



Summary of Judgment

Wong Chau Ming v Secretary for the Civil Service

[2023] HKCFI 2468; HCAL 1626/2021

Decision : **Leave to apply for judicial review refused**
Date of Hearing : **4 October 2023**
Date of Judgment : **19 October 2023**

Background

1. The Applicant was formerly a civil servant under the employment of the Inland Revenue Department (“**IRD**”). He sought leave to apply for judicial review of the decision of the Secretary for Civil Service (“**SCS**”) to retire him from the civil service in the public interest under section 12 of the Public Service (Administration) Order (“**PS(A)O**”) (“**Decision**”).
2. On the basis of Article 99 of the Basic Law and the Civil Service Code, the Civil Service Bureau (“**CSB**”) issued CSB Circular 2/2021 (“**Circular**”) on 15 January 2021 requiring all civil servants to duly sign and return a declaration in a designated form by a stipulated deadline to declare that they will uphold the Basic Law and bear allegiance to the HKSAR, be dedicated to their duties and be responsible to the HKSAR Government (“**Requirement**”). It was explicitly stated in the Circular that neglect, refusal or failure to duly sign and return the declaration by the stipulated deadline without reasonable excuse reflected an officer’s refusal to acknowledge, accept and discharge the consistent duties of civil servants, and a serious lack of commitment to adhere to the core values of the civil service which underpin good governance and help the civil service gain and retain the respect and confidence of the public.
3. 25 February 2021 was the date designated by IRD as the deadline for the compliance of its staff with the Requirement. In the morning on that day, the Applicant returned an unsigned declaration form with a handwritten remark to the effect that he was not able to sign the form for the time being as there were uncertainties or implications regarding the declaration. The Applicant went on to raise written queries on a sheet of paper attached.

At around noon on the same day, IRD issued a substantive reply to the queries raised by the Applicant. The Applicant did not comply with the Requirement by the stipulated deadline.

4. IRD invited and considered representations from the Applicant and was of the view that no reasonable explanation had been given by the Applicant for his neglect, refusal or failure to comply with the Requirement and reported the case to CSB.
5. CSB initiated action against the Applicant pursuant to section 12 of the **PS(A)O**. CSB invited and considered three rounds of representations from the Applicant. In his last round of representations to SCS dated 12 August 2021 (i.e. around 6 months after the stipulated deadline), the Applicant submitted to SCS a duly signed declaration form.
6. Having considered the Applicant's written representations, SCS, pursuant to the authority delegated to him by the Chief Executive, made the Decision on 27 August 2021 that the Applicant be required to retire in the public interest for the reason that the Government had lost confidence in his suitability to continue discharging his duties as a public officer as a result of his neglect, refusal or failure to duly sign and return the Declaration by the stipulated deadline.
7. A rolled-up hearing for the Applicant's intended judicial review application was conducted before the Honourable Mr. Justice Coleman ("**Judge**") at the Court of First Instance on 4 October 2023.

Grounds of Review

8. The Applicant's grounds of review can be broadly summarised as follows:-
 - (1) **Irrationality**, in that there was no or no good reason not to accept the duly signed declaration submitted by the Applicant ("**Ground 1A**"), and that the Decision constituted a punishment that was altogether excessive and out of proportion to the occasion ("**Ground 1B**").
 - (2) **Procedural impropriety**, in that SCS failed to give any or any adequate reasons for the Decision ("**Ground 2**").

(3) **Procedural impropriety**, in that the Applicant was not given any opportunity to respond to certain documents and/or representations (“**Ground 3**”).

(4) **Illegality**, in that SCS failed to take into account the relevant considerations as required by section 12(2) of the PS(A)O (“**Ground 4**”).

Department of Justice’s Summary of the Judge’s rulings

(Full text of the judgment can be found at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=155664&currpage=T)

9. The Judge found that none of the intended grounds of review was reasonably arguable and thereby refused the Applicant’s application for leave to apply for judicial review.

10. On **Ground 1A**, the Court held that the correct question to ask was whether the Applicant had provided a reasonable excuse for his neglect, refusal or failure to meet the Requirement by the stipulated deadline. Having considered the factual context of the case (including the timing in which the Applicant elected to raise queries on the Requirement, the nature of the queries raised, the Applicant’s conduct, etc.), the Court held that it was not arguably irrational in the public law sense for SCS to have taken the view that the Applicant had failed to provide a reasonable excuse (§§57-60).

11. On **Ground 1B**, the Court confirmed that the proposed challenge under this ground must be brought under the traditional judicial review ground of irrationality. Such challenge was not an appeal on the merits of the decision, but involved the high standard of *Wednesbury* unreasonableness. On the facts of this case, it was made known to the Applicant that the consequence of a neglect, refusal or failure duly to sign and return the Declaration by the stipulated deadline without reasonable excuse would be the likely initiation of action to terminate his service. In the Court’s judgment, the logical step to take when the Government had significant doubt as to the Applicant’s ability and commitment to follow the central tenets of service as a civil servant would be to terminate the Applicant’s service. The Court found this ground not reasonably arguable (§§66, 68,

72-74).

12. On **Ground 2**, the Court agreed with submission made on behalf of SCS that the Decision must be read against the lengthy exchange of correspondence between the Applicant and IRD/CSB, from which the Applicant could be left in no doubt as to the reason for the Decision, namely the Government had lost confidence in his suitability to continue discharging his duties following his failure to duly sign and return the Declaration within the stipulated deadline and failure to provide a reasonable explanation (§§83-85).

13. On **Ground 3**, the Court accepted SCS's submissions that the two-stage approach identified in *Chu Ping Tak v Commissioner of Police* [2002] 3 HKLRD 679 was the correct approach¹. On the facts of this case, none of the three undisclosed documents in question ought to have been disclosed to the Applicant, since (i) the first document was prepared prior to the section 12 PS(A)O action; (ii) the second document essentially dealt with the Applicant's own letters and seeking advice from the Public Service Commission the result of which was informed to the Applicant for his further representation; and (c) the third document was an internal minute prepared in the internal decision-making process after the Applicant had given his last representation. In addition, the Court found that the handwritten comments on that minute by an intermediate participant of the internal decision making process offering views as to inferences or conclusions which might be drawn from the materials as a whole did not constitute adverse material in the relevant sense so that no disclosure was required. The Judge also had regard to the fact that these documents do not involve materials from a third-party source. The Judge went on to hold that had disclosure been necessary, on the facts of the case, there would not have been any substantial prejudice occasioned to the Applicant whatsoever, and disclosure would not have made the slightest difference to the Applicant's representations made (§§89-96).

14. On **Ground 4**, the Court held that it was not reasonably arguable that SCS did not take into account the considerations required under section 12

¹ The approach requires that, first, it must be shown that the document in question ought to have been disclosed; and secondly, even if it ought to have been disclosed, the Court would proceed to assess whether or not the non-disclosure produced any or any substantial prejudice to the Applicant. In the absence of prejudice, the Court would likely refuse to grant discretionary relief.

PS(A)O, namely (a) the “conditions of the public service”; (b) “the usefulness of” the Applicant to the public service; and (c) “other circumstances of the case” (including the compassionate grounds put forward by the Applicant in his last round of representations). The “conditions of the public service” were at the core of what underpinned the Requirement and Declaration in the first place. The “usefulness of” the Applicant to the public service was obviously in serious doubt if the view taken was that he had failed to comply with the Requirement, by failing to provide a duly signed Declaration within the stipulated deadline. Lastly, there was no proper basis to think that the “other circumstances of the case” were not taken into account by SCS following a full, careful and detailed consideration of the Applicant’s position contained in his correspondence, comments and representations (§§99-101).

15. The Judge refused the Applicant’s application for leave to apply for judicial review and awarded costs to SCS. The Judge went on to state that the Court would refuse the substantive application and/or refuse to grant any discretionary relief, had leave been granted.

Civil Division
Department of Justice
October 2023