



Summary of Judgment

Loh Ming Yin (“Applicant”)

v

Hong Kong Examination and Assessment Authority (“HKEAA”)

The Education Bureau (“EDB”)

HCAL 1087/2020; [2020] HKCFI 1135

Decision : **Application for judicial review dismissed**
Date of Hearing : **2-3 July 2020**
Date of Judgment/Decision : **3 July 2020**

Background

1. The Applicant is one of the students who sat the History Paper 1 (“**HP1**”) of the Hong Kong Diploma of Secondary Education (“**HKDSE**”) Examination, which was held on 14 May 2020. Amongst those questions which he answered was Question 2(c) (“**Question**”), which is part of a wider question 2 headed “China and Japan in the first half of the 20th century”.
2. The Question was data-based, in that two source passages, namely Source C and Source D, were provided. The Question read: “ *‘Japan did more good than harm to China in the period 1900-45.’ Do you agree? Explain your answer with reference to Sources C and D and using your own knowledge.*”
3. The Question attracted media and public comments. Those comments suggested that the Question was “biased” in that it played down the impact and horrors of the Japanese occupation of China, and the effect of the war between the two countries in the period from 1937 to 1945. The HKEAA issued various press releases on the Question from 14 to 18 May 2020, while the EDB, the Secretary for Education and the Chief Executive also expressed views on the Question publicly from 14 to 19 May 2020.
4. The HKEAA Council convened two special meetings on 18 and 21 May 2020 (“**Council Meetings**”) respectively to deliberate on the matter. By a press release dated 22 May 2020, the HKEAA notified the decision to invalidate the Question (“**Decision**”).
5. The Applicant sought leave to apply for judicial review to quash the Decision.



Issues in dispute

6. The main issues in dispute were:-

- (i) Whether any established post-examination review procedure was by-passed;
- (ii) Whether irrelevant considerations were taken into account;
- (iii) Whether the HKEAA had failed to give sufficient regard to relevant considerations, including the right to academic freedom;
- (iv) Whether the History Curriculum and Assessment Guide (Secondary 4-6) ("**C&A Guide**") was misinterpreted or misapplied;
- (v) Whether the candidates had the right to be heard before the Decision was made; and
- (vi) Whether the Decision was *Wednesbury* unreasonable.

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=129193&QS=%2B&TP=JU)

7. The Applicant's application was dismissed on all grounds.

8. On the by-passing of established post-examination review procedure, there is no statutory requirement imposed on the HKEAA to adopt any particular procedure in considering whether or not to invalidate an examination question, and the HKEAA does not in fact have prescribed procedures for handling the invalidation of conventional and data-based questions. There is no basis to suggest that the HKEAA's adopted procedure was unfair or wrong, or that the HKEAA's professionalism had been compromised in any way during the decision-making process. (paras. 236-239, 245)

9. On irrelevant considerations, the Court accepted that the EDB's views on the Question were relevant to the HKEAA's consideration as to whether or not to invalidate that Question, and the composition of the HKEAA Council specifically includes the Permanent Secretary for Education (or her representative), which is a statutory recognition of the role that the expression of the EDB's views will have on the conduct of business by the HKEAA Council. The Court also accepted that the general tenor of the discussions in the Council Meetings was to seek to ensure a decision was made as a matter of fairness and credibility, based on professional and academic considerations, rather than political ones. Although there appears



to have been a stark volte-face in the Decision from the stance taken by the HKEAA in its original press releases, the Court found that it was perfectly open to the HKEAA legitimately to have formed a different view after further, and perhaps more mature, consideration. Whilst there may be plenty of scope for disagreement with the reasons for the Decision on the face of the minutes of the Council Meetings and as shown in the HKEAA's press release, those are ultimately matters of academic judgment, being matters within the purview of the HKEAA. Further, although one may rationally debate whether the EDB's reasons for finding the Question problematic are apposite or not, it is a grave assertion to say that the EDB's reasons are a sham and nothing but political instruction. The Court accepted that if the EDB takes the view that there is a significant problem with the question set, perhaps particularly if it has aroused public concern and controversy, the EDB has a role to play in acting with regard to the public interests at stake. The primary public interest is, of course in safeguarding the credibility, fairness and validity of the HKDSE examinations. Despite the Court's view that some of the public statements made by the EDB and/or the Secretary for Education were conveyed "in a most high-profile and threatening manner", those statements were made publicly outside the deliberations of the HKEAA Council, and the Court did not accept the evidence demonstrates that they created improper pressure on Council members, or forced Council members somehow to jettison their own independent thoughts and decisions. As regards the Chief Executive's statement on 19 May 2020 which the Court considered had the effect of stating as a fact that there had been a "professional error" and that she would step in if necessary, the Court did not accept that the Chief Executive's remarks must have played any part in the HKEAA's decision-making process. (paras. 76, 260-271)

10. On the failure to have regard to relevant considerations, the Court did not accept that, by the Decision, the HKEAA has taken upon itself to indicate that certain academic viewpoints and opinions can no longer be held, expressed or pursued, which in turn violates academic freedom generally and in particular in the Secondary School sector. The Court found that Article 34 of the Basic Law ("BL") only protects the freedom to engage in academic research, while Article 137 of BL recognises academic freedom only as vested in Hong Kong's educational institutions, not in individuals. The Court accepted that it was not the intention of the HKEAA to interfere with academic freedom, in making the Decision, and the Decision should not have any "chilling" effect curtailing freedom of expression or academic freedom. In respect of the Applicant's submissions that there was a failure to take into account various professional views, the Court held that Council members were clearly aware of the differing views in society, but it would have



been impracticable and ineffective to deliberate on each and every survey, essay or report in the media. (paras. 282-289, 291)

11. On the misinterpretation and/or misapplication of C&A Guide, HKDSE History examination questions must align with the C&A Guide and the Assessment Framework of HKDSE History Examination. The true meaning and effect of the C&A Guide is a matter for the Court to decide. The Council Meeting minutes identified that, after deliberation among Council members, it was agreed that the Question failed to align with the History curriculum aims and objectives, and also failed to comply with the “Guidelines on Handling Fairness and Sensitivity Issues in Examination Paper Development for the HKDSE”. The Court did not accept the evidence demonstrated that the HKEAA misinterpreted the C&A Guide. As to any alleged misapplication, that was a ‘merits point’, not a ‘decision-making process point’. However, the Court is mainly concerned with looking not at the merits of the decision itself, but at the integrity of the decision-making process. (paras. 22, 107, 303, 327-328)
12. On procedural impropriety or right to be heard, there is a distinction between the interests of candidates as individuals, and the interests of candidates as a group or cohort. It is the latter type of interest that the HKEAA was to pay regard. The Court found that the HKEAA Council did have in mind the interests of candidates as a whole in its decision-making process. (paras. 341-342)
13. On Wednesbury unreasonableness, the Court recognised that the Court is not best placed to make conclusions on matters where professional and academic judgment comes into play. It is not the function of the Court to substitute its own view in place of that expressed by the decision-maker and it would be wrong for the Court to usurp the power and discretion specifically conferred on the HKEAA by the statute. (paras. 352-355)
14. In any event, remedies in judicial review are discretionary. Quashing the Decision would impose heavy administrative burdens on the HKEAA, and would itself also risk causing other real prejudice generally to examination candidates by the potential delay and impact on university and employment applications. Therefore, the Court would not grant the remedy of quashing the Decision even had any grounds for review been established. (paras. 356, 361, 363)
15. Ultimately, it was for the HKEAA and not for the Court to make the Decision. The Court has not found any procedural irregularity or other unfairness in the



decision-making process. Rather, the evidence of the deliberation process of the HKEAA Council points to careful, almost exhaustive, deliberations amongst professionals, and the expression of and consideration of numerous differing views from different perspectives. There is nothing inherently wrong in a strong expression of any one member's views. There is nothing inherently wrong in any member changing his mind from an initial view. At the end of the lengthy deliberations in this case, by a process chosen to fit a new occurrence (and which process cannot be considered unfair), the Decision was made by majority vote of the members collectively charged with making such decisions. (paras. 364, 367)

Civil Division
Department of Justice
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