HCAL 2490/2024

[2025] HKCFI 921

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST   
NO 2490 OF 2024

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BETWEEN

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| --- | --- | --- | --- | --- |
|  | AKINBOBOLA IDOWU ALEXANDRA | | | Applicant |
|  | | and |  | |
|  | | DIRECTOR OF IMMIGRATION  HONG KONG SAR GOVERNMENT | 1st Respondent  2nd Respondent | |

\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy High Court Judge Jonathan Wong in Court

Date of Hearing: 5 March 2025

Date of Decision: 5 March 2025

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D E C I S I O N

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1. ***Introduction***
   1. The Applicant is subject to a Removal Order made on 2 January 2019. He has been held in immigration detention since 2 December 2022 pursuant to section 32(3A) of the Immigration Ordinance Cap 115 (“**Ordinance**”) pending his removal from Hong Kong. As at the date of the hearing before me, he has been detained for 825 days, on any view a lengthy period.
   2. This is my decision on the Applicant’s application for a writ of *habeas corpus* filed on 16 December 2024. At the hearing, the Applicant appeared in person. Ms Karen Ngai, Acting Senior Government Counsel, appeared for the Director of Immigration (“**Director**”).
2. ***Background***
   1. The Applicant is a Nigerian male born in 1973. On 21 June 2011, he entered Hong Kong on the strength of his Nigerian passport and was permitted to remain as a visitor until 11 July 2011. He has since overstayed in Hong Kong.
   2. On 30 September 2011, the Applicant surrendered to the police for having overstayed and was referred to the Immigration Department on 2 October 2011 for investigation. On 11 November 2011, he was released on recognizance. The Applicant does not have any criminal convictions and there is no record of any failure to report for recognizance.
   3. The Applicant’s passport expired on 7 July 2024.
   4. The Applicant has two past marriages and one subsisting one. He claims that his parents, siblings and two children are in Nigeria, but his Nigerian ex-wife has passed away.
   5. On 15 May 2018, the Applicant married his second wife, who was a Hong Kong permanent resident. He attempted to apply for an entry dependant visa twice in 2018 and 2019, but the applications were closed in 2019 and 2020 respectively as no further supporting document was submitted. The Applicant divorced his second wife in October 2021.
   6. On 19 January 2022, the Applicant married his third wife (“**Applicant’s Wife**”), who is a Hong Kong Permanent Resident. On 31 January 2022, the Applicant applied for an entry dependant visa but it was refused on 18 October 2022 on the grounds that, *inter alia*, there was insufficient proof on genuine relationship between the Applicant and the Applicant’s Wife. On 22 November 2022, the Applicant’s Wife made a request for reconsideration of the refusal decision on the Applicant’s dependant visa application and the said refusal decision was maintained by the Director on 6 December 2022 after re-consideration.
   7. The Director contacted the Applicant’s Wife on 13 February 2023, 14 February 2023 and 26 April 2023 to enlist her assistance to surrender the Applicant’s then valid passport to effect his removal. Eventually on 2 May 2023, the Applicant’s Wife surrendered the Applicant’s passport (which was kept by her for the dependant visa application) to the Immigration Department. On 31 January 2024, the Applicant’s Wife made an enquiry on the progress of the Applicant’s case and, she stated, *inter alia*, she would not apply for a dependant visa for the Applicant again. There is currently no outstanding dependant visa application made by the Applicant. The Applicant’s Wife is willing to act as a guarantor.
3. ***Non-refoulement claim (“NRC”) and related proceedings***
   1. The Applicant’s torture claim and NRC were rejected by the Director respectively on 28 May 2015 and 14 June 2017 (collectively “**Director’s Decisions**”).
   2. On 15 September 2017, the Torture Claims Appeal Board/Non-refoulement Claims Petition Office dismissed the Applicant’s challenge against the Director’s Decisions (“**TCAB Decision**”).
   3. The Applicant thereafter challenged the TCAB Decision in court, culminating in the Appeal Committee’s refusal to grant leave to appeal to the Court of Final Appeal on 9 March 2021.
   4. On 25 May 2021, the Applicant made a request for a subsequent claim which was refused by the Director on 3 November 2021.
   5. On 8 September 2022, the Applicant filed an application for leave to apply for judicial review against the Director’s refusal of his subsequent claim request, which application was dismissed by the Court of First Instance on 7 October 2022 (HCAL 828/2022). DHCJ KW Lung was of the view that it was clear that the Applicant’s conduct in seeking persistently to re-litigate his NRC without viable grounds amounted to an abuse of process. The learned Deputy Judge therefore made a Restricted Proceedings Order against the Applicant, prohibiting him from commencing any fresh proceedings relating to any NRC of the Applicant in the High Court without leave of the court.
4. ***The present detention and its reviews***
   1. On 2 December 2022, a decision was made to cease the Applicant’s recognizance on the bases that (1) his removal was going to be possible within a reasonable time and (2) his removal was imminent and/or immediate repatriation was being arranged for his departure.
   2. The decision to cease the Applicant’s recognizance took place after the conclusion of HCAL 828/0222 and whilst the Applicant’s passport remained valid.
   3. As noted above, following the commencement of the Applicant’s detention, efforts were made to obtain the return of the Applicant’s passport from the Applicant’s Wife and the Applicant’s Wife eventually surrendered the Applicant’s passport to the Immigration Department on 2 May 2023. Thereafter, 3 removal operations were conducted on 14 August 2023, 25 January 2024 and 5 June 2024, the last prior to the expiry of the Applicant’s passport on 7 July 2024. However, all 3 removal operations were abortive due to the Applicant’s strong resistance.
   4. During the present detention, the Immigration Department conducted numerous interviews with the Applicant[[1]](#footnote-1) during which he consistently expressed a strong unwillingness to return to Nigeria, refused to cooperate with the re-entry seeking formalities (before the surrender of his passport and after the current passport expired) and resisted to be removed from Hong Kong.
   5. Continued effort has been made by the Immigration Department to seek assistance from the Consulate General of the Federal Republic of Nigeria (“**CG**”) on the issuance of an emergency travel document for the Applicant. CG has confirmed that an emergency travel document would be issued to the Applicant within 1 month if the Applicant cooperated with the re-entry seeking formalities as required.
   6. The Applicant has since 28 November 2023 complained of various physical ailments and psychological issues.
   7. A total of eight reviews of detention were conducted on 27 February 2023, 8 May 2023, 31 August 2023, 7 December 2023, 11 March 2024, 13 June 2024, 12 September 2024, and 16 January 2025. The Director throughout decided that the Applicant’s case was not one which warranted release on recognizance. In particular, in the latest review, it was acknowledged that the Applicant’s detention was lengthy, that the Applicant’s Wife was willing to act as a guarantor, and that the Applicant had claimed that he was suffering from health issues. However, balancing those factors against the risk of abscondence in the light of the Applicant’s steadfast refusal to be repatriated to his home country, it was considered that his release was not warranted.
5. ***The Applicant’s submissions***
   1. The Applicant’s written materials put forward the following matters:
6. The period of detention has become unreasonable;
7. His removal is not possible as he does not consent to it;
8. He emphasizes that he has no criminal records and has always complied with his recognizance conditions;
9. He is now suffering from high blood pressure, lower back pain, eye problems, skin problems and memory deterioration;
10. His life will be endangered if repatriated;
11. The condition of his detention is akin to being imprisoned and unhygienic.
    1. At the hearing, the Applicant confirmed that the above is an accurate summary of his case and he also handed up a document showing that he has an upcoming appointment in April 2025 apparently for his mental deterioration.
12. ***The applicable principles***
    1. The applicable principles are set out in *Harjang Singh v Secretary for Security* [2022] 4 HKLRD 99. I have in particular borne in mind the summary set out at §164 thereof.
    2. I remind myself that the burden is on the Respondent to an application for a writ of *habeas corpus* to justify the lawfulness of the Applicant's detention.
    3. Under Section 32(4A) of the Ordinance, the detention of a person shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances that justify its length, including (1) whether the person's removal is directly or indirectly prevented or delayed by any action or lack of action of the person, (2) whether the person poses, or is likely to pose, a threat or security risk to the community, (3) whether the person's removal is directly or indirectly prevented or delayed by any action or lack of action of the person, including the person not obtaining, or not providing assistance to obtain, any authorization from the relevant authorities of a place outside Hong Kong that is required for the person's entry to that place and (4) factors that directly or indirectly prevent or delay the person's removal that are not within the control of the Director.
    4. The Court of Appeal has recently provided guidance in *Johnson Benjamin v Director of Immigration & Anor* [2023] HKCA 1368 on, *inter alia*, how the court ought to approach a detainee's own unreasonable behaviour or conduct in assessing the reasonableness of the length of his detention. It is stated at §29(3):

*"In our view, 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 principles."*

* 1. Where, as here, the Applicant has refused to cooperate with the reentry formalities, *Johnson Benjamin* is an authority for the proposition that this is a factor which may be taken into account in assessing the reasonableness of his detention.  At *Johnson Benjamin* §37, it is stated:

*“Second and in any event, with the greatest respect, we have reservation as to whether the observations in R(Lumba) are necessarily correct. In our view, 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. In other words, we do not see in principle why such uncooperative behaviour on the part of an applicant should only be limited to the consideration of the risks of absconding but not also to the wider question of whether any additional period of detention resulting from such behaviour shall be considered as reasonable or not.”*

1. ***Analysis***
   1. During the present detention, the Applicant is and has been detained pursuant to section 32(3A) of the Ordinance.  It follows therefore that there is and has been *prima facie* lawful authority to detain the Applicant.
   2. The question which falls for determination is whether the detention has become unreasonable in all the circumstances, and hence unlawful.  The starting point is the period of detention, namely 825 days, against which the various other factors must be weighed and balanced.
   3. As regards the Applicant’s fear for his own safety if repatriated, as has been stated and repeated in many previous decisions, an application for a writ of *habeas corpu*s is not an opportunity for the applicant to continue to assert the concerns underpinning his NRC and the court in his *habeas corpus* application will not look at the merits of any such claim.
   4. I accept that, throughout the period of detention, the intention of the Director is to remove the Applicant and that has been the only purpose of the Applicant's detention.  HS1 is satisfied.  I also accept that the Director has acted with diligence and expedition to effect the Applicant's removal.  HS4 is satisfied. The foregoing is amply justified by the matters stated above, in particular the 3 repatriation operations which were rendered abortive due to the Applicant’s resistance and the continued efforts in obtaining an emergency travel document following the expiry of the Applicant’s passport.
   5. As at the commencement of the present detention, there was no legal impediment to the Applicant’s removal by reason of the Updated Removal Policy. The only practical impediments were the Applicant’s refusal to render cooperation, either in boarding the repatriation flights (before the expiry of his passport) or in refusing to cooperate with the reentry formalities (following the expiry of his passport).
   6. I also accept the Respondent’s submission that an important consideration in the present case is the risk of the Applicant absconding, which would frustrate the very purpose for which the detention power was conferred and exercised.  I take stock of the Applicant’s persistent indications throughout the present detention of his unwillingness to be repatriated.  It seems to me that the assessment of the existence of such risk cannot be said to have been unreasonably reached. On this note, I think the Applicant should be aware that refusing to cooperate in the repatriation operation will in all the circumstances hurt rather than aid his interest. As has been noted by Coleman J in *Ruz Esmiralde Naguimbing v Immigration Director* [2023] HKCFI 2384 at §40, flatly refusing to board the repatriation flight will not improve his chances of being released on recognizance; rather, it might simply prolong his detention. I also record the fact that the Applicant’s Wife was not in court to support the present application.
   7. In relation to the Applicant’s claimed health conditions, there is no reason to believe that the Applicant would not receive proper medical treatment whilst in detention, if required (*Mansuri, Intekhab Alam Mohamed Shakil Reza v Hong Kong SAR Government*, HCAL 2428/2018, 6 November 2018), which is confirmed by the documentary evidence adduced by the Applicant himself.
   8. Overall, weighing the period of detention against all the other factors, I am satisfied that HS2 and HS3 are met. Like the Director, I acknowledge that the present detention has become lengthy. However, I accept the Respondent’s submission that the Applicant should not be allowed to rely on a self-imposed obstacle in arguing that the detention has become unreasonable.
2. ***Conclusion***
   1. By reason of the above matters, I am satisfied that the Applicant’s detention, and likely foreseeable future period of detention, has been and will remain lawful.
   2. I therefore dismiss the present application with no order as to costs.

(Jonathan Wong)  
Deputy High Court Judge

The Applicant, acting in person

Ms. Karen Ngai, Senior Government Counsel (Ag.), of the Department of Justice, for the Respondent

1. For example, on 7 December 2022, 7 February 2023, 21 February 2023, 6 March 2023, 17 March 2023, 17 April 2023, 26 April 2023, 24 May 2023, 19 June 2023, 27 June 2023, 1 August 2023, 18 August 2023, 20 November 2023, 28 November 2023, 30 November 2023, 5 January 2024, 23 January 2024, 1 March 2024, 25 March 2024, 19 April 2024, 10 May 2024, 4 June 2024, 19 June 2024, 9 July 2024, 16 July 2024, 19 August 2024, 2 September 2024, 11 September 2024, 4 November 2024, 26 November 2024, 9 December 2024, 7 January 2025, 21 January 2025, 28 January 2025. [↑](#footnote-ref-1)