



Summary of Judicial Decision

A v Secretary for Justice, Solicitor General & Deputy Solicitor General (Policy Affairs) [2020] HKCFI 427 (HCAL 176/2018)

Decision : **Application for Judicial Review dismissed**
Date of Hearing : **5 December 2019**
Date of Judgment/Decision : **11 March 2020**

Background

1. This is an application for judicial review of the refusal of the Deputy Solicitor General (Policy Affairs) (“**DSG(P)**”) to grant compensation to the Applicant (“**A**”) under (i) Article 11(5) of the Hong Kong Bill of Rights (“**HKBOR 11(5)**”), and (ii) the administrative *ex gratia* scheme (“**the Ex Gratia Scheme**”) for allegedly wrongful conviction resulting from serious default by the police or other public authority.
2. A was convicted in the Court of First Instance (“**CFI**”) of conspiracy with X (i.e. the robber) to commit robbery and whose conviction was subsequently quashed by the Court of Appeal (“**CA**”).
3. A applied for compensation for wrongful conviction under both (i) HKBOR 11(5); and (ii) the *Ex Gratia* Scheme. A's ground for seeking compensation was that (1) his conviction by CFI was wrongful; (2) that the CA had quashed his conviction on appeal; and (3) that the CA held that the Prosecution/Police did not disclose certain material evidence (discovered after the CFI conviction) which, if available to the jury, would have very likely caused the jury to return a verdict of not guilty. Both applications were rejected by DSG(P).
4. In this judicial review application, A challenges DSG(P)'s refusals to grant compensation under HKBOR 11(5) (“**the 1st Decision**”), and under the *Ex Gratia* Scheme (“**the 2nd Decision**”).

Issues in dispute

5. For the judicial review against the 1st Decision, the key issues in dispute are:-
 - (a) whether A was convicted “by a final decision”;
 - (b) whether his conviction was reversed by the CA on the ground of “a new or newly discovered fact”; and
 - (c) whether it shows “conclusively that there has been a miscarriage of justice”.
6. For the judicial review against the 2nd Decision, the key issue is whether the refusal to compensate A on the ground that “there was serious doubt about A's innocence” was unlawful; based on an error of law/error of fact; resulted from



the taking into account of irrelevant considerations/a failure to take into account relevant considerations; and/or *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=127039&QS=%2B&TP=JU)

Judicial Review against the 1st Decision

Issue (i) – meaning of “by a final decision”

7. The Court held that A’s conviction by CFI was quashed by the CA in the ordinary course of appeal and accordingly, A has not been convicted by a “final decision” within the meaning of HKBOR 11(5). Thus, the application for judicial review against the 1st Decision was dismissed. The Court’s ruling is summarized as follows:

(a) HKBOR 11(5) states that:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.” (para. 13)

(b) For the purpose of Article 14(6) of the International Covenant on Civil and Political Rights (“**ICCPR 14(6)**”), the equivalent of HKBOR 11(5), it is the consistent view of the Human Rights Committee (“**the HRC**”) that a person cannot be regarded as having been convicted by a “final decision” if his conviction has been reversed or quashed on appeal in the ordinary course of the domestic appellate process (para. 15).

(c) The consistent views of the HRC as regards the meaning or interpretation of a relevant article of the ICCPR should be regarded as highly relevant and persuasive, from which it should only be departed when there is some good reason (para. 28).

(d) Since the words “final decision” HKBOR 11(5) ought to be given the same meaning that the HRC has consistently given to the same words in ICCPR 14(6), the Court held that the A has not been convicted by a “final decision” within the meaning of HKBOR 11(5) and therefore not entitled to claim compensation under that article (paras. 30 and 31).



Issues (ii) & (iii) – “a new or newly discovered fact” and “a miscarriage of justice”

8. Given the ruling in paragraph 7(iv) above, the Court considered that it is not necessary to consider these issues (para. 32).

Other points to note

9. The Court remarked (obiter dictum) that there is nothing in the HKBOR, or any rules or regulations, statutory or otherwise, which empowers the Secretary for Justice (or any officer of the Department of Justice) to make a binding determination of a person’s entitlement to claim compensation under HKBOR 11(5). Whether such decision can, or should, properly be challenged by way of judicial review based on the usual, or traditional, grounds of judicial review is questionable (para. 33).

Judicial Review against the 2nd Decision

10. In reaching the 2nd Decision, the DSG(P) considered, inter alia, that “there was serious doubt about A’s innocence”, applying the guideline referred to in §4(e) of the LC Paper No. CB(4)486/13-14(06) (para. 36).
11. When considering the judicial review against the 2nd Decision, the Court held that the following principles should be borne in mind:
 - (a) A has no legal entitlement to be paid compensation under the *Ex Gratia* Scheme. Whether to grant compensation is a matter of discretion. In an application for judicial review, the Court does not conduct a merits review of the DSG(P)’s decision. The DSG(P)’s exercise of discretion can only be challenged on the usual grounds of judicial review, i.e. illegality, *Wednesbury* unreasonableness, and procedural unfairness (para. 40);
 - (b) There are good policy reasons for the Government to be circumspect about making a payment under the *Ex Gratia* Scheme (para. 41); and
 - (c) Whether there is serious doubt about A’s innocence is essentially a matter for the DSG(P) to decide. For this purpose, he is not bound by the judgment of the CA. DSG(P) should normally not depart from the reasoning which underlines the judgment of the CA, although the Court did not go so far as to say that it is never permissible for him to do so (para. 42).
12. The Court further held that A’s complaint that the 2nd Decision is “unlawful” or “based on an error of law” is unsustainable (para. 45).
13. Regarding rationality of the 2nd Decision, the Court held that the DSG(P) was lawfully entitled to take into account materials which were not adduced at the trial (including materials not before, or not considered by, the CA) in reaching



his conclusion. The weight that should be given to such materials was a matter for the DSG(P) (para. 48).

14. A's submission which included a minute analysis and criticism of the reasoning process of the DSG(P) was rejected by the Court because it amounted to an attempt to draw the Court into an impermissible merits review of the 2nd Decision. (para. 49).
15. Therefore, the application for judicial review against the 2nd Decision was also dismissed (para. 52).

Civil Division

Department of Justice

October 2020