



Summary of Judicial Decision

ZN v Secretary for Justice & Others

FACV 4/2019; [2019] HKCFA 53

Decision : **Appellant’s appeal dismissed**
Date of Hearing : **3-4 December 2019**
Date of Judgment : **10 January 2020**

Background

1. The Appellant (“ZN”) was brought to Hong Kong to work as a domestic helper between 2007 and 2010, during which he was mistreated by his employer; after returning to Hong Kong in 2012, the Appellant sought to report such mistreatment to various Government agencies, which had failed to recognise that he was a victim of forced labour prohibited by Article 4(3) of the Hong Kong Bill of Rights (“BOR”).
2. At the Court of Final Instance (“CFI”), the Judge was satisfied on the evidence that the Appellant was a victim of trafficking of a person for the purpose of forced labour, and was denied protection under BOR 4. On appeal to the Court of Appeal (“CA”) against the CFI’s legal and factual findings, the CA upheld the Judge’s finding that the Hong Kong SAR Government (“HKSARG”) had failed in its investigative duty under BOR 4 in relation to the Appellant’s complaints, but held that BOR 4 did not cover human trafficking (as a form of modern slavery) or human trafficking for forced labour, and the HKSARG had not breached its positive obligations under BOR 4 to provide practical and effective protection against forced labour by means of a specific criminal offence.

Issues in dispute

3. At the Court of Final Appeal (“CFA”), the main issues in dispute were:
 - (1) The scope of BOR 4, i.e. whether its prohibition covered human trafficking (as a modern form of slavery or for the purpose of forced labour);
 - (2) Whether BOR 4 imposed any positive (absolute or contingent) duty on the HKSARG to enact and maintain a bespoke criminal offence specifically for dealing with BOR 4 violations.



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

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=117196&QS=%2B&TP=JU&ILAN=en)

4. In holding that neither BOR 4(1) nor BOR 4(3)(a) prohibited human trafficking generally or for any specific purpose, the CFA found the following:
 - (a) BOR 4 had three major distinct concepts, namely, prohibition against "slavery", "servitude", and "forced or compulsory labour"; such distinction did not allow the introduction of a general concept of "human trafficking" which would remove the boundary of these concepts. This interpretation was reinforced by the structure of the wording of these concepts under BOR 4, by the established distinct definitions of these concepts in various international treaties, by the drafting history materials of the corresponding provisions of BOR 4 in the ICCPR (i.e. *travaux préparatoires*), and by the clear legislative intent under s.5(2)(c) of the Hong Kong Bill of Rights Ordinance (Cap. 383) in giving a "non-derogable" status to "slavery" and "servitude" as opposed to "forced or compulsory labour". (paragraphs 31 to 33)
 - (b) The prohibition of "slavery" and "the slave-trade in all their forms" under BOR 4 might give force to the argument that "slavery and the slave-trade in all their forms" should be given a modern interpretation to include "human trafficking", but since BOR 4 was not limited to such form of exploitation, there was no proper basis for blurring the distinctions of these concepts and confining them to the meaning of slavery and the slave-trade in some wide generic sense of human trafficking generally for exploitation. (paragraph 46)
 - (c) In response to the Appellant's attempt to introduce the concept of "human trafficking" into the meaning of "slavery and the slave-trade in all their forms" under BOR 4(1) by referring to the definition of "trafficking in persons" in the Palermo Protocol ("PP"), the CFA noted that the PRC government had lodged a declaration to exclude its application to Hong Kong; to use such definition as an aid of construction would be to inappropriately give a "backdoor" application to PP. (paragraph 48)
 - (d) The description of human trafficking as a form of "modern slavery" for the purposes of construing BOR 4 was problematic as it was neither clearly defined nor criminalised as a separate concept under the UK's Modern Slavery Act 2015; furthermore, the definition of "human trafficking" under PP showed that such concept was directed to a "process" rather than an "outcome" or a



"substantive conduct" targeted by BOR 4. (paragraphs 36, 44, 52 & 54)

5. In holding that there was no absolute duty on the HKSARG to maintain an offence specifically for criminalising BOR 4 violations, the CFA stated the following:

(a) The HKSARG would have a wide margin of discretion in the manner in which it complied with its positive obligations under BOR 4 and, even in the context of non-derogable rights, such positive obligations should be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. (paragraphs 88 & 91)

(b) The HKSARG must take steps to afford practical and effective protection of the protected rights under BOR 4; whether practical and effective protection had been provided would depend on the facts of any given case. (paragraphs 88 & 119)

(c) There was the need to consider whether an alleged breach of BOR 4 rights had arisen because of the lack of a specific criminal offence. However, that causal connection was not established in the present case. (paragraph 92)

(d) While it could not be said that the patchwork of offences available to the HKSARG was inadequate, such finding would not preclude a different conclusion being reached in a future case in the event that the HKSARG would be shown in future not to afford practical and effective protection of the BOR 4 rights; nor should it be taken to indicate that a patchwork of offences would necessarily be sufficient. (paragraphs 118 & 122(4))

6. In light of the above, the CFA unanimously dismissed this appeal. The CFA however emphasised the following points:

(a) The CFA's view of the impermissible alteration of the underlying concepts in BOR 4 as a matter of law should not be taken to endorse a literal, technical, narrow or rigid construction of the language of BOR 4. (paragraph 82)

(b) It was wrong for the HKSARG to rest on the laurels of their success on this appeal by relaxing the vigilance with which the measures to combat breaches of the rights protected by BOR 4 were administered and enforced. The protection of the BOR 4 rights must not be theoretical and illusory. Practical and effective protection of the BOR 4 rights should ensure that a case like the present would be a rare and isolated event. (paragraph 121)



Department of Justice

The Government of the Hong Kong Special Administrative Region

Civil Division

Department of Justice

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