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Summary of Judgment

**Siti Khotimah and Reza Sahin (collectively, “Applicants”)  
v Director of Immigration (“Director”)**

**CACV 420/2021 and CACV 422/2021 (heard together)  
[2022] HKCA 327**

**Decision** : **Both appeals dismissed with costs to the Director on an indemnity basis**  
**Date of Hearing** : **27 January 2022**  
**Date of Judgment** : **28 February 2022**

Background

1. The Applicants are repeated non-refoulement claimants. Their first non-refoulement claims (“**Original NRCs**”) had been rejected, and were finally and conclusively brought to an end after the two-tier statutory and administrative procedures followed by various attempts of unsuccessful legal challenges against the refusal of their Original NRCs up to the Court of Final Appeal.
2. Subsequently, the Applicants then each made a subsequent NRC to the Director under section 37ZO of the Immigration Ordinance (Cap. 115)<sup>1</sup> on substantively the same primary factual basis as the Original NRCs (“**Subsequent Requests**”). The Applicants’ Subsequent Requests were refused by the Director.
3. The Applicants’ applications for leave to apply for judicial review against the Director’s refusals of their Subsequent Requests were refused by the Court of First Instance (“**CFI**”) (“**JR Leave Refusal Decisions**”) which at the same time made a restricted proceedings order (“**RPO**”) against each of the Applicants under HCAL 328/2021 and HCAL 731/2021. The RPO provided, *inter alia*, that:-

*“The Applicant be prohibited from commencing any fresh proceedings by whatever originating process, or continuing any existing legal proceedings, relating to any non-refoulement claim of the Applicant in the High Court, without leave of the Court of First Instance;”.*

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<sup>1</sup> Relevantly, section 37ZO(2) of the Immigration Ordinance (Cap. 115) provides that “a person may make a subsequent claim if the person provides sufficient evidence in writing to satisfy an immigration officer that—

(a) there has been a significant change of circumstances since the previous claim was finally determined or withdrawn; and

(b) the change, when taken together with the material previously submitted in support of the previous claim, would give the subsequent claim a realistic prospect of success.”



4. The Applicants lodged the present appeals at the Court of Appeal (“CA”) against the JR Leave Refusal Decisions, without seeking leave from the CFI as required under the RPO.

### **Issues in dispute**

5. They are:-

- (a) whether the CFI has the jurisdiction to make a RPO which prohibits a litigant from lodging appeals and/or making any further applications at the CA (“**Jurisdiction Issue**”); and
- (b) if the answer to (a) above is yes, whether it is appropriate for the CFI to exercise its discretion in making the RPOs prohibiting appeals and/or further applications at the CA as in HCAL 328/2021 and HCAL 731/2021 (“**Discretion Issue**”).

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

(Full text of the CA’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=142636&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=142636&QS=%2B&TP=JU))

6. On the **Jurisdiction Issue**, the CA held that the CFI has inherent jurisdiction to make a RPO prohibiting vexatious litigants from lodging appeals and/or making any further applications to the CA (**§30**).
7. In coming to this finding, the CA first emphasized an essential character of a court of justice in preventing the judicial process from being abused, that the powers of the court in this regard are necessarily extensive so as to be truly effective, and that such powers are justified by the immense public interest in protecting the court system from being abused (**§23**).
8. The reasons for this finding include:-
  - a) The power to address abuse of the appellate process is long established. The court’s inherent jurisdiction to prevent vexatious misuse of that statutory right is not in any way displaced by the statutory right to appeal. This view is supported by the authorities in the English Court of Appeal. Further, a proportionate restriction on appeals does not impede on the vexatious



litigants' constitutional right of access to court (§§28, 32).

- b) Where the inherent jurisdiction has existed alongside the statutory jurisdiction, and the relevant statutory provision does not seek to limit the inherent jurisdiction, they should operate in tandem in order to deal with the subject matter, in this case, the abuse of appellate process, effectively. In other words, when the statutory powers to tackle abuse of process (i.e. sections 27 and 27A of the High Court Ordinance, Cap. 4) are expanded without limiting the court's inherent jurisdiction, the court's inherent jurisdiction should in principle evolve in line with such expansion (§34).
  - c) The abuse of the appellate process is a "prominent hallmark of vexatious conduct". Against this background, if only the CA has the power to issue a RPO restricting vexatious appeals, the CA can only do so after the appeal has been lodged and at the hearing of the appeal. By that time, the appellate process would have already been abused which would defeat the very purpose of a RPO which seeks to nip the mischief of the abuse in the bud. Thus the CFI should have the power to curb abuse of the judicial process not only in the CFI but also in the CA (§37).
  - d) The RPO made by the CFI which restricts appeals without leave of the CFI does not impair the essence of the right to access to the CA. It merely requires the litigant who has already made wholly unmeritorious appeals to satisfy the judge that leave ought to be given for him to pursue the intended appeal (§38).
9. On the **Discretion Issue**, the CA held that it is entirely legitimate for the CFI to make the subject RPOs for the following reasons:-
- a) Whether to make an order restricting appeals is necessarily a fact-specific exercise. While ordinarily it will be sufficient for the court to focus on the vexatious conduct of the litigant as the proceedings unfolded, for non-refoulement claims, the court may, give due regard to the wider context in which the legal process is being abused by unsuccessful claimants (§48).
  - b) The wider context includes the large number of judicial review applications and the ensuing appeals relating to non-refoulement claims which constitute the bulk of the judicial review cases in Court and most of which are unmeritorious. They imposed a constant and disproportionate drain of the first instance and appellate Court's scarce judicial time and resources.



Further, given the current removal policy of the Immigration Department, namely removal of those claimants, even with their requests for subsequent claims rejected, would be suspended because the ongoing legal proceedings constitute legal impediment against removal, such claimants are abusing the court system in order to prolong their illegal stay in Hong Kong. These provide a compelling case for the Court to exercise its power more readily to prevent abuses of its proceedings, including the appellate process, in non-refoulement claims rejected under section 37ZO (§§49-53).

- c) Looking at the conduct of the Applicants in these cases, they already had the full benefit of the appellate scrutiny of their claims in relation to the Original NRCs. When they sought to re-litigate their claims essentially on the same basis, it was open to the Judge to conclude that, unless restrained, they would most probably pursue further hopeless appeals, which would waste judicial time and resources and impede the access of other meritorious appeals to the CA. Further, it is beyond doubt that the Applicants' abuse of the court system is a calculated attempt to prolong their illegal stay in Hong Kong under the current removal policy (§54).

10. Having made the rulings referred to in **paras. 6-9** above, the CA revised the two RPOs by adding a clause:- *“No appeal shall lie from a decision of the Judge granting or refusing leave under this Order, unless leave to appeal has been granted by the Judge”*(§§46, 59, 61). The purpose of this added clause is to bring finality to a CFI Judge's decision in granting or refusing leave to the Applicants to commence fresh proceedings, continuing any existing proceedings or bringing any appeals, unless the CFI Judge considers that leave ought to be given for them to pursue the intended proceedings.

11. As for the **duration of the RPOs**, the CA considered that 5-year duration is not disproportionate having regard to the Applicants' past vexatious conduct and the real possibility that they would try every means to prolong their illegal stay in Hong Kong, including continuing their abuse of the Court system (§55).

12. Turning to the Applicants' appeals against the JR Leave Refusal Decisions, the CA dismissed their appeals as they are clearly devoid of merits (§§58, 60).

13. By way of *obiter*, CA considered leave to appeal is required to appeal against the RPO. Otherwise, the litigant will most probably take the RPO to the CA, thereby



continuing his abuse of the appellate process (**§§42-43**).

14. As to **costs**, the CA takes the view that these appeals are clearly an abuse of process, and has ordered the Applicants to pay the Director's costs on an indemnity basis, to be taxed if not agreed (**§62**).

**Civil Division**

**Department of Justice**

**28 February 2022**