

Case Summary for:  
*Le Cong Manh v Director of Immigration*<sup>1</sup>

<b>Court:</b>	Court of First Instance (the “CFI” or the “Court”)
<b>Judges:</b>	Hon Coleman J
<b>Applicant (and Counsel):</b>	Le Cong Manh (acting in person)
<b>Respondent (and Counsel):</b>	Director of Immigration (the “Director”) (Mr. Eric Ko, Senior Government Counsel, of the Department of Justice)
<b>Date heard:</b>	20 and 21 April 2023
<b>Date promulgated:</b>	N/A
<b>Full text:</b>	<a href="http://www.hklii.hk/eng/hk/cases/hkcfi/2023/1044.html">http://www.hklii.hk/eng/hk/cases/hkcfi/2023/1044.html</a>
<p><b>ABSTRACT:</b> The Applicant was subject to a removal order and was detained under section 32(3A) of the Immigration Ordinance (Cap.115, the “IO”) pending removal from Hong Kong. The Court considered a conundrum caused by the interplay of (i) the Director’s intention to remove the Applicant from Hong Kong and (ii) the intended prosecution of the Applicant for a relevant immigration offence. At the time of the hearing, the Applicant had been detained for 153 days (i.e., about five months). The Court reviewed the Applicant’s detention against the <i>Hardial Singh</i> principles and held that the period of detention had become unreasonable in all the circumstances and therefore also ordered the Applicant’s release from detention on recognizance.</p>	
<b>Key words:</b>	Administrative Law; Habeas corpus; Detention pending removal; Whether continuing detention become unlawful; Intended prosecution of applicant for illegal remaining; Condition of bail not to leave Hong Kong

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

<sup>1</sup> [2023] HKCU 1760; HCL 512/2023; [2023] HKCFI 1044

## SUMMARY:

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### Facts and Procedural History:

The Applicant was a Vietnamese national who was sighted in Hong Kong by the police in July 2020 and arrested for being a suspected illegal immigrant. The Applicant lodged a non-refoulement claim (“**NRC**”) in July 2020 and stayed in Hong Kong on immigration recognizance, pending the resolution of his NRC. In July 2021, he was arrested for and convicted of burglary and sentenced to two years’ imprisonment. On November 16, 2022, he was transferred to immigration detention upon discharge from his prison sentence. On March 30, 2023 the Applicant applied for a writ of *habeas corpus*.

The Applicant made the following NRC and related claims:

- in July 2020, he lodged the NRC;
- in January 2021, the Director rejected the Applicant’s NRC;
- in April 2021, the Board/Non-refoulement Claims Petition Office (the “**TCAB**”) rejected the Applicant’s appeal against the Director’s decision to reject his NRC;
- in February 2023, the Applicant sought leave to challenge the TCAB’s dismissal by way of judicial review (the “**JR Application**”); and
- by letter dated April 3, 2023, the Department of Justice, on behalf of the Director, invited the Court to accord priority to the JR Application, and the Court fixed a date of hearing of April 25, 2023. The Court expected that a decision would be made on the JR Application within a few weeks.

The Applicant was subject to one criminal charge:

- on February 14, 2023, the Applicant was charged with remaining in Hong Kong without the authority of the Director after having landed unlawfully in Hong Kong;
- the Applicant was brought for mention in the Shatin Magistrates’ Courts on February 24, 2023 but the prosecution asked for no plea to be taken and for the case to be adjourned to June 26, 2023 for a second mention, pending the outcome of the JR Application, and bail was granted on the condition that the Applicant should not leave Hong Kong; and
- once the outcome of the JR Application is known, that will trigger a further review of detention.

## Issues:

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

## Judgment:

The period of detention had become unreasonable in all the circumstances. The Court ordered the release of the Applicant on terms of recognizance acceptable to the Director pursuant to the Rules of the High Court Order 54 rule 1 and/or the inherent jurisdiction of the Court. (*paras 9 and 52*)

## Reasons for Judgment:

As a starting point, the detention was *prima facie* lawful as there was an extant removal order. (*para 36*)

The Court reviewed the Applicant's 153-day detention against the *Hardial Singh* principles set out below and determined that the period of detention had become unreasonable in all the circumstances:

(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.

The Director had always been using the detention powers for the purpose of deportation. This was so despite the Director took into account factors, such as the JR Application and the likely risks the Applicant might pose to the society, in considering whether to continue to detain the Applicant. HS1 was satisfied. (*para 39*)

The Director had exercised due diligence to seek to overcome the practical obstacles to the removal of the Applicant back to Vietnam. The Director maintained active liaison with the Consulate of the Socialist Republic of Vietnam to obtain an approval for the Applicant's re-entry into Vietnam and the issuance of a travel document. The Vietnamese authority approved

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<sup>2</sup> [2022] HKCA 781

the Applicant's return on April 4, 2023 and provided the travel document on April 18, 2023. HS4 was satisfied. (*paras 20 and 40*)

The Court, however, identified a conundrum caused by the interplay of (i) the Director's intention to remove the Applicant from Hong Kong and (ii) the intended prosecution of the Applicant for a relevant immigration offence:

- If the outstanding criminal charge was ignored, removal could be effected reasonably likely within just a few weeks. However, the outstanding criminal charge and its potential consequences were relevant circumstances which the Court must take into account in the assessment of the reasonableness of the detention. (*paras 1 and 41 to 43*)
- It was a condition of the Applicant's bail set by the magistrate that he must not leave Hong Kong, and as a result, the Applicant could not be removed. The Court considered the steps being taken (i) to effect the Applicant's removal and (ii) to prosecute a charge were in direct conflict. (*para 44*)
- The Court remarked that there might have been a lack of communication within the Immigration Department: (i) on the one hand, the Director thought it correct for the Applicant to be subject to a removal order and would be removed as soon as possible; but (ii) on the other hand, the prosecuting body (which the Court remarked to be possibly within the Immigration Department) thought it correct for the Applicant to be subject to criminal proceedings, which prevented the Applicant's removal from Hong Kong. (*paras 47-48*)

Finding that the Applicant would not be able to be deported within a reasonable period, the Court held that the Director should not seek to exercise the power of detention. HS3 was not satisfied. (*para 49*)

As HS3 was not satisfied, the Court ordered the Applicant's release from detention on terms of recognizance acceptable to the Director.

### **Other Considerations:**

The prosecution's general policy is not to pursue a charge of illegally remaining in Hong Kong against a non-refoulement claimant before the determination of that claim and the determination of any application for leave to apply for judicial review at the CFI level. (*paras 24 and 46*)

In the Court's words: "[seeking] to retain a person in Hong Kong for the purposes of prosecuting that person, and potentially imprisoning that person, appears to be the antithesis of the desire to remove that person from Hong Kong as soon as possible." The Court suggested consideration to be given to such a possible conflict and how it could be avoided as a general rule. (*paras 47-48*)

**Legal Provisions considered:**

1. Section 32(3A) 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.hklii.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.