



Summary of Judgment

Pang Lok Sze (“Applicant”) v Director of Public Prosecutions (“DPP”)

HCAL 2346/2020; [2021] HKCFI 1781

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

Date of Hearing : **31 May 2021**

Date of Judgment/Decision : **30 June 2021**

Background

1. In this leave application for judicial review, the Applicant challenged DPP’s decision not to prosecute two suspects for any offence under the Prevention of Cruelty to Animals Ordinance (Cap. 169) (“**PCAO**”) in respect of a suspected case of animal cruelty incident on 14 February 2020 (“**Decision**”).
2. On 14 February 2020, 15 carcasses and 9 injured animals were found on a slope near an estate in Sham Tseng. A few more animals were found in vicinity on the next few days. Subsequently, two suspects attended the Police Station in respect of the investigation of the suspected offence.
3. DPP made the Decision on 12 August 2020 and the Society for the Prevention of Cruelty to Animals (“**SPCA**”) (which was a body assisting in rescuing and providing care for the animals) was informed of the same on the next day. Such communication was made before the expiry of statutory time limit for prosecution under PCAO which was on 15 August 2020. On 2 September 2020, upon media enquiry, the Department of Justice (“**DoJ**”) publicly confirmed that the two suspects were not prosecuted on the basis of insufficiency of evidence.
4. The Applicant and her boyfriend adopted the cat “Potter” one of the surviving animals since 3 September 2020.
5. The Applicant alleged that DPP had failed to make the Decision and to communicate the Decision to members of the public within a reasonable time in light of the statutory time bar so as to allow them sufficient time to lay their complaint. She asserted that the Decision was unlawful, perverse and irrational and was in breach of a legitimate expectation and her right to court under Article 35 of the Basic Law (“**BL 35**”).



6. The Applicant's application for leave to apply for judicial review was heard on 31 May 2021 and was dismissed by judgment of 30 June 2021.

Issues in dispute

7. The main issues in dispute are:-

- (i) whether this judicial review is academic;
- (ii) whether the Decision is susceptible to judicial review; and
- (iii) whether the Applicant has the requisite standing to bring the proposed judicial review proceedings.

DoJ'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=136867&QS=%2B&TP=JU)

8. On issue of whether this judicial review is academic (i.e. issue (i)), the Court noted that the underlying suspected offence had already been time-barred when this judicial review application was filed and no prosecution (whether public or private) of the suspected offence could be made. The present judicial review application is therefore academic and leave could be refused on this basis alone. (§ 7)
9. In determining whether the Decision is susceptible to judicial review (i.e. issue (ii)), the Court followed a consistent line of local case authorities including *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397, *RV v Director of Immigration* [2008] 4 HKLRD 529 and *Re Leung Lai Fun* [2018] 1 HKLRD 523, and reaffirmed that, under Article 63 of the Basic Law, the independence of the DoJ's control of criminal prosecutions is protected from judicial encroachment except in extremely rare situations such as where there is evidence proving that the DoJ has acted in obedience to political instruction or is acting in bad faith, such as to cause the Court to find that the prosecutorial decision is unconstitutional. (§§ 16-17)
10. Having considered the evidence in this case, the Court held that the grounds relied by the Applicant did not come any way close to "truly exceptional circumstances" so as to render the Decision unconstitutional and subject to judicial review (§ 35) for the following reasons:
 - (a) there was no "legitimate expectation" on the part of the public (and the Applicant) to be informed of the Decision and to be informed within a "reasonable time" before the expiry of the time limit for prosecution as:-



- (i) there has not been any representation by the DoJ, by words or by conduct, expressly or impliedly, that the public (and the Applicant) would be informed of the Decision (§§ 23-24);
 - (ii) there was no breach of the Prosecution Code (“**Code**”) or the “Victims of Crime Charter” (“**Charter**”). The Police had informed the SPCA of the Decision before the expiry of the statutory time limit and the Applicant was not a “victim” under the Code or the Charter (§ 25); and
 - (iii) the Applicant’s contention that she has a legitimate expectation that DPP would communicate the Decision “within a reasonable time” before the prosecution was time-barred is not reasonably arguable as this would encroach the time for investigation and would contravene the legislative intent for allowing the prosecution the full 6-month period to lay summons before prosecution is time-barred (§ 26);
- (b) The right to access to court protected by BL 35 is not engaged as one does not need to wait for the making or communication of the Decision before instituting a private prosecution against any suspect (§ 28); and
- (c) DoJ does not have a general duty to inform the public of its decisions not to prosecute before the expiration of the time bar for summary offence. There is no valid distinction between offences under PCAO and other offences which are subject to a time limit. Interests of animals can be represented and protected by their owners and/or other interested parties and there is no justification to impose a burden on the DoJ to inform the public of its decisions not to prosecute, whether before or after the expiry of the time limit (§§ 30-31).

11. As regards the Applicant’s standing (issue (iii)), the Court followed the principle laid down in *Kwok Cheuk Kin v President of Legislative Council for and on behalf of the Legislative Council and Secretary for Justice* [2021] 1 HKLRD 1247 and held that the Applicant did not have standing in bringing this purported judicial reviews for the following reasons (§ 39):-

- (a) she only decided to adopt “Potter” on 3 September 2020 (i.e. after the Decision was communicated to the SPCA and the expiry of the statutory time limit for prosecuting the suspected offence);
- (b) there is no evidence showing that she had at any stage made any enquiries with either the Police or the DoJ on the case;
- (c) there are other potential challengers who have better standing and a greater interest in the subject matter e.g. animal welfare groups, the SPCA and other non-governmental organisations. The mere fact that those bodies are not



challenging the Decision cannot by itself confers standing upon the Applicant; and

(d) the Applicant's challenges lack merits.

12. The Applicant's challenges on the ground of procedural impropriety, illegality and irrationality are not reasonably arguable. (§ 40)

13. In the circumstances, the Court refused to grant leave for judicial review to the Applicant and refused her summons for leave to amend the Amended Form 86. The Court also made an order nisi that the Applicant shall pay Government's costs incurred after the hearing on 16 April 2021 (when the Applicant received the SPCA's confirmation of the date on which they were informed of the Decision). (§§ 42-44)

Civil Division

Department of Justice

30 June 2021