

Case Summary for:
SAJID MAHMOOD v HONG KONG SAR GOVERNMENT¹

Court:	Court of First Instance (the “ Court ”)
Judges:	Hon Coleman J
Applicant (and Counsel):	Sajid Mahmood (acting in person)
Respondent (and Counsel):	Hong Kong SAR Government (the “ Director ”) (Mr Jack Wong instructed by the Department of Justice)
Date heard:	5 October 2022
Date promulgated:	5 October 2022
Full text:	https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2022/3060.html
<p>ABSTRACT: The Applicant was subject to a removal order and detained under section 32(3A) of the Immigration Ordinance (Cap. 115, the “IO”) pending removal from Hong Kong. The Applicant made an application for a writ of habeas corpus. At the time of the hearing, the Applicant had been detained for 252 days. The Court reviewed the Applicant’s detention against the <i>Hardial Singh</i> principles and ruled that the Applicant had been detained for a period that was reasonable pending removal, dismissing the application.</p>	
Key words:	administrative law; habeas corpus; detention pending removal; whether removal not possible within reasonable time; risk of absconding and reoffending

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

¹ [2022] HKCFI 3060; also cited as HCAL 898/2022; [2022] HKCU 4923

SUMMARY:

Facts and Procedural History:

The Applicant, a Pakistani national, entered Hong Kong and was arrested for remaining in Hong Kong illegally on March 4, 2011. The Applicant was released on recognizance on April 20, 2011. A removal order was issued against the Applicant on January 20, 2015.

The Applicant was convicted and sentenced for a number of offences and had the record of failing to report recognizance twice (September 5, 2011 and January 11, 2016) and jumped court bail once (from December 4, 2015 to February 8, 2022):

- in 2013, for robbery (3 years' imprisonment);
- in 2021, for possession of an identity card relating to another person (15 months' imprisonment); and
- in 2021, for giving false information to willfully mislead or attempt to mislead a police officer with intent (3 months' imprisonment).

The Applicant made the following non-refoulement claim and petition:

- he raised a torture claim on March 7, 2011, which was refused on August 11, 2011, and he appealed against dismissal of the torture claim on February 4, 2013, which was dismissed under the unified screening mechanism on February 8, 2013;
- he indicated an intention to lodge a non-refoulement claim ("**NRC**") on October 3, 2013, and the Director decided to take no further action on the NRC on January 25, 2018 as the Applicant could not be contacted for processing his NRC (in the meantime he was serving his 3-year prison sentence for conviction of robbery, and after he was discharged from prison, he failed to report recognizance and absconded);
- he requested a resumption of the processing of his NRC on November 16, 2021 before completing his 3-month prison sentence (for giving false information to willfully mislead or attempt to mislead a police officer with intent), which was refused on April 21, 2022;
- on May 6, 2022, he lodged a petition with the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the "**TCAB**") against the refusal of his NRC, and the Immigration Department (the "**ImmD**") made requests to the TCAB on May 24, 2022, June 22, 2022, July 12, 2022 and August 1, 2022 seeking to expedite the petition and for priority to be accorded to the processing of the petition; and

- on August 16, 2022, the TCAB informed the ImmD that the Applicant's petition hearing had been fixed for September 29, 2022, which was re-fixed for October 6, 2022 due to the Applicant's Covid-19 status.

The Applicant was detained under section 32(3A) of the IO pending removal. At the time of the hearing, the Applicant had been detained for 252 days.

The Applicant's detention had been reviewed five times during the period of detention (on April 22, 2022, May 25, 2022, June 28, 2022, July 25, 2022 and September 27, 2022). On each occasion, the Director declined to release the Applicant on recognizance, having balanced the various factors including the risks of absconding and reoffending, and the threat posed by the Applicant to the community, the progress of the NRC, and liaison with the Pakistan Consulate. The Director had consistently been of the view that the detention has remained lawful and reasonable, and that the Applicant could be removed within a reasonable time. On September 13, 2022, the Applicant applied for a writ of habeas corpus.

Issues:

Whether the detention had become unlawful in light of the *Hardial Singh* principles outlined at §164 of the judgment in *Harjang Singh v Secretary for Security*² as set forth in the Appendix to this summary.

Judgment:

The Applicant continued to be lawfully detained. The Applicant's application for writ of habeas corpus was, therefore, dismissed.

Reasons for Judgment:

The Court reviewed the Applicant's detention against the *Hardial Singh* principles as set forth below and ruled that the Applicant had been detained for a period that was reasonable pending removal:

(HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;

(HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;

(HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and

² [2022] HKCA 781

(HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.

The Court found that the Director did intend to remove the Applicant and that the power of detention was being used for that purpose, so HS1 was satisfied. (*para 41*)

The Court found that the Director had acted with reasonable diligence and expedition to effect removal, including by seeking a travel document for the Applicant, so HS4 was satisfied. (*para 42*)

The Court considered that the Applicant's petition hearing would be held the day after the hearing (October 6, 2022), and did not think the TCAB would grant the adjournment and the significant additional time which the Applicant had said he would seek from the TCAB at the hearing (though noting that those matters were for the TCAB), therefore it was reasonable to expect a decision from the TCAB within three months. The Court was of the view that the Applicant could likely be removed within a reasonable period, so HS3 was satisfied. (*paras 44, 45 and 50*)

The Court acknowledged the possibility that the TCAB would grant the adjournment and the extra time which the Applicant sought, and the Applicant's challenge of any decision against the Applicant on his NRC through judicial review proceedings, but did not give weight to those factors. The Court noted that the balance would shift towards release if these events occur. On balance, the Court was satisfied that HS2 was satisfied. (*paras 51-52*)

The Court also considered the following factors:

- The Court acknowledged that a travel document had not been issued by the Pakistani Consulate, and accepted the practical sense in seeking the travel document once the NRC had been finalized, as there was little point in obtaining a document the validity of which would probably expire before that time. (*para 43*)
- The Court determined that there was a serious risk that the Applicant would abscond if released on recognizance because the Applicant had a history of absconding. (*para 46*)
- The Court determined that the risk of re-offending was not low in light of the previous history of offences. (*para 47*)
- The Court did not consider that the Applicant's paternal obligations to his son would lower the risk or prevent him from absconding and re-offending. (*para 46*) The Court did acknowledge the Applicant's point that reuniting his family would possibly relieve the family from extreme distress, and that there were inherent difficulties in leaving his wife to raise the son alone (each of the wife and the son was subject to a removal order in 2013 and 2015, respectively, pending outcome of judicial review and released on recognizance).
- The Court considered that the Police had no comment on or objection to the Applicant's potential release on recognizance. (*para 48*)

- The Court considered the Applicant's medication condition but did not see that the Applicant would not receive proper medical treatment while detained. (*para 49*)

Other Considerations:

The Applicant relied on a potential discrepancy between the provisions in section 32 and section 37ZK of the IO. The Court noted that (a) that was misplaced, (b) the correct authority for detention was to be found in section 32(3A) of the IO, and (c) the lawfulness of continued detention under either section requires consideration of the full circumstances, including factors which may be said to point to continued detention as well as those which may be said to point against detention or to release.

Legal Provisions considered:

1. Sections 19(1)(b), 32, 32(3A) and 32ZK of the IO:
<https://www.elegislation.gov.hk/hk/cap115>

Key Cases cited:

2. Harjang Singh v Secretary for Security and Another [2019] HKCFI 1486
<https://v2.hkii.hk/en/cases/hkcfi/2019/1486?hl=Harjang%20Singh>

Appendix

Hardial Singh principles as outlined in Harjang Singh v Secretary for Security

- (1) The central question on an application for habeas corpus is whether there is, and continues to be, lawful authority for a detention.
- (2) An originally lawful detention may cease to be lawful if it continues for an unreasonable period in the particular circumstances.
- (3) What is a 'reasonable time' will therefore depend upon the circumstances of the particular case, taking into account all relevant factors.
- (4) The lawfulness of detention, or continuing detention, is subject to potential objective review by the Court. But the review is not a review as to *Wednesbury* unreasonableness, or on other public law grounds.
- (5) Either continuing detention is reasonable and so lawful, or it is not. Though the Court's review involves an exercise of judgment and balance, that is not a discretionary decision.
- (6) Hence, the Court is the judge of, and the primary decision maker as to, the reasonableness of the detainee's continued detention.
- (7) The burden of showing that detention is lawful lies upon the Secretary and Director.
- (8) The assessment will be made in line with the 'Hardial Singh principles', namely that:
 - (HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;
 - (HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;
 - (HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and
 - (HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.
- (9) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative.
- (10) A review of what might be regarded as a reasonable period of detention will include at least: (a) the length of the period of detention; (b) the nature of the obstacles which

stand in the path of the Director preventing a deportation; (c) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (d) the conditions in which the detained person is being kept; (e) the effect of detention on him and his family; (f) the risk that if he is released from detention he will abscond (which may have the effect of defeating the deportation order); and (g) the danger that, if released, he will commit criminal offences.

- (11) It is helpful first to identify and have firmly in mind the period of detention to date, before balancing the various other factors and risks against that period. This is because the weight to be given to the other factors and risks will vary as the period of detention increases in length.
- (12) Though it might seem attractive to set guideline periods or a red line (in terms of months or years) applicable to all cases, as to the circumstances in which a lawful detention becomes unreasonable and hence unlawful, no such guidelines can be set. Indeed, any attempt to do so is unhelpful. Reference to the facts of other cases is also likely unhelpful.
- (13) Nor would it be correct to think that the longer any period of detention, the greater the scrutiny that would be applied to it. Every deprivation of liberty pending deportation requires proper scrutiny of all the facts, in accordance with the Hardial Singh principles, which are the sole guidelines.
- (14) The risks of absconding and reoffending are of critical and paramount importance in the assessment of the lawfulness of the detention.
- (15) This is because if a person absconds, it will defeat the primary purpose for which the power to detain has been conferred, and for which the detention order was made in the particular case.
- (16) However, a very careful assessment of the risk must be made in each case, as the magnitude and potential impact of that risk will vary according to the circumstances.
- (17) The risk of absconding is distinct from the risk of committing further offences, and not dependent on that further risk
- (18) The risk of reoffending requires its own distinct assessment, by reference to both its likelihood and seriousness.
- (19) Neither risk can justify detention of any length, as that would permit indefinite detention.
- (20) The longer the detention, the greater the risk necessary to justify it.
- (21) The Court will rigorously scrutinize the Secretary/Director's assessment of risk on both grounds, and the weight to be given to that assessment will include consideration as to how convincing the reasoning is.

- (22) When assessing (a) the probability that removal can be effected at all and (b) the proximity of the time to removal, a real sense of the timescale likely to be involved must be identified to be able to qualify it as reasonable.
- (23) There must be a sufficient prospect of removal to warrant continued detention, having regard to and balanced against the weight of all other circumstances of the case.
- (24) As the period of detention gets longer, the greater the degree of certainty and proximity of removal would be expected to be required in order to justify continued detention.
- (25) On any appeal from a first instance decision of the Court, the appellate court will not interfere with the judge's decision unless it can be shown that what is a difficult exercise of judgment is inconsistent with his findings of primary fact, or was based on an incorrect understanding of the law, or was one that was not sensibly open to him on the basis of those facts. The leeway given to the first instance judge is not as a result of the view that he has made a discretionary decision, but rather as a reflection that the balancing exercise can be difficult.