JUSTICE CENTRE | HONG KONG

Case Summary for:
SUNDAY PETER ATYH ALIAS SHABU YABRE v DIRECTOR OF IMMIGRATION[1]

Court:	Court of First Instance (the "**CFI**")
Judges:	Hon Chow J
Applicant (and Counsel):	Sunday Peter Atyh alias Shabu Yabre (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr. Sunny Li, Senior Government Counsel of the Department of Justice)
Date heard:	19 May 2020
Date promulgated:	27 May 2020
Full text:	https://www.hklii.hk/eng/hk/cases/hkcfi/2020/901.html

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 judgement, still pending. After a deportation 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 *habeas corpus* in respect of his detention under section 32(3) of the Immigration Ordinance ("the **IO**").

The CFI held that the detention was prima facie lawful, because a detention 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 *R v Governor of Durham Prison, ex parte Hardial Singh*[2] which were set out in *Simona Mundia v Director of Immigration*[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 nine 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; and (c) the CFI was entitled to place weight on the Director's view that there were risks of the Applicant absconding and reoffending.

Key words:	Non-refoulement; Non-refoulement Claims Petition Office; habeas corpus; Hardial Singh; detention; Immigration Ordinance; torture; Torture Claims Appeal Board; persecution; removal order

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

[1] [2020] HKCU 1241. Also cited as: HCAL 894/2020, [2020] HKCFI 901
[2] [1984] 1 WLR 704
[3] [2020] HKCFI 741

SUMMARY:

Facts and Procedural History:

The Applicant was a dual national of Guinea-Bissau and Nigeria. After his arrival in Hong Kong on 7 September 2009, the Applicant was intercepted at Customs Clearance and was subsequently convicted of drug trafficking on 18 March 2010. After his release on 11 January 2019, he had been detained at the Castle Peak Bay Immigration Centre (i) under sections 29 and 32(2A)(a) of the IO pending a decision as to whether a removal order should be made against him and (ii) under section 372K of the IO pending the final determination of his non-refoulement claim (which he made while serving his sentence).

After the Applicant's release from prison, the non-refoulement claim was rejected by the Director, and he subsequently appealed against the Director's decision to the Board, which was finally dismissed on 14 June 2019. The Board found that the Applicant was not credible, and most, if not all, of his core assertions in support of his non-refoulement claim were fabricated and wholly unreliable.

On 22 July 2019, the Applicant applied for leave to apply for judicial review of the Board's decision, but his application merely stated as grounds that he was not satisfied with the decision of the Board which he considered to be clearly unfair, and that he would be in grave danger if he returned to his home country. As at the date of the judgement, the leave application was pending determination.

The Secretary for Security (the "**Secretary**") made a deportation order against the Applicant on 1 August 2019 and since then he was detained under section 32(3) of the IO. Subsequently, there had been three reviews of the Applicant's detention, 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 might abscond and/or reoffend, (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*. In support of his application, the Applicant stated that his detention since his discharge from prison was unlawful, and complained about the length of his detention and the delay in the determination of his application for leave to apply for judicial review. He also stated that his life would be in danger in the hands of the government and gangsters in Nigeria, and that he could be persecuted again for the same offence.

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(3) of the IO, the Secretary may detain a person in respect of whom a removal order under section 19(1)(a) of the IO is in force, pending his removal from Hong Kong under section 25 of the IO. Given that a deportation 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 17 to 19*)

The CFI noted that the *Hardial Singh* principles are set out in *Simona Mundia v Director of Immigration*[4]. 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 20 and 23*)

The CFI confirmed that the determination of whether a period of detention is reasonable in all the circumstances is a fact sensitive exercise. Relevant considerations include the length of the period of detention; whether there is realistic prospect that deportation will take place; the nature of the obstacles impeding the deportation; the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; the conditions of detention; the effect of detention on the Applicant and his family; and risks of absconding and reoffending. In determining whether a period of detention has become unreasonable in all the circumstances, the CFI should have regard to the merits of the judicial process pursued by the Applicant which impeded his removal, and the risks of absconding and reoffending (which are of "paramount importance"). (*paras 21 and 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 9 months) under section 32(3) of the IO, and even longer taking into account of his previous detention under sections 32(2A), 37ZK and 29 of the IO. (*para 24*)

- 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

[4] [2020] HKCFI 741

not appropriate to examine the merits in detail, but on provisional assessment, the CFI concluded that the Applicant did not have a good prospect of success. The Applicant's mere assertion that the Board's decision was unfair or unsatisfactory was not sufficient ground for judicial review and his 'double jeopardy' argument was not a ground against deportation. 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*)

- The CFI confirmed it was entitled to place weight on the Director's assessment as to whether risks of absconding and reoffending exist and whether the Applicant may pose a threat or security risk to the community if released. 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, however it appeared that his friends were themselves non-refoulement claimants / asylum seekers who required support from International Social Service and were not accepted by the Director to act as guarantors for purpose of release on recognizance. (*paras 27 and 28*)

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 has 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 29)*

Legal Provisions considered:

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

Key Cases cited:

1. *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

2. *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

3. *Simona Mundia v Director of Immigration* [2020] HKCU 957 (sets out the *Hardial Singh* principles)
https://www.hklii.hk/eng/hk/cases/hkcfi/2020/741.html

4. *Ubamaka Edward Wilson v Secretary for Security* [2012] 15 HKCFAR 743 (risk of double jeopardy is not a ground against deportation)
https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2012/87.html