



Summary of Judicial Decision

Harjang Singh (“Applicant”) v Secretary for Security (“Secretary”) and Director of Immigration (“Director”) (collectively “Putative Respondents”) CACV 183 / 2021; [2022] HKCA 781

Decision : Applicant’s appeal allowed¹ & Applicant be released from detention
Date of Hearing & Decision : 7 December 2021
Date of Reasons for Judgment : 29 July 2022

Background

1. The Applicant is a refused *non-refoulement* claimant. While staying in Hong Kong, and between 1994 and 2000, he was convicted of a number of offences. The Secretary issued a deportation order against him on 22 July 2003. Subsequently on 2012 and 2017, he was convicted of other offences.
2. On 10 May 2004, the Applicant lodged a torture claim. His claim (on torture and all applicable grounds) was dismissed by the Immigration Department (“ImmD”) on 26 September 2018, and his appeal/petition was rejected by the Torture Claims Appeal Board (“Board”) on 7 November 2019.
3. On 31 December 2019, the Applicant applied for leave to apply for judicial review (“JR”) against the Board’s Decision (HCAL 3895/2019) (“JR Leave Application”) which is pending decision of the Court of First Instance² (“CFI”).
4. On 24 February 2021, the Applicant applied for (i) leave to apply for JR against the Director’s decision to detain him; and (ii) a writ of *habeas corpus* (HCAL 224/2021). He alleged that his detention had become unlawful because (i) he had been detained for an unreasonable period of time; and (ii) his removal could not be effected within a reasonable time. By agreement, CFI heard the *habeas corpus* application on 12 March 2021.
5. By the judgment of 19 March 2021 [2021] HKCFI 705 (“CFI’s Judgment”), the CFI refused the *habeas corpus* application. The parties were given liberty to apply for directions for the remainder of the JR application (HCAL 224/2021). On 15 April 2021, the Applicant appealed against the CFI’s Judgment. Full text of the CFI’s Judgment at:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=134302
6. The Applicant had been detained for 3 years and 4 months by the time when the Court of Appeal (“CA”) heard and allowed his appeal against the CFI’s Judgment on 7 December 2021. CA indicated that it would hand down its Reasons for Judgment later.
7. On 29 July 2022, the CA handed down its Reasons for Judgment.

¹ And the Putative Respondents pay to the Applicant the costs of the appeal and the costs below, to be taxed if not agreed on a party and party basis.

² The JR Leave application was re-fixed for 24 December 2021 but was vacated due to the Applicant’s counsel’s illness.



Issues in dispute

8. The central question of the appeal is whether there is, and continues to be, lawful authority for the detention of the Applicant.
9. Should the reasonableness of the period of detention be judged at the time of the appeal or at the time of the CFI's Judgment? ("**Reasonable Period Issue**")
10. What significance, if any, attaches to steps taken by the Applicant that have lengthened the procedures in the other proceedings, bearing in mind the CFI's reliance on a number of adjournments which the Applicant sought? ("**Adjournment Issue**")
11. Is the likelihood and seriousness of the Applicant's reoffending risk capable of justifying a period of detention this long? ("**Reoffending Issue**")
12. When evaluating whether removal can be achieved within a reasonable time, how much certainty is required about the probability of removal and its proximity? ("**Time for Removal Issue**").

Department of Justice's Summary of the Court's rulings

(Full text of the CA's judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146125)

13. On the Reasonable Period Issue, the CA held that where matter comes before the CA by way of an appeal, the primary focus on the appeal is by reference to the events as at the date of the first instance judgment. That said, the CA accepts that where the liberty of the subject is concerned, there is a strong argument that in an appropriate case it may be necessary to consider the position even up to the date when the appeal is heard. Therefore, even if the view were to be taken that at the date of the hearing before the first instance Judge the detention had not become unreasonable, but by the date of the appeal it had become unreasonable, the correct thing for the CA to order would be the release of the applicant. The CA held that the detention of the Applicant had become unreasonable at the time of the first instance hearing. (paras. 81 & 82)
14. On the Adjournment Issue, the CA took the view that some assessment should be made (though necessarily fairly broad brush and on a preliminary basis) as to the apparent merits of the challenge to deportation or claim to non-refoulement protection. Unless the Court considers the challenge to be hopeless, frivolous or abusive or there is some special reason, to that it can accord minimal weight to the time taken for determination of that challenge, the Court will be unlikely to 'discount' the period taken for determination of the challenge. Instead, that period will be taken into the overall consideration of reasonableness (para. 89). The CA took the view that some qualitatively assessment may be required to deal with the time taken by adjournment. First, it would be necessary to decide whether any real or substantial delay to the process has actually been caused. If so, the question then arises as to how



- to treat any period of delay found (para. 92).
15. On the limited evidence available, the CA opined that it was unlikely that any judge would have found any procedural impropriety or abuse on the part of the Applicant, and the CFI had erred in taking into account the mere fact of adjournments, or to give ‘discount’ or weight to that fact in consideration of the reasonableness of the period of detention of the Applicant (paras. 97 & 98).
 16. The CA also held that the CFI erred in offering a reason which was not the basis underlying the original detention decision, and which was not sustainable on the materials which simply identified the fact of adjournments and nothing more (para. 105).
 17. On the Reoffending Issue, the CA held that the risk of reoffending is a relevant consideration. To the extent relevant, it may be appropriate to take into account the risk of re-offending as something which may defeat the purpose of the intended deportation (para. 108).
 18. Whilst the CFI was right to think that some assistance may be obtained from the assessments of the risk of reoffending performed by the Secretary and the Director, that would only be correct if there is some appropriate contemporaneous documentation showing their evaluation, and which enabled consideration as to how convincing their reasoning was (para. 117). The CA observed that the tick-box review form used by ImmD was unlikely to be sufficient to tell what the factors which have actually been considered, and what has gone into the process in relation to any individual factor when reaching the conclusion, and it did not promote any recognition that as time goes on the weight to be given to some of these boxes may have to change (paras. 127 & 128).
 19. The CA took the view that the CFI erred in placing conclusive weight on the views of the Director and the Secretary with regard to the potential risks of absconding and reoffending and of the Applicant, if released, posing a threat or security risk to the community (paras. 141 & 142).
 20. On the Time to Removal Issue, the CA accepted that it is not necessary to have a specific pinpointed date or range of dates when the removal is possible, but at least there must be some sense at a broad level of what sort of timescale is being canvassed (para. 148). The CA held that there was a lack of sufficient clarity when the legal aid appeal and the JR Leave Application might be held, and therefore, the Applicant ought to be released (para. 150).
 21. At para. 164, the CA provided a summary of applicable principles to provide guidance for future cases, and to the Secretary and the Director in their own application of the principles.

Civil Division

Department of Justice

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