

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 91 OF 2015

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BETWEEN

DHILLON KANWAR JEET SINGH                      Applicant

and

DIRECTOR OF IMMIGRATION                      Respondent

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Before: Hon Chow J in Court

Date of Hearing: 11 June 2015

Date of Decision: 11 June 2015

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**DECISION**

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*INTRODUCTION*

1.            I have before me an urgent application by the applicant seeking an order that a writ of habeas corpus *ad subjiciendum* be issued to direct the Director of Immigration (“the Director”) to bring the

applicant before a judge of the court at such time as may be directed by the judge.

2. Notice of the intended application was first given to the court by a letter sent by fax to the court in the evening of 10 June 2015. This court received the originating summons herein and an affidavit of Tam Kam Tong, the applicant's solicitor, in the early afternoon of 11 June 2015. This court convened at 3:30 pm today to hear the application.

3. Notice of the application was given to the Director and Mr Lawrence Chan, Government Counsel of the Department of Justice, has appeared before me to resist the application.

*BACKGROUND FACTS*

4. A brief summary of the relevant background facts are as follows. I should mention that these facts are based largely on what Mr Chan told me from the Bar table. Mr Mark Sutherland (for the applicant) informed me that he and his instructing solicitor saw the applicant only once on 6 May 2015 while he was in detention and could only obtain preliminary instructions from the applicant. As I understand it, Mr Sutherland does not necessarily accept the accuracy of everything that has been said by Mr Chan, but he has not, understandably, been able to contradict the same.

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B 5. On 15 August 2014, the applicant first arrived in Hong Kong  
C but was refused landing.

D 6. On 18 August 2014, the applicant lodged a non-refoulement  
E claim.

F 7. On 10 November 2014, the applicant's non-refoulement  
G claim was rejected at the first tier of the assessment process. I am told  
H by Mr Chan that the assessment dealt with all applicable grounds for  
I non-refoulement under the current unified screening mechanism, namely,  
J torture, cruel inhuman degrading treatment or punishment, and refugee  
K claims.

L 8. On 1 December 2014, a removal order was made against the  
M applicant under section 19(1)(b) of the Immigration Ordinance.

N 9. The applicant had all along been under detention until 3  
O January 2015 when he was released on recognizance under section 36 of  
P the Immigration Ordinance.

Q 10. On 2 March 2015, the applicant's appeal against the first tier  
R determination was dismissed by the Torture Claim Appeal Board /  
S Non-refoulement Claims Petition Office.

T 11. Apparently, the applicant failed to comply with his reporting  
U obligation on 13 March 2015. He was subsequently arrested on 30  
V March 2015, and has been in detention since. I should record that Mr  
Sutherland stated that the applicant might have a good or reasonable  
explanation for the failure to comply with his reporting obligation on 13

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March 2015, but he had no instruction on this matter. For the purpose of the present application, I do not place any weight on the applicant's alleged failure to comply with his reporting obligation on 13 March 2015.

12. A review of the applicant's detention was carried out on 4 and 30 May 2015 and 9 June 2015, but the decision to detain was maintained.

13. The applicant has, I understand, applied for legal aid, but I have no information regarding the nature of the legal claims that he wishes to pursue. It is likely, though, that the claims would include challenges in respect of his screening process and/or the decisions to reject his non-refoulement claim, and possibly a claim for damages for unlawful detention. In any event, I am told by Mr Chan that the Director was informed by the Legal Aid Department on 20 April 2015 that the legal aid application was then under process, and was further informed by the Legal Aid Department on 9 June 2015 that the applicant's legal aid application had been refused. There were other communications between the Director and the Legal Aid Department which it is not necessary to set out here.

14. In a letter dated 10 June 2015 from the Director to the applicant's solicitors, the Director informed the applicant that the Director had decided to execute the removal order on 11 June 2015. I am given to understand that arrangement has been made to remove the applicant by a CX697 flight scheduled to depart at 8:15 pm tonight.

15. Finally, I should add that the applicant, through his solicitors, has asked for documents from the Director and the Duty Lawyer Service

(which assisted the applicant in the first tier screening process) by letters dated 10 May 2015, but has so far not received the documents sought.

### *DISCUSSION*

16. The legal principles governing an application for the issue of a writ of habeas corpus are well settled. As mentioned at paragraph 37 of the recent decision of Deputy High Court Judge Kent Yee in *Mohammad Aslam Qureshi v Director of Immigration*, HCAL 75/2015 (27 May 2015), the central question is whether the detention is unlawful. An unlawful detention is one that is made without proper lawful authority in the first place and remains unlawful throughout. On the other hand, an initially lawful detention can be turned into an unlawful detention if it fall foulds of the *Hardial Singh* principles as summarised by Ribeiro PJ in *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138 at paragraph 23 which it is not necessary to set out in this decision.

17. The applicant is currently detained under section 32(3A) of the Immigration Ordinance pending his removal from Hong Kong.

18. Section 32(3A) of the Immigration Ordinance states as follows:-

“ A person in respect of whom a removal order under section 19(1)(b) is in force may be detained under the authority of the Director of

Immigration or any assistant director of immigration pending his removal from Hong Kong under section 25.”

19. In the present case, there is no doubt that:-

(1) a removal order under section 19(1)(b) in respect of the applicant is in force;

(2) the detention is pending his removal from Hong Kong under section 25..

20. There is no complaint about the reasonableness of his current detention under the *Hardial Singh* principles, although Mr Sutherland has said that the applicant’s previous detention during the period from 15 August 2014 to 3 January 2015 might be unlawful. Even if that is right (as to which I express no view), it would have no impact on the lawfulness of the current detention.

21. Two points are raised by Mr Sutherland in support of the present application.

22. First, it is said that the applicant has expressed a desire to pursue further legal remedies and has not yet exhausted his remedies in Hong Kong. It is said that where an applicant has indicated such a desire, the removal of the applicant from Hong Kong would be unlawful. In other words, the Director is under a duty not to remove someone who has no right to stay in Hong Kong until he has exhausted all possible legal remedies here. I can see no valid legal basis for this submission.

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23. Second, it is said that the applicant’s appeal process was tainted with unfairness or irregularity because he was not legally represented. In his solicitors’ letter dated 10 June 2015, it is said that the applicant conducted the appeal without a lawyer “primarily because he has no means”. Mr Sutherland has informed me that this statement is incorrect, but has not been able to say what was the reason why the applicant was not legally represented in the appeal process. I pause to observe that the Duty Lawyer Service provides free legal representation to non-refoulement claimants at both the first tier and appeal stages.

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24. I appreciate the difficulties faced by Mr Sutherland and those instructing him to advance the present application in view of the limited information and materials available to them at this stage. However, before the court can exercise its jurisdiction to issue a writ of habeas corpus, there must some proper basis shown. The court cannot issue a writ of habeas corpus simply to enable the applicant more time to discover whether he has grounds to challenge the lawfulness of his detention, or to challenge the screening process or removal decision.

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25. I regret to say that there is nothing in the materials before me or in the submissions made by Mr Sutherland on behalf of the applicant that his current detention or proposed removal from Hong Kong is unlawful.

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26. In the circumstances, I have no alternative but to dismiss the application for the issue of a writ of habeas corpus. I make no order as to costs.

27. Lastly, I wish to thank Mr Sutherland and his instructing solicitors whom I understand act on a pro bono basis, and Mr Chan who appears before me this afternoon at short notice, for the assistance that they have rendered to the court.

*[Further submissions by counsel after delivery of oral decision]*

28. Mr Sutherland applies for a temporary stay of execution of the removal order for 14 days so that the applicant may be able to lodge an appeal against the decision of the Director of Legal Aid to refuse to grant legal aid to him.

29. Mr Sutherland says that the Director has a policy to withhold execution of a removal order once an applicant lodges a legal aid appeal, and the existence of such appeal constitutes a legal impediment to prevent removal. Mr Chan has informed me that he is not aware of any such policy on the part of the Director.

30. To justify the granting of a stay of execution of the removal order, it seems to me that the court must at least be satisfied that there is some proper basis to challenge the legality of the removal order, or the screening process or the decision to reject the non-refoulement claim. However, no ground has been advanced to challenge the lawfulness of those decisions or process. This is not a criticism of Mr Sutherland or those instructing him having regard to the limited information available to them.

31. The only thing that has been said is that the applicant did not have legal representation at the appeal stage, but this does not mean that



he was denied legal representation. It is simply not known why he did not avail himself of the service provided by the Duty Lawyer Service.

32. In the absence of some proper legal basis to challenge the relevant decisions or process, there seems to me to be no proper ground on which the court can exercise its discretion to stay the execution of the removal order.

33. I am therefore not prepared to grant any stay of execution of the removal order.

(Anderson Chow)  
Judge of the Court of First Instance  
High Court

Mr Mark Sutherland, instructed by Messrs K.L. Leung & Co., for the applicant

Mr Chan Ho-yin, Lawrence, Government Counsel of the Department of Justice, for the respondent