



Summary of Judicial Decision

H v Director of Immigration FAMV 415/2019

AH v Director of Immigration FAMV 3/2020

[2020] HKCFA 34

Decision : **Applicants' leave applications dismissed**
Date of Hearing : **6 November 2020**
Date of Reasons for Determination : **12 November 2020**

Background

1. Under the Dependant Visa Policy of the Immigration Department in Hong Kong, a person may apply to the Director of Immigration (“**Director**”) to enter Hong Kong for residence as a dependant (“**DV Policy**”).
2. Under the DV Policy, one of the eligibility criteria for granting a dependant visa is that there is no known record to the detriment of the applicant (“**No Record Requirement**”).
3. The Director refused the application for dependant visa of H, Applicant in FAMV 415/2019, on the ground that H failed to meet the No Record Requirement in that he has a record of suspected offence of making a false representation to an immigration assistant contravening section 42 of the Immigration Ordinance, Cap. 115, though he was not prosecuted for that offence.¹ The Director also refused the application for dependant visa of AH, Applicant in FAMV 3/2020, on the ground that AH failed to meet the No Record Requirement because he was convicted of the offences of (i) using a false travel document and (ii) making a false statement to an immigration assistant when seeking to enter Hong Kong.²

¹ The factual details can be seen in the judgment of Court of First Instance in HCAL 172/2015 at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=106604&QS=%2B&TP=JU&currpage=T

² The factual details can be seen in the judgment of Court of First Instance in HCAL 32/2015 at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=101445&QS=%2B&TP=JU&currpage=T



4. The Applicants by way of judicial review challenged the Director's refusal decisions to grant a dependant visa to them on the ground, *inter alia*, that they failed to meet the No Record Requirement. The Court of First Instance refused granting leave to them to apply for judicial review. The Court of Appeal dismissed their appeals and also their applications for leave to appeal to the Court of Final Appeal.
5. The Applicants applied to the Appeal Committee for leave to appeal to the Court of Final Appeal on issues relating to the interpretation of the DV Policy.

Issues in dispute

6. The key issues in dispute are that on a true construction of the DV Policy:-
 - (a) Whether the No Record Requirement is an eligibility criterion or merely a relevant factor to be considered by the Director ("**1st issue**"); and
 - (b) Whether the No Record Requirement covers a "record of serious crime" or one that raise a "security objection" as opposed to a wider range of adverse record ("**2nd issue**").

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=131799&QS=%2B&TP=JU)

7. On the 1st issue, the Appeal Committee upheld the Court of Appeal judgment on similar issue in *BI & BH v Director of Immigration* [2016] 2 HKLRD 520. The DV Policy is a policy to be understood in the context of the overall highly restrictive immigration control policy such that the No Record Requirement is an eligibility criterion which must be complied with, as opposed to a mere factor for consideration, before an application for dependant visa can be favourably considered. (paras. 6 and 9)
8. On the 2nd issue, the DV Policy is not determined by an underlying presumption in favour of family reunion. Again in the context of the overall highly restrictive immigration control policy, there is no suggestion that the DV Policy limits the types of adverse records that the Director may take into account in reaching his decision as to whether to exercise his discretion under the DV Policy. If the Director relies on a trivial record as being adverse to the applicant, this is subject to challenge on the basis of *Wednesbury* reasonableness but that would be a fact sensitive issue in an individual case. (para. 9)



9. The Appeal Committee was not satisfied that the two issues were reasonably arguable, and dismissed both Applicants' leave applications to appeal to the Court of Final Appeal.

Civil Division

Department of Justice

12 November 2020