



Summary of Judgment

Hui Chi Fung (“Applicant”) v Secretary for Justice (“SJ”) and Others HCAL 2270/2020; [2021] HKCFI 1208

Decision : **Application for Leave to apply for to judicial review refused**

Date of Hearing : **12 March 2021**

Date of Judgment/Decision : **7 May 2021**

Background

1. In this judicial review application, the Applicant challenged two decisions of SJ (collectively, the “Decisions”) made on 24 August 2020 to intervene and withdraw two sets of criminal proceedings taken out by the Applicant in the Magistrates’ Court as private prosecution summons.
2. One incident concerns the shooting of a masked male on 11 November 2019 by the 1st Putative Interested Party who was a traffic police officer on duty. The other incident was about the mode of driving of the 2nd Putative Interested Party who was a taxi driver, on 6 October 2019 in an area occupied by a group of protestors.
3. The Applicant was not physically involved in either of the two incidents. He alleges that the Decisions are illegal, *Wednesbury* unreasonable and unconstitutional.

Preliminary Issue

4. Meanwhile, the Applicant was also the defendant or one of the defendants in various unrelated criminal proceedings. In around November 2020, the Applicant provided misleading information to the Court and Police in relation to his alleged duty visit in Denmark to procure the return of his travel documents and lifting of his travel ban imposed by the Court as one of his bail terms. He did not return to Hong Kong as promised. Warrants of arrest have been issued against the Applicant.
5. In view of the above, on 27 January 2021, the Court requested the assistance from the parties on the preliminary issue as to whether the Court should hear the Applicant’s proposed judicial review at all.



6. The Applicant's application for leave to apply for judicial review was dismissed by the Court of First Instance by judgment of 7 May 2021.

Issues in dispute

7. The main issues in dispute are:-

- (i) whether the Applicant has the requisite standing to bring the proposed judicial review proceedings; and
- (ii) the relevance of the Applicant being a fugitive;

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=135568&QS=%2B&TP=JU)

8. The Court began by overviewing the legal framework of private prosecution and the amenability of a decision to discontinue under *Ng Chi Keung v SJ* [2016] 2 HKLRD 1330 and *RV v Director of Immigration* [2008] 4 HKLRD 529. (§§ 10-15)
9. On deciding whether the Applicant has standing to bring this judicial review, the Court followed the principles of the Court of Appeal in *Kwok Cheuk Kin v President of Legislative Council*¹. The Court rules that he has standing in this judicial review given: (§§ 21-24)
- (a) It was the Applicant's private prosecutions that were intervened and dropped by the SJ.
 - (b) Assuming that the protestors affected in the two incidents would have been better placed to take out the prosecutions, they may not be better placed to challenge SJ's Decisions to intervene than the Applicant, who was privy to the discussions with DoJ leading to the SJ's Decisions to intervene.
 - (c) It may give rise to the strange situation where the prosecutor (who applied for and was granted the private summonses) has no standing to judicial review SJ's Decisions.
10. In considering whether the Applicant should be allowed to proceed with his application for leave to judicial review as a fugitive, the Court made reference to the case of *Polanski*² where the UK House of Lords held, inter alia, that the court

¹ [2021] HKCA 169

² *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637



has to balance two conflicting policy considerations (a) it should not frustrate a properly brought claim to ventilate a fugitive's rights from being properly and fairly litigated and (b) it should not take steps the effect of which is to frustrate or impede the due execution of the criminal process (or to facilitate or enable a fugitive to escape from his or her just desert). (§ 27)

11. In *Polanski*, majority of the House of Lords held in favour of the claimant of a libel case who was himself a fugitive from England and granted leave to him to give evidence by video conference link from France. The case can be distinguished from the present one as the claimant in *Polanski as a fugitive* was entitled to bring proceedings to protect his civil rights and there was a strong public interest in allowing a claim to be properly and fairly litigated, whilst the Applicant's judicial review is not about the protection of any of his substantive legal right but about the legality or rationality of SJ's Decisions. The Applicant does not have the *right* to judicial review as it is a discretionary remedy. (§§ 29–31)

12. In the present case, the Court has given due weight to the following factors in deciding whether to exercise its discretion in judicial review proceedings:-

- (a) Leave requirements serve as an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process. The Court has inherent jurisdiction to prevent any abuse of its process and the administration of justice cannot be doubted. (§ 33)
- (b) The approach to leave applications for judicial review is not "right-based" but "interest-based"³, and the Applicant admitted that he does not have any private interest in the private prosecutions. (§ 37)
- (c) The Court has cogent reasons to believe that the Applicant was involved in a plan to mislead the Court and the Police into believing he was leaving Hong Kong temporarily when he in fact intended not to face his trial. (§ 35)
- (d) The Applicant's plan to flee the jurisdiction was conceived even before he presented his Form 86 dated 17 November 2020. (§ 35)
- (e) His provision of misleading information to the court amounts to a criminal contempt. (§ 36)
- (f) Refusal of leave would not adversely affected legitimate interests of other parties such as the protestors concerned as the summonses were withdrawn rather than offering no evidence and there is nothing to suggest that the present application for judicial review is not supported by any of the protestors concerned. (§ 38)
- (g) Refusal of leave for judicial review would not bar any civil claims against the

³ AXA General Insurance Ltd v HM Advocate [2012] I AC868



putative interested parties. (§ 38)

13. In the circumstances, the Court refused to grant leave to judicial review to the Applicant and, in view of the Applicant's conduct as mentioned above in paragraph 12 (c) to (e), the Court awarded costs to SJ on an indemnity basis.

Civil Division

Department of Justice

7 May 2021