



Summary of Judgment

Law Yee Mei (“Applicant”) v Chief Executive of Hong Kong SAR, Secretary for Food and Health, and Secretary for Innovation and Technology

HCAL 151/2022

Decision : **Application for leave to apply for judicial review dismissed**
Date of Hearing : **30 March 2022**
Date of Judgment : **30 March 2022**

Background

1. The Applicant sought leave to apply for judicial review to challenge decisions (together, “**Decisions**”) described as:-
 - (1) the legislation and commencement of the Prevention and Control of Disease (Vaccine Pass) Regulation, Cap. 599L (“**Cap. 599L**”) which introduced the requirements of “Vaccine Pass”; and
 - (2) the announcements and decisions made by the Chief Executive (“**CE**”) and the Secretary for Food and Health (“**SFH**”) to add venues such as markets, supermarkets, malls and restaurants, *inter alia*, to the requirements of “Vaccine Pass”.
2. By way of background, Cap. 599L was made pursuant to section 8 of the Prevention and Control of Disease Ordinance, Cap. 599 (“**Cap. 599**”). Cap. 599L provides a legal framework for the implementation of “Vaccine Pass”, including liabilities for a failure to comply with vaccination requirements for entering specified premises. Under Cap. 599L, SFH may make a vaccine pass direction in relation to any category of premises, requiring a person belonging to any category not to enter or remain on any specified premises unless the person has been vaccinated in the specified manner.
3. At the meeting of the Executive Council on 8 February 2022, it advised and the CE ordered, *inter alia*, that the following regulations should be made under section 8 of Cap. 599:-



- (1) Amendment should be made to the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation, Cap. 599F (“**Cap. 599F**”) to add religious premises, barbershops or hair salons, shopping malls and department stores, markets, and supermarkets as scheduled premises, in order to subject them to the requirements in relation to “LeaveHomeSafe” and “Vaccine Pass” to be imposed in the directions to be made under Cap. 599F; and
 - (2) Cap. 599L should be made to introduce the legal framework for the implementation of “Vaccine Pass”, including liabilities for a failure to comply with vaccination requirements for entering specified premises, in order further to boost vaccination coverage in Hong Kong.
4. On 21 February 2022, a vaccine pass direction was issued by SFH pursuant to Cap. 599L (“**VP Direction**”). Under the VP Direction, premises subject to the requirements of “Vaccine Pass” under Cap. 599L covered (a) catering business premises; and (b) all existing scheduled premises under Cap. 599F (except for hotels/guesthouses, where only staff were to be subject to vaccination requirements), as well as (c) religious premises, barber shops or hair salons, shopping malls and department stores, markets, and supermarkets.
5. A hearing for leave to apply for judicial review was conducted before the Honourable Mr Justice Coleman on 30 March 2022.

Purported Grounds of Review

6. The Applicant’s purported grounds of review can be broadly summarised as follows:-
- (1) The requirements of “Vaccine Pass” restrict her right to apply for and sit for property agent licence exams, thus rendering a loss of job opportunity;
 - (2) The requirements of “Vaccine Pass” restrict her access to wet markets, supermarkets or restaurants, thus denying her easy access to, *inter alia*, affordable food and daily necessities; and
 - (3) The requirements of “Vaccine Pass” restrict her access to the courts as an unrepresented litigant.



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

(Full text of the CFI's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=143255&QS=%2B&TP=JU)

7. CFI refused to grant leave for the Applicant to apply for judicial review (para. 85) for the following key reasons:-

- (1) **Failure to identify any ground of review.** The Court agreed that the Applicant has failed to state any proper ground in support of the application for leave to apply for judicial review. This is in breach of Order 53, rule 3(2)(a) of the Rules of the High Court, Cap. 4A, which is in mandatory terms. It is not the Court's role to identify any ground of review for an applicant (paras. 48-54). Further, whilst the Applicant named the Secretary for Innovation and Technology ("SIT") as one of the putative respondents, the Applicant has failed to identify any relevant decision in which the SIT was involved (para. 84);
- (2) **Factual misunderstanding.** In particular:-
 - (a) Venues for examinations organised by the Estate Agents Authority are not specified premises for the purposes of the requirements of "Vaccine Pass" imposed by way of Cap. 599L or Cap. 599F. Administrative measures adopted by individual examination premises operators to impose vaccine requirements are outside the scope of Cap. 599L or Cap. 599F, and therefore not amenable to judicial review in the present application (paras. 56-57); and
 - (b) The Applicant's complaint about being denied access to the Courts as a non-represented litigant was misconceived (para. 60);
- (3) **Denial of easy access to affordable food and daily necessities at wet markets and supermarkets constitutes mere inconvenience.** Access to wet markets or supermarkets cannot arguably be described as basic rights. Further, there are plenty of alternatives for the Applicant to obtain food, meals and daily necessities. A wide range of exemptions are also identified in Cap. 599L itself to cater for daily needs of those who choose to remain as unvaccinated residents. The Court accepted that the current public health



situation in Hong Kong is grave and Cap. 599L is broadly in the societal interest, which includes a proper desire to boost vaccination rates so as to reduce cases of death or severe illness (paras. 58 & 59);

(4) The Applicant's reliance on various alleged fundamental rights is either without basis or misplaced. In particular:-

(a) Liberty of movement under Article 8 of the Bill of Rights and right to private life under Article 14 of the Bill of Rights are not absolute. There is no breach of the rights if the restriction of rights is prescribed by law, is not arbitrary, and can be justified (para. 62);

(b) No torture or inhuman treatment under Article 3 of the Bill of Rights is engaged in the present application. It is not arguable that the Applicant's human dignity has been degraded, or that she has suffered from any cruel or inhumane treatment as a result of the requirements of "Vaccine Pass" (para. 67); and

(c) Article 11 of the International Convention on Economic, Social and Cultural Rights ("ICESCR"), referring to unrestricted access to adequate food, does not have the force of law in Hong Kong as it has not been domesticated as a part of Hong Kong law. Further, it is not reasonably arguable that the requirements of "Vaccine Pass" remove the Applicant's physical and economic access at all times to adequate food or the means for its procurement (paras. 68);

(5) The requirements of "Vaccine Pass" satisfy the proportionality test in that:-

(a) The requirements of "Vaccine Pass" are prescribed by law (para. 72);

(b) The requirements of "Vaccine Pass" are in pursuit of the legitimate aim of protecting public health and are rationally connected with the advancement of that aim (paras. 73-76);

(c) A wide margin of discretion should be accorded to the Government in assessing the legality of Covid-19 measures. Neither Cap. 599L nor Cap. 599F is manifestly without reasonable foundation in the light of the prevailing circumstances (para. 77); and



(d) The requirements of “Vaccine Pass” strike a reasonable balance between (1) the societal benefits of the restriction or encroachment, namely the protection of public health in Hong Kong which is of paramount importance, and (2) the restricting of the Applicant’s individual rights (paras. 78-79). In arriving at this conclusion, CFI considered that the following points are of relevance, i.e. Hong Kong is a geographically small and densely populated place with a highly mobile population, that the requirements of “Vaccine Pass” are imposed on a limited number of specified premises, that the relevant activities involved at those specified premises are not of absolute necessity, that Cap. 599L embodies a range of exemptions to cater for the crucial needs of residents, that Cap. 599L is not intended to be a permanent measure, and that there is no legal requirement for Hong Kong residents to be vaccinated against Covid-19.

8. CFI dismissed the Applicant’s application for leave to apply for judicial review. In making no order as to costs, while the Court acknowledged the lack of merits in this application, the Court considered that the lack of merits did not overbalance the fact that the proceedings broadly satisfied the three criteria of “public interest litigation”, namely: (a) the Applicant brought proceedings to seek guidance from the court on a point of general public importance; (b) the judicial decision has contributed to the proper understanding of the law in question; and (c) the Applicant has no private gain in the outcome.

Civil Division

Department of Justice

March 2022