



Summary of Judgment

**Akram Muhammad (“Applicant”) v
Director of Immigration (“Director”) and Secretary for Security (“Secretary”)**

HCAL 1329/2022; [2023] HKCFI 595

Decision : Leave to apply for judicial review refused
Date of Hearing : 17 January 2023
Date of Reasons for Decision : 16 March 2023

Background

1. The Applicant, a Pakistani illegal immigrant, had been continuously detained under various provisions of the Immigration Ordinance (Cap. 115) (the “**Ordinance**”) since 19 December 2020. On 17 June 2021, in accordance with the prevailing policy, he was transferred from the Castle Peak Bay Immigration Centre (“**CIC**”) to the Tai Tam Gap Correctional Institution (“**TGCI**”) for continued detention (the “**Detention Decision**”) in light of his higher risk profile.
2. By way of background, both CIC and TGCI are among places where a person may be detained under the Ordinance, and are managed by the Immigration Department (“**ImmD**”) and Correctional Services Department (“**CSD**”) respectively. According to paragraph 3 (the “**Order**”) of the Immigration (Places of Detention) Order (Cap. 115B), those of the Prison Rules (Cap. 234A) that are applicable to persons committed to prison for safe custody apply also to detainees in certain institutions (such as TGCI, but not CIC), with rules 189 to 207 thereof applying *mutates mutandis* (i.e. with necessary modifications).
3. On 24 November 2022, the Applicant filed a “hybrid” application consisting of (i) an application for leave to apply for judicial review against the irrationality of the Order (namely, the difference in detention conditions between CIC and TGCI violated the equality principle) and (ii) a usual habeas corpus application seeking his immediate release (“**HC Application**”) (collectively, the “**Applications**”). Before the matter was heard, by his Amended Form 86, the Applicant sought to include the Detention Decision as part of his judicial review challenge (“**Leave Application**”).
4. Both Applications were heard before the Honourable Mr Justice Coleman in the Court of First Instance (the “**CFI**”) on 17 January 2023 and were dismissed with



reasons reserved. The reasons for decision of the HC Application were handed down separately on 31 January 2023 while the present decision is concerned with the reasons for dismissing the Leave Application only.

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

(Full text of the CFI's judgment at

https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2022/HCAL001329A_2022.doc)

5. The Leave Application was dismissed for the following key reasons:-

- (1) **Irrationality review inapplicable:** The Order enacted within the scope of power of the enabling statute is not subject to judicial review on the ground of irrationality (applying *Noise Control Authority v Step In Ltd* (2005) 8 HKCFAR 113). Construing the scope of powers of the enabling statute would be key to an *ultra vires* argument, but no attempt was made by the Applicant to construe the scope of the relevant enabling provisions of the Order or the Prison Rules. The Applicant's argument that unreasonableness is 'part and parcel' of the *ultra vires* doctrine was not sufficiently developed and hence not accepted. In any event there is no unreasonableness in the legislative scheme. (See §§77-82)
- (2) **TGCI and CIC detainees not comparable in the present context:** The Applicant's case is that, TGCI detainees are CIC detainees are alike, but the former received less favourable treatment than the latter. The issue is thus whether the two group of detainees are "alike" such that they are entitled to like treatment. Given that (i) TGCI detainees had more serious criminal and disciplinary backgrounds, (ii) the Court gave sufficient weight to the Government's assessment of detainees' security risk, and (iii) there was a policy intent to centralise detainees with higher security risks to TGCI, the Applicant failed to establish that the two groups were comparable in terms of security risk profile. (See §§94-95, 100, 109 and 114)
- (3) **Differential treatment justified in any event:**
 - (a) The Court made it clear that, with the Applicant not disputing the relevance of security risk profile in assessing the comparability of the two groups, the question of justification did not arise where the two groups were held not comparators. The issue of justification was however still



addressed for completeness. (See §§116 and 117)

(b) The usual four-step proportionality test was applied with the following analysis:

(i) **1st and 2nd Steps – Legitimate Aim & Rational Connection:** The Court accept that the more stringent treatments were to safeguard the security of the institution, the safety of the officers and other detainees as well as the general public. The Applicant did not dispute otherwise. (See §§119 and 120)

(ii) **3rd and 4th Steps – Proportionality & Proper Balance:** The differences in the relevant treatments were not disproportionate and they did strike a proper balance between accompanying social benefit and the incursion into detainees' privacy or liberty as the differences were not substantial. In addition, some of the inconsistent treatments were only temporary, given that legislative amendments would soon be introduced to align the same. (See §121)

(c) The proper standard of review in such circumstances is the higher threshold of manifestly without reasonable foundation given that (i) the treatment of immigration detainees in TGCI fell within the Secretary/Director's wide imperative of immigration controls and (ii) the designation of TGCI as a prison facility under CSD's management involved manpower consideration. (See §122)

Civil Division

Department of Justice

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