Summary of Judgment

Johnson Benjamin ("Applicant")
v
Director of Immigration ("1st Respondent")
Secretary for Security ("2nd Respondent")
CACV 229/2023; [2023] HKCA 1368

Decision	**:**	**1st and 2nd Respondents' Appeal allowed**
Date of Hearing	**:**	**29 November 2023**
Date of Judgment	**:**	**29 November 2023**
Date of Reasons for Judgment	**:**	**22 December 2023**

Background

1. This is the 1st and 2nd Respondents' appeal against the decision of the Court of First Instance (**"CFI"**) in granting a writ of *habeas corpus* in favour of the Applicant and ordering his release (the **"Decision"**). The Applicant had originally been under administrative/immigration detention for a period of 1 year and 4 months. (Full text of CFI's judgment at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=153400&QS=%2B%7C%28HCAL897%2F2023%29&TP=JU)

2. The Applicant is a Liberian National who came to Hong Kong in February 2012 and was permitted to stay as a visitor for 5 days, but he had overstayed thereafter. Two days after he was arrested by the police in September 2012 for his overstay, he applied for a non-refoulement claim (**"NRC"**). A removal order against him was issued by the 1st Respondent in November 2013.

3. In March 2014, the Applicant married a Ms Chan (the **"Wife"**), who is a permanent Hong Kong resident. The Wife gave birth to a son (the **"Son"**) on 16 June 2015. Two days later, the Applicant assaulted and raped the Wife's friend in the couple's home on the pretext of asking her to take something to the Wife who was still in the hospital. After trial, he was convicted on one count of rape, one count of assault causing actual bodily harm and one count of indecent assault. He was sentenced to 10 years of imprisonment. In passing the sentence, the trial judge described the rape as a most brutal one. The applicant started to serve his sentence in prison in October 2016. His appeal on conviction and sentence was dismissed by the Court of Appeal in December 2017.

4. After the completion of the Applicant's sentence, he was released from prison on 15 February 2022. Upon release, he was immediately detained by the Immigration Department for the purpose of deporting him. On 15 June 2023, the Torture Claims Appeal Board (**"TCAB"**) dismissed the Applicant's appeal. It had taken more than 10 years for the Applicant's NRC to have reached the stage of being disposed of by the TCAB, and much of the delay was self-induced by the Applicant due to his uncooperativeness.

5. In the meantime, when the Applicant was detained by the 1st Respondent between March 2022 and June 2023, the 1st Respondent had taken various and repeated active steps to arrange for the Applicant to complete the re-entry formalities and have an interview with the Liberian Embassy in Hong Kong to renew the Applicant's passport so that he would be ready for his removal when his NRC was properly disposed of. However, all these efforts and steps were frustrated as the Applicant had repeatedly refused to cooperate with the 1st Respondent and the Liberian Embassy to complete the re-entry formalities or to attend the various arranged interviews.

6. On 8 June 2023, the Applicant made a *habeas corpus* application. After hearing the application on 23 June 2023, the Honourable Mr Justice Coleman (the **"Judge"**) granted the writ of *habeas corpus* and ordered the release of the Applicant. The 1st and 2nd Respondents' appeal was heard and allowed by the Court of Appeal (**"CA"**) on 29 November 2023 with reasons for judgment handed down on 22 December 2023.

Grounds of Appeal

7. The 1st and 2nd Respondents' grounds of appeal were that the Judge had: (1) misapplied the *Harjang Singh*[1] principles and the requirements under sections 32(4A) and 37ZK(2) of the Immigration Ordinance (Cap. 115) (the **"Ordinance"**) (**"Ground 1"**); and (2) reached a conclusion that was not consistent with his finding of primary facts and/or was not sensibly open to him on the basis of those facts (**"Ground 2"**). (see paras. 19 – 20)

CA's Ruling

(Full text of CA's Reasons for Judgment at:
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS

[1] *Harjang Singh v Secretary for Security* [2022] HKCA 781

=157101&QS=%2B%7C%28CACV229%2F2023%29&TP=JU)

8. CA held that the appeal should be allowed on Ground 2 as it was not sensibly open to the Judge to conclude that the detention of the Applicant had become unlawful given the primary facts found by him. It was plain that the relevant relatively lengthy period of immigration detention was substantially caused and necessitated by the Applicant's own unreasonable conducts and acts in significantly delaying the disposal of his NRC, and that he had failed and/or refused to cooperate with obtaining a replacement passport for his repatriation. Therefore, the Judge's emphasis on the relatively long period of detention as the starting point and in effect the tipping point to show that the detention had become unreasonably excessive simply cannot be right. (see paras. 29(1) – 29(2))

9. In general, any period of a detention which is caused, necessitated or prolonged by a detainee's own unreasonable behaviours or conducts should not be counted or regarded as an unreasonable period of detention for the purpose of determining whether an originally lawful detention has become unlawful, unless there are other circumstances to show otherwise. This is so, as if otherwise, it would result in an absurd situation where the more unreasonably and uncooperatively a detainee behaves in seeking to frustrate or delay the procedures or process necessary to prepare for his removal, the more likely he is to be released. That cannot be the intention of the *Hardial Singh*[2] principles. (see para. 29(3))

10. The principle espoused in *R(Lumba)* [3] concerning a detainee's refusal to leave voluntarily is not applicable to cases where: (a) a detainee has by himself delayed the pursuit of the relevant non refoulement claim; and/or (b) if not because of an applicant's own unreasonable delay, the relevant non-refoulement claim ought to have been disposed of before the subject detention has commenced. (see paras. 33, 35, 36)

11. In any event, CA expressed its reservation as to whether the observations made in *R(Lumba)* are necessarily correct, as even if there is an ongoing non-refoulement claim, there is no reason in principle why it is not reasonable to expect an applicant to cooperate with the relevant authorities to obtain the necessary travel document to facilitate his removal once the non-refoulement claim is disposed of. (see para. 37)

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[2] *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704
[3] *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245

12. CA further reiterated and emphasised that: (1) a detainee's previous criminal conviction imprisonment is irrelevant to reasonableness of the immigration detention as the purpose of the latter is for removing the Applicant and has nothing to do with former; and (2) a decision of whether a detention is lawful or unlawful by reason of its length is not an exercise of discretion or a factual determination. There should only be one correct answer. As such, the fact that it may be a difficult judgment for the first instance judge to make in a particular case should not in principle make the appellate court more reluctant to interfere, although the court for that reasons may tend to afford a decent degree of respect or deference to the judge's weighing exercise of the relevant factors for his judgment before departing from his or her conclusion. (see paras. 43 – 44)

13. The appeal was therefore allowed and the *habeas corpus* application was dismissed. Costs were summarily assessed at HK$300,000 to be paid by the Applicant to the 1st and 2nd Respondents.

Civil Division
Department of Justice
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