



Summary of Judgment

Md Yazdani (Applicant) v

Director of Immigration (Putative Respondent)

HCAL 186/2023; [2023] HKCFI 1046

Decision : **Application for leave to apply for judicial review dismissed**
Dates of Hearing : **19 and 24 April 2023**
Date of Judgment : **26 April 2023**

Background

1. The Applicant has been staying in Hong Kong unlawfully since November 2013. On 12 December 2017, a Deportation Order (“**DO**”) was made against the Applicant under section 20(1) of the Immigration Ordinance (Cap 115) (“**Ordinance**”) on the basis of the criminal offences he had committed.
2. In 2014, he lodged a non-refoulement claim (“**NRC**”), which remained unsubstantiated at all times. In May 2017, his NRC was rejected by the Director of Immigration (“**Director**”). In September 2017, his appeal of the Director’s decision to the Torture Claims Appeal Board / Non-refoulement Claims Petition Office (“**TCAB**”) was dismissed. In December 2018, his leave application for judicial review against the TCAB’s decision was refused by the Court of First Instance (“**CFI**”). In August 2021, CFI refused to grant extension of time for Applicant to appeal to the Court of Appeal (“**CA**”) against the CFI’s refusal. In March 2022, CA refused his renewal of extension of time application. Finally, in April 2022, CA rejected his application for leave to appeal to the Court of Final Appeal (“**CFA**”).
3. Notwithstanding the power to deport or remove the Applicant from Hong Kong pursuant to section 25 of the Ordinance, the Director only made arrangements to execute the DO four years later, in December 2022, in view of the original removal policy not to remove claimants whose NRC or consequent legal proceedings were still ongoing, or that the Director knew that such proceedings were about to commence.
4. On 6 December 2022, the Applicant renewed his leave application to appeal before the Appeal Committee of the CFA. On 15 December 2022, the CFA issued a “Rule 7 summons” requiring the Applicant to show cause by 12 January 2023 on why his application should not be dismissed, as it is considered that the application disclosed no reasonable cause of action. The CFA’s decision is pending.
5. On 7 December 2022, the Director has updated the removal policy such that once an NRC has reached the stage of its consequent judicial review proceedings having been rejected by the CFI, the claimant’s removal may be proceeded (“**Updated**



Removal Policy”). As such, the Applicant is considered ‘removable’ under the Updated Removal Policy.

6. In this leave application, the Applicant sought to challenge the execution of DO and removal operations (aborted eventually) against him under the Updated Removal Policy. He asked for withholding all departure proceedings against him and alleged that the Director did not consider merits of his case and relied solely on the Updated Removal Policy in his removal.

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

(Full text of the CFI’s judgment at

https://legalref.judiciary.hk/lrs/common/ju/gotoPdf.jsp?lan=en&url=https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2023/HCAL000186_2023.doc)

7. The Court acknowledged the backdrop for the Updated Removal Policy: Hong Kong has been flooded with tens of thousands of NRC claimants in the past decade who have been lingering in Hong Kong for years exhausting all the available administrative and judicial avenues for ultimate resolution of their NRC, creating enormous workload and pressure to both the Government and the Judiciary. (§§24-27)
8. The Court agreed that the present challenge was on the Director’s fact-specific decision to execute a valid and extant DO, but not a systemic challenge to the Updated Removal Policy. The Applicant has not challenged the Updated Removal Policy on its own and has not put forward that the Updated Removal Policy was susceptible to challenges on public law grounds. The Applicant simply argued that the Updated Removal Policy should not be used as a ‘bright line’ rule on him and his case merits should be assessed on its individual circumstances. (§41)
9. On the facts, there is no basis to suggest that the Director did not take into account relevant factors, or that the Decision was otherwise made solely on the basis of the Updated Removal Policy. (§43)
10. Although the Applicant’s CFA application predated the promulgation of the Updated Removal Policy, the Court found no retroactive effect involved in the Updated Removal Policy and the Applicant could not have any expectation except that he remains liable to lawful removal in accordance with the prevailing policy. (§45)
11. It is important to note that neither the old policy nor the Updated Removal Policy was the source of power to deport/remove the Applicant. The power should instead be found in the Ordinance. It is entirely within the Government’s lawful authority to effect deportation/removal of a person subject to a deportation order



and to clarify the removal procedures by an updated policy, which merely clarifies that an appeal will not operate as a stay of deportation/removal. (§46)

12. Moreover, reasonableness or fairness would not necessarily require the Applicant to have his case be determined by the CFA before removal. Firstly, procedural fairness does not require the Government to postpone removal pending the resolution of court proceedings. Secondly, every reasonable opportunity was given for the Applicant to establish his NRC when the CFI looks at the TCAB's decision and assesses whether high standards of fairness required have been met. Thirdly, factually, the Applicant's NRC has been considered and rejected by four separate bodies on six occasions. (§§48-52)

13. Accordingly, there is no reasonably arguable basis to challenge the execution of the extant and legally valid DO on any public law grounds. The leave application is dismissed.

14. The Applicant was ordered to pay the Director's costs as the application was thoroughly ill-conceived and unmeritorious: it was launched to serve the Applicant's personal interest in delaying his departure from Hong Kong. The Court further warned future applicants that if their applications are ill-conceived and lack merits, there is a significant risk of adverse costs order being made against them. (§§55-56)

Civil Division

Department of Justice

27 April 2023