Summary of Judgment

CB ("Applicant") v Commissioner of Police & Secretary for Justice ("Respondents")
CACV 208/2022, [2024] HKCA 172

Decision	:	**Respondents' appeal partially allowed**
Date of Hearing	:	**31 August 2023**
Date of Decision	:	**22 February 2024**

Background

1. This is the Respondents' appeal before the Court of Appeal ("**CA**") in relation to the Judgment dated 22 April 2022 before the Court of First Instance ("**CFI Judgment**"), whereby it was ordered *inter alia* that:-
   (a) The decisions that the Applicant was not a victim of trafficking in persons ("**TIP**") or forced labour be quashed;
   (b) There be a declaration that the failures as regards the investigation as to whether the Applicant was a victim of TIP and/or forced labour in this case were causally connected to the absence of specific legislation criminalising forced labour.

2. The Applicant is a Philippine national who worked in Hong Kong as a foreign domestic helper ("**FDH**"). She sought leave to apply for judicial review to challenge the failure of the Commissioner of Police ("**Commissioner**") to provide her with practical and effective protection against forced labour under BOR4, and to screen her in as a victim of forced labour and TIP. She also challenged that such alleged failures were caused by the lack of a bespoke offence criminalising forced labour.

3. On her factual claim, the Applicant was recruited in Hong Kong to work as a FDH for Z since September 2018, replacing Z's former FDH. From September 2018 to April 2019, the Applicant was subject to various forms of sexual abuse/exploitation by Z. In December 2019, the Applicant reported the sexual abuses to the Police. The ensuing investigation led to the prosecution of Z, and his conviction, on two charges of indecent assault. Upon screening conducted by the Police, the Applicant was found not to be a victim of TIP or forced labour.

4. The legal basis for protection against TIP is solely a matter of policy, as the Palermo Protocol[1] is not applicable to Hong Kong. On the other hand, the right for protection against forced labour is grounded in Article 4(3) of the Hong Kong Bill of Rights ("**BOR 4**").

5. The Government has adopted policies and strategies to combat TIP the definition of which is adopted from the Palermo Protocol. In terms of victim identification, investigation and prosecution, and protection of victims, there was a set of inter-departmental guidelines first published in 2016 and revised in March 2019 by a steering committee headed by the Chief Secretary for Administration, and an "Action Plan to Tackle TIP and to Enhance Protection of FDHs in Hong Kong" published in March 2018.

<u>**Issues in dispute**</u>

6. The plank of the Applicant's grounds for judicial review is that the Commissioner failed to conduct an effective investigation on both TIP and forced labour. She also argues that the investigative failure was a result of the absence of a bespoke offence criminalising forced labour.

7. In the CFI Judgment, it was decided *inter alia* that:-
   (a) On TIP, there had been a complete failure by the Commissioner to take into account various matters which, had they been taken into account, no rational decision-maker would have concluded that there was not at least credible suspicion that the recruitment of the Applicant was precisely for the purpose of sexual exploitation;
   (b) On forced labour, one of its constitutive elements namely "menace of penalty" was established at least on the credible suspicion threshold, and that to decide otherwise was perverse.
   (c) As to the issue of whether the breach of the BOR 4 investigative duties in relation to the Applicant was attributable to the lack of specific legislation criminalising forced labour, the failures as regards the investigation as to

[1] Palermo Protocol, which is an instrument adopted by the United Nations ("UN") to supplement the 2000 Convention against Transnational Organized Crime. The protocol was adopted to prevent, suppress and punish TIP.

whether the Applicant was a victim of TIP and/or forced labour were causally connected to the absence of specific legislation criminalising forced labour.

8. On this appeal, the Respondents contended:-
   (a) Taking the Applicant's case at its highest, she cannot properly be classified as a victim of TIP or forced labour. In other words, the Commissioner was not under a duty to investigate the same. CFI erred in refusing to engage with this threshold question ("**Threshold Ground**");
   (b) On the footing that an investigative duty did arise, CFI erred in concluding that the Respondents had failed in their positive obligations to conduct an effective investigation into TIP and forced labour in relation to the Applicant. The Commissioner did duly assess the Applicant's case and properly concluded that she was not a victim of TIP and forced labour, and CFI failed to afford a wide margin of deference to the investigative steps taken ("**Effective Investigation Ground**");
   (c) CFI was wrong to conclude that the breach of BOR 4 duties on the part of the Respondents was causally connected with the absence of specific legislation criminalising forced labour and that there was a need for a specific offence against forced labour ("**No Causal Connection Ground**").

<u>Department of Justice's Summary of the Court's rulings</u>
(Full text of CA's judgment at
https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2022/CACV000208_2022.docx)

<u>Threshold Ground</u>

9. According to *ZN v Secretary for Justice* [2018] 3 HKLRD 778 (CA), the applicable standard in assessing whether there are duties to investigate is one of credible suspicion. A positive duty arises 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 that an identified individual has been, or is at real and immediate risk of being, required to perform forced or compulsory labour within the meaning of BOR 4. The same approach should be taken in assessing the applicability of the policies relating to TIP: §79.

10. On the proper construction of the Government's policy, there is no question of giving any administrative decision-maker any margin of discretion. On that basis, and after considering various international instruments, CA rejected the Respondents' argument that the definition of "sexual exploitation" under TIP is limited to exploitation for commercial gains. The purpose of using another person for one's own sexual gratification, without any intended economic or commercial gain, can amount to a "purpose of exploitation" within the definition of TIP: §§81-89.

11. Therefore, CA rejected the Respondents' argument that taken at their highest, the Applicant's allegations did not disclose a possible case of TIP. On the facts, there was at least a credible suspicion that the Applicant was recruited by Z by prohibited means (namely deception) for the purpose of sexual exploitation: §§90-94.

12. As to forced labour, it is common ground that for there to be forced labour, work or service must have been exacted "under the menace of any penalty". There must be a causal connection between the menace of penalty and the performance of the work in question. CA disagreed with the Respondents that there was no menace of penalty. The concept of menace of penalty has been interpreted generously and is context-specific. In the Applicant's case, the vulnerabilities of FDHs arising from their employment conditions in Hong Kong had to be taken into account. On the facts, the Applicant could establish menace of penalty to the credible suspicion standard: §§96-102.

Effective Investigation Ground

13. CA agreed with the Respondents on the distinction between the roles of law enforcement officers and the courts respectively. Subject to the usual restraints in public law, the court should accord law enforcement officers a wide margin of discretion. It is for the officers to judge what investigative steps are to be taken and whether there is sufficient evidence to charge a suspect or refer the case to a prosecutor. That said, so far as forced labour is concerned, protection against which is entrenched as a fundamental right under BOR 4, the standard of review by the court should be correspondingly more intense: §§104-107.

14. Notwithstanding the wide margin of discretion accorded to the Commissioner, CA considered, on the facts of the case, the investigation decisions of the Commissioner were based on an incorrect understanding of the law, were irrational, or had irrelevant considerations taken into account: §§113-117.

No Causal Connection Ground

15. Applying *ZN(CA)* and CFA's ruling of the same case (*ZN v Secretary for Justice* (2020) 23 HKCFAR 15), to contend that a bespoke criminal offence is required for protection under BOR 4, a simple "but for" connection is not sufficient. Instead, it is necessary to show that enacting a specific offence is "the only effective solution" – a *sine qua non* of compliance. It is a very strong measure for a court to hold that short of the enactment of statute providing for a specific offence for forced labour the Government is in breach of its obligation under BOR 4: §§120-122.

16. Further, the adjudication on this issue must be grounded on the facts of the case. The court is not concerned with whether certain potential deficiencies that one can conceive of in the existing system may best be rectified by the enactment of a bespoke offence. It is concerned with the question whether the breaches of duty under BOR 4 found in the case were caused by the absence of a bespoke offence criminalising forced labour: §§124, 136.

17. While the benefits of having a bespoke offence are not disputed, the question is not whether a specific offence is something helpful or desirable, and the court must be careful not to usurp the role of the legislature: §139.

18. In the present case, while there were operational failures in the investigation, they were attributable to the erroneous approach taken by the Commissioner to the facts and evidence in the circumstances of this case. There was nothing to show that the inadequacies in respect of the screening form used and the lack of written record of the investigation on forced labour in relation to the Applicant could not be redressed by measures other than a bespoke offence. CA was also not satisfied that there was such a sizeable pool of like cases as to lead to the conclusion that the operational failures found in this case were a widespread phenomenon rather than an aberration: §140.

19. In the circumstances, CA found that CFI erred for two main reasons. First, CFI did not apply the correct approach on causal connection as set out in *ZN(CA)*. The phrase "did substantially contribute" used by CFI was potentially confusing. Secondly, CFI erred in taking into account general and hypothetical shortcomings in the existing system and how they might perhaps be remedied, instead of focusing on the actual breaches of BOR 4 found in the present case.

CA's Disposition

20. CA allowed the Respondents' appeal to the limited extent that it has not been demonstrated that the failures in the discharge of the Government's investigative duties in relation to the Applicant were causally connected with the absence of a specific offence of forced labour. The relevant declaration by CFI is set aside. On a *nisi* basis, CA made no costs order.

Civil Division
Department of Justice
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