HCAL 77/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 77 OF 2015

BETWEEN

SA — Applicant

and

TORTURE CLAIMS APPEAL BOARD — 1st Putative Respondent
THE DIRECTOR OF IMMIGRATION — 2nd Putative Respondent
THE SECRETARY FOR SECURITY — 3rd Putative Respondent

Before: M Poon J in Court
Date of Hearing: 20 August 2015
Date of Judgment: 14 September 2015

J U D G M E N T

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1. This is an application for leave to apply for judicial review against the decision of the Torture Claim Appeal Board (hereinafter called the Board), the Director of Immigration (hereinafter called the Director) and the Secretary for Security for dismissing the claim of the applicant made

under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

BACKGROUND

2. The applicant is a Pakistan national now 42 years of age.

3. He arrived in Hong Kong on 25 October 1997 and was given permission to stay until 25 January 1998. He overstayed until 2006 when he made a Refugee claim. That claim was dismissed in 2007.

4. On 13 July 2007 he made a Non-refoulement claim to the Immigration Department (torture claim). He alleged that when he was still in college he joined a political organization called ATI. He and his friends were bullied and harassed by members from another political organisation (MSF) when one day his friend shot and injured one member from MSF. He said that his friends all fled and he was left behind, was assaulted by those from MSF, and that the Satellite Town Police had acquiesced, detained and tortured him. After his release from police custody he went to Lahore to stay away for 4 months. Upon his return to Gujranwala, there were further incidents of torture which caused him to make a report to the police but the police refused to record the complaint. Thereafter he had to leave Gujranwala for Rawalpindi, then fled to Sri Lanka and to Hong Kong.

5. The torture claim was rejected by the Director on 30 November 2012. His petition to the Board was heard on 9 April 2013 and was dismissed on 26 July 2013.

6. On 8 August 2013 the applicant applied for legal aid. His application was refused on 17 March 2014. He lodged an appeal against that decision, and after a hearing before a Master, legal aid was eventually granted to him on 13 January 2015.

7. The Notice of Application (Form 86) for leave for judicial review was filed on 21 May 2015. By then 22 months have elapsed since the dismissal of his claim by the Board. The applicant now applies for an extension of time on grounds that there are good reasons for extending the 3 months time limit under O 53 r 4.

SUBMISSION

The applicant

8. At the hearing, the applicant was represented by Miss Margaret Ng of Counsel. The decisions of the Director and the Board are challenged on similar grounds:

(1) No reasonable basis for rejecting the applicant's credibility;

(2) Failure to consider the extended form of state acquiescence;

(3) Failure to fully consider the COI reports in assessing risk to the applicant if refouled; and

(4) No proper basis for consideration of internal relocation.

The 2nd and 3rd putative respondents

9. Miss Bethany Choi, Senior Government Counsel, opposed the application on the following grounds:

(1) There has been substantial delay and the applicant failed to show good reasons. Delay caused by application for legal aid has already been shown in many cases as not constituting good reasons;

(2) If leave for judicial review is granted it is prejudicial to the good administration of the Immigration Department; and

(3) Since the processing of the applicant's non-refoulement claim on the basis of the CIDTP and persecution claims is at foot, the intended judicial review serves no useful purpose.

10. Further or in the alternative, since the case of *AW v Secretary for Security & Ors*, CACV 63/2015 which dealt with similar issues, would be heard in October 2015, it is submitted that the present application should be adjourned pending the outcome of that.

Delay

11. Counsel for the applicant agrees that there has been a substantial delay in the filing of the Notice of application for leave to judicial review from the Board decision. Counsel, however, submitted that there are good reasons for an extension of time to be granted after the 22 months delay. A chronology of events explaining the delay was set out as follows:

(1) Applicant applied for legal aid on 8 August 2013;

(2) Further submissions were made to DLA on 4 September 2013;

(3) Legal aid was refused on 17 March 2014;

(4) Notice of appeal against the decision of refusal of legal aid was filed on 26 March 2014;

(5) Appeal was heard before Master Hui and was allowed with condition to review audio-record of oral hearing on 18 December 2015;

(6) Legal Aid certificate was issued on 13 January 2015;

(7) Counsel was assigned on 16 February 2015;

(8) Audio-record was reviewed with merits of proceedings confirmed on 10 March 2015; and

(9) Form 86 was filed on 21 May 2015.

12. The chronology compiled by Legal Aid Department supplemented and supported the above whilst showing details of the processing of the application. Miss Ng submitted that the delay was due to the lengthy process of legal aid application and the applicant had all along been diligently pursuing his legal aid application.

13. Time and again, the courts have insisted in the promptitude in the applications for leave to apply for judicial reviews. Such leave applications shall be made not later than 3 months from the date of the challenged decision, O 53, r 4(1) of the Rules of the High Court (Cap 4A). The court may on the basis of inordinate and inexcusable delay grant leave unless the applicant can demonstrate good reason.

14. Hartman J (as he then was) said in *Law Chun Loy v Secretary for Justice*, HCAL 13/2005:

> "13. . . . 'sleep on your rights and, even if your cause is meritious, you may find the gates locked against you'."

15. Hartman J was of the view that the applicant in that case must bear personal responsibility for at least five months out of the some 14 months delay, but added that:

> "33. . . . even if the applicant was not found to be at fault for any portion of the delay, in the present case, in my view, it is plain that an overall delay of some 14 months was detrimental to good administration."

16. In *X v Torture Claims Appeal Board and Director of Immigration*, HCAL 143/2013, Zervos J said:

> "12. . . . Where the delay is inordinate and inexcusable a court is likely to refuse to extend time. The onus is on the claimant to show that there is 'good reason' for extending time for applying for judicial review. This essentially means that it is too late to deal with the matter because it is likely to have adverse consequence to good administration but this depends on the gravity of what is at stake and an appropriate assessment of likelihood of the consequence being adverse to good administration.
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> 13. . . . Much depends on the particular facts and circumstances of the case as to whether there is good reason to extend time, although key considerations would include the nature of the interest at stake and the significance of the issue in relation to it, and the import that a judicial review would have in resolving the dispute in relation to the issue in question."

Detriment to good administration

17. What is or is not detrimental to good administration must depend on the circumstances of each individual case.

18. In the present case, the applicant made his CAT claim as early as 13 July 2007. The screening of his CAT claim was suspended due to the decision in *FB & Ors v Director of Immigration & Anor* [2009] 2 HKLRD, and resumed in June 2010. After the appeal against the decision of the Director was dismissed by the Board on 26 July 2013, duty lawyer

acting for the applicant raised with the Director that the applicant's non-refoulment claim be screened on grounds of CIDPT and/or persecution risks on 15 August 2013.

19. The USM was implemented on 3 March 2014. The applicant was subsequently informed that he would be screened under those two grounds. After filing Form 86 against the dismissal of his CAT claim, the applicant attended a briefing session at the Immigration Department, and he returned a completed Supplementary Claim Form on 8 July 2015. It is thus clear that the screening on grounds of CIDPT and/or persecution risks is underway. In the correspondence, it has been made clear to the applicant that this screening would be handled by another officer and not the one who had refused his CAT claim, and that no reference will be made to the refusal decision of his CAT claim.

20. Miss Ng stressed that the USM itself does not replace this judicial review, because should this judicial review be successful, there will hopefully be an order of the court to remit the claim back to the Board, with an order for the Board to take accordance of the court's judgment. Thus, the Board, when reconsidering the claim, can reverse the decision of the Director, rendering the USM nugatory.

21. In *Re RI*, HCMP 3295/2013, the Court of Appeal, faced with a situation not dissimilar to the present, said that:

> "8. There is no suggestion that the applicant is barred from submitting his CIDTP claim or Refugee claim to the Director for consideration under the USM (which has come into operation since March 2014). Nor is there any suggestion that he is subject to any risk of removal pending the processing of these claims.

> 9. Thus, the position we have is that there has not been any substantive determination of the CIDPT claim and the refugee claim by the Director. In these circumstances, we cannot see any reason why the applicant should not be required to have his claims determined under the USM before the court entertains any application for judicial review regarding the same. . . .
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> 10. . . . in the absence of a determination by the primary decision-maker when it is possible for an applicant to submit his or her CIDTP claim and/or Refugee claim to that decision-maker for consideration, it is pre-mature for the court to entertain such claims by way of judicial review. To allow such claims to be advanced in the absence of a primary decision is to arrogate the court to the role of a primary decision-maker. This is not the proper role of the court in an application for judicial review."

22. The Court of Appeal in refusing to grant leave to appeal to the Court of Final Appeal in *RI*, said:

> "6. In any event, we refused to extend time mainly because the substantive merits of the applicant's case in terms of his fear of persecution or risk of safety to his person should properly be canvassed in his USM proceeding which, we were told, were on foot . . . Even if the applicant were successful on his intended challenge based on the refusal of the adjudicator to grant him any oral hearing, it would only end up with an order of mandamus directing the adjudicator to hear the matter afresh with an oral hearing. But he can already have the merits of his claims hear by, first the Director, and on a petition by an adjudicator, in the USM proceedings. If he fails in the USM proceedings, it is difficult to see how he could succeed in his CAT claim. Viewed thus, the challenge based on the lack of oral hearing in the context of state involvement or acquiescence is a matter of little moment."

23. By the same token, the present judicial review serves no meaningful purpose for the following reasons. The venue to make his claim to the primary decision-maker has not been exhausted. He is still entitled to be screened under in the USM proceedings. The issue of torture can be canvassed again under the CIDPT claim since there is no need to establish any form of state acquiescence. So, given that wider scope, should the applicant fail under those claims, his chance of success in his

CAT claim would be tenuous. In any event, should the future screening fails, he still has his channel for redress by appealing to the Board and then taking out judicial review proceedings.

24. Having the same primary decision-maker deciding again what he is already entitled to under the new USM scheme is definitely detriment to good administration.

25. That said, what is at stake to the applicant should leave be refused in this application is minimal. I am not persuaded that there are good reasons for extension of time. I am not going to deal with the merits of this application. The application for leave to apply for judicial review is refused.

(M Poon)
Judge of the Court of First Instance
High Court

Ms Margaret Ng, Counsel instructed by Daly & Associates, for the applicant

Ms Bethany Choi, Senior Government Counsel of the Department of Justice, for the putative respondents