



## Summary of Judgment

Nancy Ann Kissel (Applicant)

v

The Long-Term Prison Sentences Review Board (Respondent)

CACV 230/2018; [2020] HKCA 490

**Decision** : Applicant's appeal dismissed  
**Date of Hearing** : 23 & 24 October 2019  
**Date of Judgment** : 18 June 2020

### Background

1. In 2005, the Applicant was convicted of murder. After retrial in 2011, she was convicted of murder and sentenced to mandatory life imprisonment. She has been incarcerated in Tai Lam Centre for Women.
2. The Long-term Prison Sentences Review Board ("**Board**") is a statutory board under the Long-term Prison Sentences Review Ordinance, Cap. 524 ("**Ordinance**") for (i) reviewing the imprisonment sentences of certain categories of persons and (ii) making recommendations on possible remission and commutation. One of its functions is to conduct regular reviews on indeterminate sentences. When conducting a sentence review, the Board may recommend to the Chief Executive ("**CE**") to convert an indeterminate sentence to a determinate one.
3. The Board had reviewed the Applicant's sentence three times. The last review took place in 2016 whereby the Board declined to recommend to the CE to convert her indeterminate sentence to a determinate one ("**Decision**"), on the ground of insufficient detention from 2005 in her case.
4. By this judicial review, the Applicant challenged that the Board acted unreasonably in making the Decision, and refused to identify the tariff period reflecting the punitive part of the sentence or the "triggering period" that would be sufficient to trigger the Board's consideration for an early release. Section 8 of the Ordinance provides that "*The Board must have primary regard to ... (c) whether the part of the prisoner's sentence already served is sufficient, in all the circumstances (in particular given the nature of the offence for which the prisoner is being detained), to warrant consideration being given to having the prisoner released from detention early*".
5. The Applicant's challenge was dismissed by the Court of First Instance ("**CFI**"). The CFI held that (i) the "triggering period" was no more than one step in the review process and in rejecting a review, it is inappropriate and impracticable for the Board to identify the "triggering period" or the punitive part of the sentence as this would depend on the prisoner's circumstances in the future; and (ii) when the Board decided the period served was insufficient, it did not mean that the Board must have already decided the period that should be served. (Full text of the CFI's judgment



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[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=115231&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115231&QS=%2B&TP=JU)

6. The Applicant appealed to the Court of Appeal (“CA”). The Applicant argued that (i) on a proper construction of section 8(c) of the Ordinance, the Board should have indicated the tariff period or the “triggering period”, and (ii) as a matter of fairness and natural justice, in reaching an adverse conclusion when conducting a review the Board has a duty to give reasons, so as to allow her to make informed representation at subsequent reviews.

### **Issues in dispute**

7. The appeal turns on the proper construction of section 8(c) of the Ordinance. The main issues in dispute are:-
  - (a) Whether the Board should, in performing its administrative function, identify the tariff period reflecting the punitive part of an indeterminate sentence or the “triggering period” representing a sufficient threshold period warranting consideration being given for early release (“**Issue 1**”);
  - (b) Whether the Board has a duty to disclose as part of its reasons what period it considered would be sufficient when reaching an adverse conclusion in a review (“**Issue 2**”) (paragraphs 20-21)

### **Department of Justice’s Summary of the CA’s rulings**

8. On **Issue 1**, CA confirmed that CFI has correctly applied the relevant legal principles derived from CA in *Tong Yu Lam*<sup>1</sup> and CFA in *Lau Cheong*<sup>2</sup>. First, CA pointed out that as reflected by the legislative history, section 8(c) of the Ordinance was not intended to transform the system built on the traditional line (i.e. a sentence of life imprisonment is on its face and in actual effect an indeterminate sentence imposed by the court, subject to executive clemency where the entire sentence is treated as punitive, as discussed in CFA *Lau Cheong*<sup>3</sup>) into a system of requiring the Board to fix the tariff period administratively, or to transpose the then English tariff system into Hong Kong. (paragraphs 42-48)
9. Second, CA held that as pointed out in CA *Tong Yu Lam*<sup>4</sup>, requiring the Board to determine the punitive part of an indeterminate sentence, which is a judicial function, will be a fundamental departure from the cardinal principle of separation of power, and if it was indeed the legislature’s intention, section 8(c) should have expressly provided for it. (paragraphs 49-50)

<sup>1</sup> *Tong Yu Lam v The Long-term Prison Sentences Review Board & Another* [2009] 4 HKC 133

<sup>2</sup> *Lau Cheong v & Another v HKSAR* (2002) 5 HKCFAR 415

<sup>3</sup> (2002) 5 HKCFAR 415

<sup>4</sup> [2009] 4 HKC 133



10. Third, for the same reasons set out in the first and second points above, CA held that the legislative history does not support the contention that section 8(c) requires the Board to fix a “triggering period” in determining a review. (paragraphs 53-57)
11. Fourth, fixing a "triggering period" is itself a decision which would constrain a later review of the case by a subsequent Board, which may be differently constituted, and this could not be the intention of section 8(c). More importantly, on each review the Board should consider the question of sufficiency by reference to all circumstances afresh pertaining to the prisoner that are liable to change from time to time. (paragraphs 58-61)
12. Fifth, even if it may be argued that the punitive part of the sentence does not change while other circumstances may change, and that the Board could still fix a definite period by reference to the gravity of the offence, it does not follow that it is the sufficient period to trigger the Board’s consideration for early release. (paragraph 62)
13. On **Issue 2**, as the Applicant’s argument on this issue premised on its primary contention on Issue 1, which CA rejected, CA held that the Applicant’s case on Issue 2 must also fail. (paragraph 65)
14. Further, CA agreed that CFI was correct on its finding of facts that Applicant had not been denied the right to make an informed representation simply because the Board did not indicate the tariff period or the “triggering period” in its adverse decision, and on law that a prisoner must be taken to know what are the matters relevant to the Board’s consideration as clearly set out in section 8 of and Schedule 1 to the Ordinance. The Board, in making an adverse decision, only needs to state the reasons why it disagreed, as long as the reasons provided satisfied the legal requirements. (paragraphs 66-67)

**Civil Division**  
**Department of Justice**  
**18 June 2020**