: (i) that there was no sufficient reason to believe that his case could not be finalized in the near future, (ii) that if there was an outstanding claim / legal proceeding, there was no sufficient reason to believe that his claim / legal proceeding could not be completed within a reasonable period of time, (iii) that he posed, or was likely to pose, a threat or security risk to the community, (iv) his previous conviction(s) associated with crime(s) of serious or violent nature (including (a) his conviction of the offence of conspiracy to steal the property of a deceased person on 16 March 2005, which triggered the Deportation Order and (b) his conviction of the offence of dealing with goods to which the Dutiable Commodities Ordinance Cap 109 applied on 22 November 2011, when he was fined \$5,000), (v) his previous history of absconding, (vi) his record of jumping bail, (vii) his failure to comply with the terms / conditions of recognizance, (viii) that he was re-arrested during recognizance and (iv) his family connection and alleged medical condition (his back pain and his wife's mental disorder). (para 55)

In terms of procedural history, the Applicant had previously lodged a torture claim in March 2005 which was refused in January 2008, after which he filed his petition against refusal of torture claim which was also refused. His torture claim was reassessed but again refused in February 2012. The Applicant also made an asylum claim in August 2008 and that was closed in November 2008. The Applicant lodged a non-refoulement claim in March 2014 which was similarly refused in December 2018. The Applicant filed an appeal/petition to the Torture Claims Appeal Board (the "**Board**") but that was dismissed by the Board in July 2022. On 22 July 2022, the Applicant filed a Form 86 seeking leave to apply for judicial review of the Board's decision<sup>4</sup>. (paras 24 to 29)

In terms of personal background, the Applicant lived with his family (his wife and their two sons aged four and five) in Tai Po. The Applicant's wife was claimed to be a businesswoman and the Applicant was claimed to be the person providing primary care to their children. Due to the current detention, the Applicant's wife was claimed to be struggling to maintain her business and taking care of two young boys with adjustment disorder with mixed depressive and anxious reaction. (paras 57 to 60)

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<sup>4</sup> HCAL 649/2022

## Issues:

(1) Whether the detention was lawful at the outset? (2) If so, whether the detention was at the time of the hearing lawful? (para 68)

## Judgment:

The CFI dismissed the *habeas corpus* application ruling that the Applicant's detention was under lawful authority and remained lawful as being *Hardial Singh* compliant.

## Reasons for Judgment:

The CFI restated the *Hardial Singh* principles, together with its relevant rules and interpretations, as the applicable principles to the present case. (para 63)

The CFI first set out the context of this case: the Applicant was subject to an extant and valid Deportation Order, all previous challenges to which had failed. There had already been an unassailable decision that the presence of the Applicant in Hong Kong was undesirable, and that the Applicant should be deported. (para 86)

### Lawfulness of the Deportation Order

The Deportation Order was made against the Applicant under section 20(1) of the IO. Due to the existence of such Deportation Order, it was not disputed that section 32(3) of the IO empowered that the Applicant may be detained pending his removal from Hong Kong. It was also settled that the detention powers granted under section 32 of the IO were part of the statutory machinery designed to regulate termination of a person's stay in Hong Kong and to ensure his enforced departure where a decision to remove had been taken, though the Secretary and the Director were not given an unlimited discretion and they could only exercise the power subject to certain built-in statutory limitations. (paras 87 to 91)

Section 32 confers discretionary executive detention powers, which attract the application of the *Hardial Singh* principles. It is not controversial that an initially lawful detention may be turned into an unlawful detention if it fails to meet the *Hardial Singh* principles. The question is at what point the *Hardial Singh* principles come into play. The application of the first limb of the *Hardial Singh* principles may arise if the original purpose of the exercise the power has changed in the circumstances. In only exceptional cases, the *Hardial Singh* principles are applicable in advance of detention even commencing and the CFI believed this is not such a case. (paras 94 to 97)

The CFI believed it was not reasonably arguable that the power to detain had been exercised arbitrarily against the Applicant. Where a person who is subject to a deportation order, and who although on recognizance for a lengthy period has recently failed to report (albeit with an explanation), is then arrested for a serious offence involving violence, it could not be described as arbitrary for that person's recognizance to be revoked and for him to be brought into detention for at least a period of time. (para 98)

The CFI rejected that the detention directly breach of the first limb of *Hardial Singh* principles from the start since the CFI saw nothing inappropriate in the Commissioner bringing to the attention of the Director that a person subject to a Deportation Order and currently on recognizance has been arrested in connection with a crime of serious violence. The CFI also rejected the argument that the police had invited the Secretary/Director to use their immigration detention power to deny the Applicant's bail, since exercising immigration detention powers does not trigger the CFI procedure applicable to the grant or refusal of bail, but only the application of principles (such as the *Hardial Singh* principles) that regulate the exercise of the discretionary power of executive detention. (para 100)

The CFI concluded that the original detention of the Applicant on 24 June 2022 was lawful because the power to detain is used for the purpose of deporting the Applicant. (para 101)

### Lawfulness of the Continuing Detention

Once detained, the power to detain must continue to be exercised reasonably, and that is what triggers the *Hardial Singh* principles. Standing as the primary decision maker, the CFI applied the *Hardial Singh* principles and examined whether the detention has become unlawful on the materials available to it. (para 103)

The CFI balanced the following various factors and concluded that the detention so far is under lawful authority and remains lawful: (paras 119 to 120)

- (1) the length of the period of detention. The CFI took the Applicant's relatively short detention period of 49 days as starting point against which the various other factors need to be weighed and balanced (para 104);
- (2) the nature of the obstacles which stand in the path of the Director preventing a deportation, being (previously) the outstanding decision from the Board and (now) the judicial review leave application, which could reasonably be determined within three to four months in light of the Director's diligence as stated in (3) below (para 105);
- (3) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles, including in his seeking to expedite the determination of the appeal/petition by the Board and the hearing of the judicial review leave application, and to obtain the relevant travel document to permit repatriation (para 105);
- (4) the conditions in which the detained person is being kept, specifically by reference to his medical condition and needs. While the CFI acknowledged the interruption of the Applicant's preferred treatment or recovery regime, it did not accept that he is presently unable to obtain appropriate medical treatment whilst in detention (para 118);
- (5) the effect of detention on him and his family, which is clearly of some real and significant adverse impact as the Applicant is the primary caregiver of his young children. The CFI agreed that the particular weight to be given to family considerations that is specific to the circumstances of the individual cases and believed in this case, the impact on other family members is of some significance and must be taken into account (paras 115 to 117);

- (6) the relatively low risk of absconding if he is released from detention due to the Applicant's family circumstances (paras 107 to 108); and
  - (7) the danger that, if released, the Applicant will pose a security risk, which is not particularly high, but which risk if it eventuates would give rise to grave and serious consequences. The CFI believed that (i) the prosecuting authorities and the Director exercising his discretionary powers of detention are not applying the same burden or standard of proof and (ii) the Secretary, the Director and the Commissioner are entitled, but not obliged, to form their own view as to the relevant risk based on enough information (paras 109 to 114).
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#### **Legal Provisions considered:**

1. Sections 20(1)(a), 20(7), 25, 32(3), 32(3B), 32(3C), 32(3D), 32(4A), 36 of the Immigration Ordinance  
<http://www.hkii.hk/eng/hk/legis/ord/115>

#### **Key Cases cited:**

2. *Harjang Singh v Secretary for Security* [2022] HKCA 781  
<http://www.hkii.hk/eng/hk/cases/hkca/2022/781.html>