

Case Summary for:
SIMONA MUNDIA v DIRECTOR OF IMMIGRATION¹

Court:	Court of First Instance (the “CFI”)
Judges:	Hon Chow J
Applicant (and Counsel):	Simona Mundia (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr. Sunny Li, Senior Government Counsel of the Department of Justice)
Date heard:	6 May 2020
Date promulgated:	8 May 2020
Full text:	https://www.hklii.hk/eng/hk/cases/hkcfi/2020/741.html
<p>ABSTRACT: The Applicant had been in detention after serving his prison sentence. The Applicant’s non-refoulement claim was rejected by the Director of Immigration (the “Director”) and by the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “Board”) on appeal. His appeal for leave to apply for judicial review of the Board’s decision was, as at the date of the judgment, still pending. After a removal order was made against the Applicant, and unsuccessful reviews in respect of his detention pending removal from Hong Kong, he applied for a writ of <i>habeas corpus</i> in respect of his detention under section 32(3A) of the Immigration Ordinance (the “IO”). The CFI held that the detention was <i>prima facie</i> lawful, because a removal order in respect of the Applicant was in force and the Applicant was detained pending his removal from Hong Kong. In addition, the CFI held that the detention was in compliance with the principles set forth in <i>R v Governor of Durham Prison, ex parte Hardial Singh</i>² as adopted in <i>Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration</i>³ (the “Hardial Singh principles”), because (1) there was nothing to show that the Director was using the power to detain for any purposes other than for the removal of the Applicant; (2) there was nothing to suggest that the Director failed to act with reasonable diligence or expedition to effect the Applicant’s removal; and (3) the period of detention was reasonable and had not become unreasonable in all the circumstances. Regarding the reasonableness of the detention period, the CFI considered (a) the length of the period of detention already elapsed was substantial (over 15 months); (b) the Applicant’s application for leave to apply for judicial review was weak and therefore the Applicant had to bear some responsibility for his prolonged detention; (c) the CFI was entitled to place weight on the Director’s view that there were risks of the Applicant absconding and reoffending; and (d) there was no reason to believe that the Applicant was not receiving proper medical care and attention during detention.</p>	
Key words:	Non-refoulement; Non-refoulement Claims Petition Office; habeas corpus; Hardial Singh; detention; Immigration Ordinance; torture; Torture Claims Appeal Board; persecution; removal order

SUMMARY:

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

¹ [2020] HKCU 957. Also cited as: HCAL 782/2020 and [2020] HKCFI 741.

² [1984] 1 WLR 704

³ [2014] 17 HKCFAR 138

Facts and Procedural History:

The Applicant was a Zambian national. After his arrival in Hong Kong on 11 July 2010, the Applicant was intercepted at Customs Clearance and was later convicted of drug trafficking on 4 April 2011. After his release on 29 September 2018, he had been detained at the Castle Peak Bay Immigration Centre under section 32(2A) of the IO pending (i) a decision as to whether or not a removal order should be made against him and (ii) the final determination of his non-refoulement claim under section 37ZK of the IO (which claim was made when the Applicant was serving his sentence, rejected by the Director and was pending reviewed by the Board where the Applicant appealed against the Director's decision).

The Board heard the appeal on 26 November 2018 and the Applicant refused to say anything further even when the adjudicator raised concerns about the credibility of his claims. The Board affirmed the decision of the Director. The Applicant then applied for leave to apply for judicial review of the Board's decision on 28 December 2018, but his application did not state the relief sought or any grounds thereto, nor was the application supported by an affidavit. As at the date of the judgment, the leave application was pending determination.

The Director made a removal order against the Applicant under section 19(1)(b) of the IO on 15 January 2019. The Applicant gave notice that he did not intend to appeal against the removal order. Since then, the Applicant had been detained under section 32(3A) of the IO pending his removal from Hong Kong under section 25 of the IO. Subsequently, there had been six reviews of the Applicant's detention, each of which decided that the Applicant's detention should continue on the grounds that (i) the Applicant's removal was going to be possible within a reasonable time, (ii) he constituted a threat/security risk to the community, (iii) he did not have close connection or fixed abode in Hong Kong, and (iv) there were no other circumstances in favour of his release. The Applicant then made the present application for a writ of *habeas corpus*.

Issues:

The CFI considered: (1) whether the Applicant's detention was lawful; and (2) whether the Applicant's detention was in compliance with the *Hardial Singh* principles.

Judgment:

The CFI dismissed the Applicant's *habeas corpus* application, ruling that the Applicant had been detained for a period that was not unreasonable in all the circumstances, and his detention was in compliance with the *Hardial Singh* principles.

Reasons for Judgment:

The CFI noted that the central question of a *habeas corpus* application was whether there was lawful authority for the detention. Under section 32(3A) of IO, the Director may detain a person

in respect of whom a removal order under section 19(1)(b) of the IO is in force, pending his removal from Hong Kong under section 25 of IO. Given that a removal order in respect of the Applicant was in force, and that the Applicant was detained pending removal from Hong Kong, his detention was *prima facie* lawful. (*paras 14 to 16*)

The CFI commented that an initially lawful detention may be turned unlawful if it failed to meet the *Hardial Singh* principles. The CFI cited the *Hardial Singh* principles as adopted in the case of *R(I) v Secretary of State for the Home Department*⁴. (*para 17*)

The CFI considered the *Hardial Singh* principles, including the guidance from *Bhullar Angad Singh v HKSAR*⁵ regarding the period of detention that was considered reasonable in all the circumstances. The CFI held that there was nothing to show that the Director was exercising his power of detention for any purposes other than for the removal of the Applicant. There was nothing to suggest that the Director had failed to act with reasonable diligence or expedition to effect the Applicant's removal. The CFI considered that the Applicant's pending application for leave to apply for judicial review was the only obstacle to this removal. The CFI opined that the Director had the intention of removing the Applicant at the earliest moment, and was of the view that the Applicant could be removed within a reasonable period of time and that it would not be impossible to do so. (*paras 18 and 21*)

The CFI further considered (i) whether the Applicant had already been detained for an unreasonable period of time; and (ii) whether there was a realistic prospect of removal within a reasonable time. (*para 22*)

In assessing whether the period of detention had become unreasonable in all the circumstances, the CFI considered the following:

- The Applicant had been detained for a substantial period of time (over 15 months) under section 32(3A) of IO, and even longer taking into account of his previous detention under sections 32(2A) and 37ZK of the IO. (*para 23*)
- The CFI also considered the merits of the Applicant's application for leave to apply for judicial review of the Board's decision which impeded his removal. The CFI noted it was not appropriate to examine the merits in detail, but on provisional assessment, the CFI considered that the Applicant did not have a good prospect of success, and he would have been removed earlier but for his appeal to the Board and application for leave to apply for judicial review, thus the Applicant had to bear some responsibility for his prolonged detention. (*paras 25 and 26*)
- Further, the CFI cited from *R(WL (Congo)) v Home Secretary*⁶ that the risks of the Applicant absconding and reoffending were of "paramount importance". The CFI confirmed it was entitled to place weight on the Director's assessment as to whether such risks exist and whether the Applicant may pose a threat or security risk to the community if released.

⁴ [2003] INLR 196

⁵ HCAL 134/2014

⁶ [2012] 1 AC 245

The Director was of the view that such risks existed, taking into account that the Applicant had no local connection or fixed abode in Hong Kong, and the serious nature of the offence for which the Applicant was convicted. At his *habeas corpus* hearing, the Applicant said that he had friends in Hong Kong who could act as his guarantor, which contrasted with his previous statement in his supplementary application document that he did not have any Hong Kong resident who could act as his guarantor, and that he could only seek support from the International Social Service. He was also unable to provide further details of his friends or explain why they would provide him with accommodation or support him. (*paras 24 and 27 to 29*)

- Lastly, the CFI considered the conditions in which the Applicant were detained. The Applicant stated in his *habeas corpus* application that he was suffering from hypertension, deafness in his left ear that required surgery, and mental, physical, emotional and psychological torture due to the present stressful situation. Having considered his medical report, however, the CFI concluded that there was no reason to believe that the Applicant was not receiving proper medical care and attention during detention. (*paras 30 and 31*)

Other Considerations:

The CFI noted that as of the date of the judgment, the Applicant's application for leave to apply for judicial review of the Board's decision had not yet been heard by the High Court. The CFI noted that there had been a huge increase in the number of judicial review applications relating to non-refoulement claims in the past few years, and there had been a general adjournment of court proceedings due to the COVID-19 pandemic. Nevertheless, the CFI noted that it was reasonable to expect that the Applicant's application would be heard soon given court proceedings had generally resumed. (*para 32*)

Legal Provisions considered:

1. Section 32(3A) of the IO:
<https://www.hklii.hk/eng/hk/legis/ord/115/?stem&synonyms&query=prabakar>

Key Cases cited:

1. *Bhullar Angad Singh v HKSAR*, HCAL 134/2014 (Director is entitled to continue to detain a person pending deportation at his discretion so long as Director is intent on removing the person at the earliest possible moment and remains reasonably of the view that he can do so within a reasonable period of time and that it will not be impossible to do so)
<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2014/1873.html>
2. *Fidelis Ahuwaraezeama Emen v Superintendent of Victoria Prison* [1998] 2 HKLRD 448 (purpose of an *habeas corpus* application is to determine whether there is lawful authority for a detention, not to determine the reasonableness of any decision or any failure to observe the rules of natural justice)
<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/1998/25.html>

3. *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138 (adopted the *Hardial Singh* principles)
<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfar/2014/21.html>
4. *Harjang Singh v Secretary for Security* [2019] HKCFI 1486 (the Director is much better placed than the court to consider the risks of absconding or reoffending, and whether the detainee poses a threat or security risk to the community if released, which are fact-sensitive; the court is entitled to place weight on the Director's assessment)
<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2019/1486.html>
5. *R(A) v The Secretary of State for the Home Department* [2007] EWCA Civ 804 (risk of absconding is likely often to be a decisive factor in determining reasonableness of detention because it threatens to defeat the purpose of the deportation order; the relevance of the risk of offending depends on the likelihood of it occurring and the gravity of the consequences)
<http://www.bailii.org/ew/cases/EWCA/Civ/2007/804.html>
6. *R(I) v Secretary of State for the Home Department* [2003] INLR 196 (the *Hardial Singh* principles are (i) intention to deport; (ii) deportee is detained for a reasonable period; (iii) the Secretary of State should not exercise power to detain if it becomes apparent that deportation cannot be effected within reasonable period; and (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal)
<http://www.bailii.org/ew/cases/EWCA/Civ/2002/888.html>
7. *R(Mahfoud) v Secretary of State for the Home Department* [2010] EWHC 2057 (Admin) (court's general approach in assessing whether a non-refoulement claimant can be removed within a reasonable time: (i) the power of detention exists for the purpose of deporting the deportee; (ii) the power can only be exercised for a reasonable period in all the circumstances; (iii) the basis and certainty of when the Secretary of State expects to be able to remove the deportee; (iv) factors relevant to 'reasonable time' include the extent to which any delay is caused by the deportee's own lack of cooperation, chances of the deportee absconding or reoffending, effect of detention on the deportee and conditions of detainment, and conduct of the Secretary of State; (v) no factor is necessarily determinative; (vi) the burden of showing that detention is lawful lies upon the Secretary of State)
<http://www.bailii.org/ew/cases/EWHC/Admin/2010/2057.html>
8. *R(WL (Congo)) v Home Secretary* [2012] 1 AC 245 (circumstances relevant to reasonable period of time include at least: length of period of detention, nature of obstacles preventing deportation, diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles, conditions of the detainment and its effect on the detainee and his family, and risk of the detainee absconding or committing criminal offences if released; the weight to be given to time spent detained during appeals is fact-sensitive, much more weight should be given to a period during which the detainee is pursuing a meritorious appeal than a period for which he is pursuing a hopeless one)

