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HCAL 68/2005

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

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CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

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NO. 68 OF 2005

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BETWEEN

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SUKHMANDER SINGH

Applicant

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and

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PERMANENT SECRETARY FOR SECURITY 1<sup>st</sup> Respondent

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DIRECTOR OF IMMIGRATION

2<sup>nd</sup> Respondent

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Before: Hon Reyes J in Court

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Date of Hearing: 14 September 2005

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Date of Judgment: 14 September 2005

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*I. Introduction*

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1. Mr. Singh seeks judicial review of decisions made by the Permanent Secretary for Security (PSS) on 14 January and 27 June 2005.

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By the former, the PSS decided that Mr. Singh should be deported from Hong Kong and barred from returning here. By the latter, the PSS confirmed his former decision.

2. The issue is whether, given the circumstances of Mr. Singh's case, the PSS's 2 decisions were unreasonable in the sense that they were beyond the range of responses open to a reasonable decision-maker.

## *II. Background*

3. Mr. Singh was born in Takhanwadh Village, Moga District, Punjab, India on 5 April 1971. He left school in 1987. He studied to be an auto mechanic for 3 years and worked as such for 7 years, before coming to Hong Kong to live with his wife.

4. Ms. Swaranjit Kaur (Mr. Singh's wife) was born in Minian Village, Moga District, Punjab, India. In November 1992 she acquired Hong Kong residence as the dependent of her then husband. Ms. Kaur was allowed to stay in Hong Kong unconditionally from January 1996. Ms. Kaur became a Hong Kong permanent resident in January 2000.

5. On 2 January 1997 Ms. Kaur's marriage to her former husband was dissolved. On 27 January 1997 Mr. Singh and Ms. Kaur were married in India. Mr. Singh entered Hong Kong as a visitor in February 1997.

6. In June 1997 Mr. Singh's immigration status changed. He was allowed to reside here as Ms. Kaur's dependent. Permission to remain

was subject only to a limit of stay. That permission was last extended to 11 June 2001.

7. In Hong Kong, Mr. Singh held a day job as a construction worker (earning about \$10,000 per month). In the evening he worked as a waiter and delivery man for a fast food shop until August 1998, when he changed to being a night watchman.

8. On 18 February 1998 Mr. Singh was arrested and charged with rape. The victim (aged 21) was his distant relative. Mr. Singh committed the offence while the victim's husband and son were away in India.

9. On 26 August 1998 Mr. Singh pleaded not guilty to the charge of rape. He alleged that sex was consensual.

10. Mr. Singh says that at around the time when his plea was taken he received threatening phone calls from Mr. Avtar Singh (the victim's husband), warning him to plead guilty or else be killed.

11. On 27 August 1998, while on bail pending trial for rape, Mr. Singh was attacked by 4 men wielding chopping knives. He suffered multiple chop wounds over his neck, back and upper limb regions. Permanent weakness of both of Mr. Singh's upper limbs is a likely consequence of the incident. It is unlikely that Mr. Singh can resume employment as an auto mechanic, construction worker or farm hand.

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12. Two of Mr. Singh's 4 assailants were arrested. The other 2 (including Mr. Avtar Singh) remain at large. There is evidence that Mr. Avtar Singh fled from Hong Kong to Japan to avoid arrest. Having been deported from Japan, Mr. Avtar Singh now lives with the victim in Minian Village.

13. Of the 2 arrested attackers, one was convicted to 7 years' imprisonment for wounding with intent, while the other was acquitted. Mr. Singh gave evidence at the attackers' trial.

14. Mr. Singh says that, other than Mr. Avtar Singh, 2 of his attackers now live within 5 km of Minian village.

15. On 1 June 1999 Mr. Singh was convicted at the end of a trial before Deputy Judge L. Tong.

16. After a review by the Court of Appeal, Mr. Singh was sentenced to 8½ years' imprisonment. In so deciding, the Court of Appeal noted that there were 3 aggravating features. First, Mr. Singh must have planned the crime since he entered the victim's premises using keys which he had no right to possess. Second, Mr. Singh had breached the trust of a relative. Third, Mr. Singh had threatened the victim with death during and immediately after the rape.

17. On 16 February 1999 Mr. Singh's daughter was born in Hong Kong. She has been raised and educated here. She is a Hong Kong permanent resident. She speaks fluent English and Cantonese.

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18. On 10 January 2005 Mr. Singh was released from prison. Upon release he was initially detained at Victoria Immigration Centre and is now at the Castle Peak Immigration Centre.

19. Mr. Singh's parents are both deceased. Mr. Singh has a brother in Japan, a brother in India (with whom Mr. Singh has lost contact) and a sister in Canada.

20. Ms. Kaur is gainfully employed and self-sufficient.

21. Ms. Kaur has a brother in India. Ms. Kaur's sister was granted unconditional stay in Hong Kong in 2003. Ms. Kaur's mother came to Hong Kong in 2000 and has been permitted to remain here until 12 April 2005. Otherwise, Ms. Kaur's father and her siblings and their families live in Hong Kong, where they are all permanent residents.

22. Mr. Singh says that, if deported back to India, having little job prospect and owning no property there, he will have no option but to live in his mother-in-law's home in Minian Village. He will thus be very close to his attackers (including Mr. Avtar Singh). Mr. Singh believes that his life would then be under serious and constant threat from revenge attacks.

23. A memo dated 7 January 2005 to the PSS setting out the factors for and against a deportation order contained the following summary:

**“Further recommendation**

32. After having considered all the circumstances of the case, I would like to draw your attention to the following mitigating factors against Mr. Smith's deportation:-

(a) he has strong family connections in Hong Kong. His immediate family members, namely his wife and daughter (aged about 6 years), are HKPRs. He has no connection in India. Though he has a brother in India, he claimed that they have no connection with each other;

(b) Mr. Singh's wife, Madam Kaur has resided in Hong Kong since 1992. She has been employed by her present employer since 1993;

(c) Mr. Singh's daughter was born in Hong Kong. She is studying in Hong Kong. Madam Kaur claimed that her daughter had health problems, namely diarrhoea, where she was staying in India;

(d) all of Madam Kaur's own family members, including her parents, siblings, siblings-in-law and nephew, are in Hong Kong. In fact she and her daughter are living with her parents;

(e) Madam Kaur has been long established in Hong Kong. She may encounter considerable hardship if she, together with her daughter, follows Mr. Singh to return to India. Besides, Madam Kaur indicated that she did not wish to return to India;

(f) Madam Kaur claimed that she and her daughter were threatened by the victim's family in India;

(g) the victim's husband (Mr. Avtar SINGH) involved in the wounding case of which Mr. Singh was seriously injured. According to the Indian Police Authority, Mr. Avtar SINGH is residing in his home village in India. Mr. Singh and his family considered that Mr. Avtar SINGH was a potent threat to Mr. Singh; and

(h) this was Mr. Singh's first time conviction.

33. On the other hand, the following factors concerning the enforcement of immigration control are noted:-

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- (a) Mr. Singh was sentenced to 4 years and 6 months' imprisonment by the Court of First Instance. Upon review of sentence, **his sentence was increased to 8 years and 6 months' imprisonment by the Court of Appeal;**
- (b) the nature and gravity of Mr. Singh's present conviction is very serious. Rape is an offence which is repugnant to the generally accepted standards of morality that the continued presence of the offender in the community would not be acceptable, irrespective of a propensity to commit further offences in a similar character;
- (c) Mr. Singh was arrested for the offence of rape in February 1998, i.e. about 1 year after he arrived in Hong Kong and 8 months after he was granted dependent status, and was sentenced to custodial punishment in June 1999. Before his imprisonment, he had resided in Hong Kong for about 27 months. Mr. Singh himself had not ordinarily resided in Hong Kong for a long period of time;
- (d) Mr. Singh promised to behave well after his release from prison. The risk of re-offending may be low. However, we cannot rebut the fact that in general psychological impact on victims of rape cases, even on their family members, is serious and long-lasting. Our society cannot afford to give a chance to Mr. Singh; and
- (e) on balance, the interference with Mr. Singh's family life and the potential threat to Mr. Singh in India resulted from personal conflicts should not outweigh the need to prevent disorder and to protect Hong Kong and its residents."

### *III. Discussion*

24. The PSS made the deportation order pursuant to Immigration Ordinance (Cap. 115) (IO) s. 20(1). That provides:

"The Governor may make a deportation order against an immigrant if:-

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- (a) the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than 2 years; or
- (b) the Governor deems it to be conducive to the public good.”

25. An immigrant is defined by IO s. 2(1) as “a person who is not a Hong Kong permanent resident”. Mr. Singh is an immigrant as so defined. The Chief Executive has delegated his power under IO s. 20(1) to the PSS. Rape is an offence of the nature described in IO s. 20(1)(a).

26. I accept that as a result of the attack on him Mr. Singh’s capacity to take on future employment as a construction worker, farm hand or auto mechanic has been severely constrained. His family’s economic circumstances are such that he has no real option other than to live for the time being in his mother-in-law’s home in Minian Village if deported to India.

27. Ms. Chung (appearing for the PSS) faintly suggests that Mr. Singh may have unidentified relatives living in India outside of Minian Village.

28. She relies for this submission on a letter dated 8 March 2000 from Ms. Kaur to the Government. That letter states:

- “(1) Singh Sukhmander’s mother, brothers, sister are all in India.
- (2) They are staying with relatives except the elder brother who is married staying with his own family.
- (3) Since his mother got tumour which is inoperable she wants to stay in India. Therefore the younger brother and sister has to stay there to take care of her.”



29. I do not find the letter helpful. It describes the situation in 2000 long before Mr. Singh's mother died in December 2000. It is evident that matters have moved on considerably between the time when the letter was written and January 2005 when the deportation order was made. After the death of Mr. Singh's mother, Mr. Singh's siblings have dispersed. It does not seem that the immediate family maintains a home in the Punjab or elsewhere in India. No relative (whether near or distant) having a home in India has been identified in the evidence.

30. In my view, the threat to Mr. Singh's life if he returns to Minian Village is credible and serious. This is demonstrated by 2 facts. First, Mr. Singh has already been savagely attacked once. Second, 2 of his attackers have fled the jurisdiction to escape the reach of Hong Kong law. Plainly, they show no remorse for what they have done and it must be assumed that they are prepared to inflict more violence.

31. In *Singh and others v. Secretary for Security and another* (1996) 6 HKPLR 440 (at 450C) Keith J described the PSS' duty in respect of deportation orders as follows:

“[T]he making of a deportation order involves striking a balance between the threat which is posed by the potential deportee's continued presence in Hong Kong, and the hardship which deportation would cause to him and innocent third parties.”

32. On the Court's approach where there is a threat to a person's life on deportation, I am guided by the principles in *Secretary for Security v. Sakthevel Prabakar* (2004) 7 HKCFAR 187. That was a case involving

a deportation order against a Sri Lankan applicant claiming refugee status.  
The latter alleged that he would be tortured if deported.

33. Li CJ (with whom Chan and Ribeiro PJJ and Lord Millett NPJ  
agreed) stated (at paragraphs 44-45):

“Here, the context is the exercise of the power to deport. The determination of the potential deportee’s torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such determination.

It is for the Secretary to make such a determination. The courts should not usurp that official’s responsibility. But having regard to the gravity of what is at stake, the courts will on judicial review subject the Secretary’s determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met. R v. Home Secretary, ex p. Bugdaycay [1987] 1 AC 514 at p.531E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully.”

34. Bokhary PJ was even more forthright. He said (at paragraph  
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“So the physical danger involved in this case was the violation of a person’s right not to be tortured. Some rights are non-derogable under any circumstances. They form the irreducible core of human rights. The right not to be tortured is one of these non-derogable rights. Great indeed, therefore, were the demands of procedural fairness in this case.”

35. There are 2 possible distinguishing features between the  
present case and *Prabakar*.

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36. First, this case does not involve torture. Nonetheless, there is here a serious threat (already once carried out) to Mr. Singh’s person.

37. Second, in *Prabakar* the applicant belonged to the Tamil Tigers. He fled from Sri Lanka to Canada. He then attempted to enter Hong Kong on a forged Canadian passport. He was arrested here and served 2 years’ imprisonment for possessing the forged passport. It is arguable that in Mr. Singh’s case the offence committed was more serious as demonstrated by the longer sentence of 8½ years imposed by the Court of Appeal.

38. But I do not find the features identified compelling as distinctions. If one takes the CFA’s dicta to heart, it seems to me that, where life and limb are at stake, the Court’s scrutiny of a deportation order should not be any less rigorous or anxious in the case of a convicted person. Even an offender, however reprehensible his crime, is entitled to respect for his life and dignity as a human being. To use the words of Bokhary PJ, respect for a person’s life is non-derogable.

39. At the forefront of her case, Ms. Panesar (appearing for Mr. Singh) submits that the PSS’ decisions were irrational. She says that the PSS has not taken sufficient account of the real risk to Mr. Singh’s life if he were deported and compelled by economic circumstance to live in Minian Village close to his attackers.

40. Ms. Chung suggests the opposite in relation to the PSS. In particular, she points to the PSS’ affirmation evidence where the PSS

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states the factors which he took into account. Those factors largely repeat (with minor variation) the paragraphs of the 7 January 2005 memo quoted above.

41. In his evidence, the PSS rightly observes that a conviction for rape is serious, even if only a first offence. The crime is repugnant to generally accepted moral standards in Hong Kong. In this case, there were aggravating features as noted by the Court of Appeal. Nor can the psychological impact on the victim and her family be overlooked. The trauma of rape is inevitably deep and long-lasting.

42. But against these undoubtedly relevant factors, how did the PSS evaluate the potential threat to Mr. Singh’s life if deported?

43. In his 1st Affirmation, the PSS says this (in language echoing the 7 January 2005 memo):

“The interference with the Applicant’s family in Hong Kong and the potential threat to the Applicant in India should not outweigh the need to protect law and order in Hong Kong and the interest of Hong Kong residents.”

44. In his 2nd Affirmation, the PSS says this:

“In making the deportation order against the Applicant or in considering the request for its rescission, I had already considered the threat to the Applicant’s personal safety and that of his family in India as alleged at the time. The information provided in the 3rd Affirmation of the Applicant does not alter the substance of the representations which he made himself or through his solicitors or family over a 5 years’ period. On the basis that the court grants leave to the Applicant to adduce the 3rd Affirmation in the resent proceedings, I note that the Applicant claimed that if deported, he would be forced to live at the village home of his mother-in-law in Minian where the

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husband of the victim resides with the victim and the rest of his family. In this connection, I also note the following:-

- (a) The Applicant was born and grew up in the village of Takhanwadh in Punjab.
- (b) The Applicant has spent almost 26 years in India whereas he has only lived in Hong Kong for about 27 months prior to his imprisonment.
- (c) The wife of the Applicant would support him financially if he is deported. It is also clear that the Applicant's extended family are willing to support him.
- (d) From their movement records, the wife and daughter of the Applicant spent about one month away from Hong Kong each year for the years 2001, 2002 and 2004. As I note that the Applicant's daughter had been to India previously, the trips, or some of the trips, were apparently to India where the alleged threat existed. ...
- (e) From Mr. Gurdev Singh's (the Applicant's father-in-law) letter of 12 October 1998 ..., the threatening calls were received both at the father-in-law's residence in Hong Kong and at his mother's residence in India. Hence, the threats were received both in Hong Kong and India. Any risk of attack exists both in Hong Kong and India.
- (f) One of the assailants has been released from prison and from his movement records, he is still in Hong Kong.
- (g) The Director of Immigration would inform the consulate of India in Hong Kong of the Applicant's return and alleged threat when he returns to India and would ask them to provide whatever assistance they think appropriate to the Applicant. Being an Indian national, the Applicant may always resort to the Indian authorities for protection of his personal safety. The Indian police in the same district of the village of the victim's husband are aware of the conflict between the Applicant and the victim's husband.

In the circumstances, I have weighed the above considerations in the light of the further information provided by the Applicant in his 3rd Affirmation and all the previous representations. I also took into account the factors which were set out in my affirmation filed in these proceedings on 2 August 2005. I remain of the view that a deportation order should be made against the Applicant and the order should not be rescinded."

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45. I have difficulty in following the PSS’ reasoning.

46. The passage which I have quoted from his 1st Affirmation simply restates the exercise to be conducted. The factors pointing to deportation should be weighed against the potential threat to Mr. Singh’s life if deported. The PSS says that the latter element “should not outweigh” the former. But he does not articulate why.

47. This is troubling when according to the 7 January 2005 memo, in the Government’s own assessment, the risk that Mr. Singh will re-offend is most likely “low”. Given a low risk of re-offending, how precisely does the need “to protect law and order in Hong Kong and the interest of Hong Kong residents” in the future “outweigh” threat to Mr. Singh’s life? There is only an assertion that such is the case.

48. Ms. Chung submits that the reference to the low risk of re-offending were the words of the author of the 7 January 2005 memo, not of the PSS. But there is no evidence that the PSS thought otherwise. Indeed, the PSS’ initialising of the memo without significant comment suggests that, in coming to his decision to deport, the PSS fully endorsed the contents (including the reasoning) of the memo.

49. In his 2nd Affirmation, the PSS attempts to flesh out his reasoning. But the rationale provided there is far from cogent or persuasive.

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50. Points (a) to (d) in the passage quoted from the 2nd Affirmation do not answer the question why the real threat to Mr. Singh's life is counter-balanced.

51. That Mr. Singh grew up in the Punjab and that his wife or extended family can support him financially do not seem relevant in addressing the problem of neutralising the present threat to Mr. Singh's life. Prior to 1997, when Mr. Singh lived in India, there was no threat to his life. As for the resources of Mr Singh's wife and others, there is no evidence that the family or extended family can presently afford any other alternative to Mr. Singh living in Minian Village.

52. It is hard to understand why the mere fact that Ms. Kaur and her daughter travelled to India in 2001, 2002 and 2004 shows that the threat can be disregarded. India is a large country. It is unclear from the evidence whether Ms. Kaur and her daughter visited Minian Village during their visits to India. But assume that they did. How does that render the threat to the life of Mr. Singh the offender (as opposed to his wife and daughter) any less credible or real? Ms. Panesar also points out that it is only relatively recently in 2004 that Mr. Avtar Singh settled in India from Japan.

53. Point (e) in the quoted passage is also unconvincing. There may be a risk of attack both in India and Hong Kong. The issue is whether there is appreciably less risk in one place than the other. It seems to me that, if Mr. Singh lives in the same small village as his would-be attackers, there would plainly be greater risk, than if he remained in the large city of

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Hong Kong. Mr. Singh by his mere presence, living side by side with his attackers (especially the victim's husband), would be like holding a red rag to a bull. On the other hand, the geographical distance between Hong Kong and the Punjab, would be such as to dampen provocation and the risk of attack.

54. Point (f) is beside the point. The assailant who was convicted may now be at liberty in Hong Kong, having served his sentence here. In contrast to Mr. Avtar Singh who lives in India, the freed assailant is obviously only a henchman, not an instigator. I do not see how the henchman's presence here neutralises the threat posed by 3 of the assailants, including the husband of the victim, living in Minian Village.

55. Point (g) again does not address the pertinent issue. Assume that the Indian consulate and the Indian police in Minian Village are informed. Even with the best will in the world, what exactly are the Indian police supposed to do to prevent a threat to Mr. Singh's life from materialising?

56. It would be surprising if they were to provide Mr. Singh with 24-hour bodyguards. There is no suggestion in the evidence that they are prepared or able to do so. But short of such security, how is Mr. Singh actually to be protected, apart possibly from limited spot checks coupled with warnings to his would-be assailants to behave themselves? How likely is it that the attackers would heed any such warnings when 2 of them have already shown contempt for Hong Kong laws and become fugitives from here?



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57. If a fatal attack does occur, it would be cold comfort to say that anyway the Indian police should have a good idea who the culprits are and can act swiftly to arrest them. That would be bolting the stable doors after the horses have left.

58. It consequently does not seem to me that the PSS rigorously weighed the factors for and against deportation, in light of the serious threat to Mr. Singh's. In my judgment, in the exceptional circumstances of this case, especially given the threat to life and the likely low risk of re-offending, the only reasonable decision would have been to allow Mr. Singh to remain in Hong Kong on compassionate grounds.

59. Ms. Panesar raised other grounds in support of Mr. Singh's judicial review. In light of the foregoing discussion, I need not deal with those other grounds. I only state that I have not found those other grounds of much substance.

#### *IV. Conclusion*

60. The PSS' decisions are quashed. I will hear the parties on consequential orders and costs.

61. The practical effect of my Judgment is that Mr. Singh can return to normal life in Hong Kong. My decision should not be taken in any way to mean that Hong Kong society condones the heinous crime that he has committed. It does not condone the crime. On the contrary, the circumstances of the rape were abhorrent. The aggravating factors render Mr. Singh's offence all the more repulsive.

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62. Mr. Singh should reflect carefully on the profound agony and pain that his crime has inflicted not just on the victim and her family, but also on himself and his immediate family. Mr. Singh has said on affirmation that he is deeply remorseful and sincerely undertakes to be law-abiding and upright for the rest of his life. The Court takes him at his word. It hopes he will adhere to it.

(A. T. Reyes)  
Judge of the Court of First Instance  
High Court

Ms. M. Panesar, instructed by Messrs. B. Manek & Co., for the Applicant.  
Ms. Ada Chung, DPGC of the Department of Justice, for the Respondents.