



Summary of Judicial Decision

**ZN (“the Applicant”) v Secretary for Justice, Director of Immigration,
Commissioner of Police and Commissioner for Labour (collectively as “the
Respondents”)
CACV 14/17; [2018] HKCA 473**

Decision : **The Respondents’ Appeal allowed in part
(see paragraphs 6-9 below)**

Date of Hearing : **8 – 9 May 2018**

Date of Judgment/Decision : **2 August 2018**

Background

1. The Applicant was a Pakistani who was brought to Hong Kong to work as a foreign domestic helper (“FDH”) between 2007 and 2010. The Applicant alleged that whilst working as a FDH, he had to work long hours, his salary was withheld and he was subject to assaults and threats by his employer. Even when the Applicant returned from Pakistan to Hong Kong in 2012, he continued to be subject to threats from his former employer when he remained in Hong Kong between 2012 and 2015. He had approached the relevant authorities for assistance during 2012 to 2015 but to no avail.
2. The Applicant applied for judicial review alleging that he was a victim of human trafficking for forced labour, that the relevant authorities failed to address his situation, both at the time when he was a victim and later when he sought redress for the ill treatment inflicted by his former employer, and that the said failure was due to a lack of legislative and administrative measures to prohibit and penalise the conduct outlawed under Article 4 of the Hong Kong Bill of Rights (“BOR4”).
3. By judgment of 23 December 2016, the Court of First Instance (“CFI”) allowed the Applicant’s application for judicial review and held that (i) the Applicant was a victim of human trafficking for forced labour, or forced labour; and (ii) the Applicant was denied protection under BOR4 which was due to the failure of the Government to fulfil its obligations under BOR4. The question of relief and damages was directed to be heard separately. (full text of the CFI judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=107415&QS=%2B&TP=JU).
4. The Respondents appealed to the Court of Appeal (“CA”) against the CFI’s judgment. The Applicant filed a Respondent’s Notice seeking to affirm the CFI’s judgment on the additional or alternative ground that the Government is under a duty to criminalise the exaction of forced labour by reason of Article 25 of the



Forced Labour Convention, 1930 (No. 29) (“Forced Labour Convention”). By judgment of 2 August 2018, CA allowed the Respondents’ appeal in part.

Issues in dispute

5. The key issues in dispute are:-

- (i) what is the scope of protection under BOR4, that is, whether BOR4 covers not only forced labour, but also human trafficking for forced labour;
- (ii) whether the Applicant was a victim of forced labour;
- (iii) whether BOR4 entails a positive obligation on the part of the Government to enact a specific criminal offence to combat forced labour, and whether the Government is in breach of its positive duties under BOR4 by not enacting a specific criminal offence to combat forced labour; and
- (iv) whether the Government has breached its investigative duty under BOR4 in relation to the complaints made by the Applicant.

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

(full text of the CA judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=116661&QS=%2B&TP=JU)

6. On issue (i), CA held that, having regard to the drafting history of BOR4 and of article 8 of the ICCPR (which is domesticated by BOR4) and having regard to the contemporary situation in Hong Kong as well as the relevant international developments, the proper construction of BOR4 is that it only covers the prohibition of slavery (and the slave trade in all their forms), servitude, and forced or compulsory labour, but not human trafficking for forced labour. In arriving at the above finding, CA accepted the approach of construing BOR4 as a living instrument but rejected the Applicant’s expansive interpretation of BOR4. In particular, CA took the view that the jurisprudence from the European Court of Human Rights is of little value in construing BOR4 in view of the differences in the relevant domestic and international settings including the fact that the “Palermo Protocol” does not apply to Hong Kong;¹ and that the evidence and material adduced did not persuade CA that there is a real need in the contemporary position in Hong Kong to warrant the adoption of an expansive interpretation of BOR4 to cover human trafficking for forced labour within its

¹ The long form of the “Palermo Protocol” is the “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime”. It imposes various obligations on state parties to take positive and concrete actions to combat human trafficking. It is binding on almost all member states to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 on which the European jurisprudence is based. While the People’s Republic of China (“PRC”) is a signatory to the Palermo Protocol, by a declaration made by the PRC, it does not apply to the Hong Kong SAR. (paragraph 10)



scope. That said, CA added that the scope of application of BOR4 may change according to the changes in the needs to combat forced labour for human trafficking and changes in the relevant international scene. (paragraphs 65 - 132)

7. On issue (ii), CA held that the Applicant was a victim of forced labour.² CA took the view that there must be a causal connection between the menace of a penalty and the performance of forced labour, and that the menace of a penalty played a material part in the Applicant's remaining in this employment. (paragraphs 133 - 151)
8. On issue (iii),
 - CA noted that the Government accepts that BOR4 carries positive duties on the part of the Government to combat forced labour. The question is therefore whether the Government has a positive obligation to enact legislation for specific offence of human trafficking. CA held that there is no absolute obligation under BOR4 to enact specific legislation to combat forced labour and thus the Government is not in breach of its positive duties under BOR4 by not enacting a specific criminal offence to combat forced labour. CA considered that given these are serious obligations, it does not follow that the only possible way to discharge those duties is to have a specific criminal offence to penalize forced labour, and instead, a suitable degree of margin of appreciation must be accorded to the Government.
 - In the present case, CA held that the Government failed in its investigative duty under BOR4 in relation to the complaints of the Applicant (see paragraph 9 below). In this regard, CA held that the lack of effective protection was only due to inadequate investigation caused by a lack of training on BOR4 issues and a central coordination within the Government, not the absence of specific criminal offence. While noting that the Government has already put in place more sophisticated efforts to strengthen protection for potential victims of BOR 4, CA remarked that it remains to be seen whether these measures, without specific criminal legislation, are sufficient protection, and the Government has to act fast lest there be many other cases brought before the courts to make the courts come to the ultimate conclusion that enactment of specific criminal law is the only way out. (paragraphs 152 – 188, 220)
9. On issues (iv), CA held that the Government failed in its investigative duty under BOR4 in relation to the complaints of the Applicant on the facts as found by CFI.

² CA adopted the definition of forced labour in Article 2(1) of the Forced Labour Convention as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." (paragraph 134)



In arriving at this finding, CA emphasized that it is a positive duty on the part of the Government to carry out investigation once it is aware, or ought to be aware, of circumstances giving rise to a credible suspicion of the risk of an identified individual being required to perform forced labour within the meaning of BOR4. (paragraphs 189 - 196)

Civil Division
Department of Justice

August 2018