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**Summary of Decision**

**Etik Iswanti (“Iswanti”) v Torture Claims Appeal Board and Director of Immigration (“Director”)**

**Director of Immigration (“Director”) v Etik Iswanti (“Iswanti”)**

**HCAL 411/2021 & HCMP 602/2021**

**[2021] HKCFI 1589**

**Decision : Iswanti’s Leave Application for Judicial Review (“JR”) Dismissed, and the Director’s Section 27 Application Allowed.**

**Date of Hearing : 31 May 2021**

**Date of Decision : 9 June 2021**

**Background**

1. Iswanti is an overstayer and a claimant whose non-refoulement claim (“**Original NRC**”) first raised in 2014 had been rejected, and was finally and conclusively brought to an end in 2020 after the two-tier statutory and administrative procedures followed by four attempts of unsuccessful legal challenges against the refusal of her Original NRC, including her application for leave to apply for JR in the Court of First Instance (“**CFI**”), two sets of proceedings in the Court of Appeal and one set of proceedings in the Court of Final Appeal (“**CFA**”).
2. In 2020, after the Original NRC was brought to a final end, Iswanti made a request to make a subsequent NRC to the Director under section 37ZO of the Immigration Ordinance (Cap. 115)<sup>1</sup> on substantively the same primary factual basis. The Director refused the request on the ground that there is no significant change of circumstances since the final determination of her Original NRC (“**Refusal Decision**”).
3. Iswanti made a JR leave application to challenge the Director’s Refusal Decision, repeating in substance the same complaints as in the JR leave application in respect of the Original NRC (“**JR Leave Application**”).

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<sup>1</sup> Relevantly, section 37ZO(2) of the Immigration Ordinance (Cap. 115) provides that “a person may make a subsequent claim if the person provides sufficient evidence in writing to satisfy an immigration officer that—  
(a) there has been a significant change of circumstances since the previous claim was finally determined or withdrawn; and  
(b) the change, when taken together with the material previously submitted in support of the previous claim, would give the subsequent claim a realistic prospect of success.”



4. Meanwhile, in light of the repeated and pending legal proceedings as aforesaid, Iswanti's removal from Hong Kong has been suspended under the Director's removal policy.
5. Given the vexatious nature of Iswanti's conduct, the Director applied for a vexatious litigant order against her under section 27 of the High Court Ordinance (Cap. 4) ("**Section 27 Application**").<sup>2</sup>
6. The hearing of the JR Leave Application and the Section 27 Application was held before the CFI on 31 May 2021.

#### **Issues for determination**

7. The issues for determination are (1) Iswanti's JR Leave Application, and (2) the Director's Section 27 Application.

#### **Department of Justice's Summary of the Court's Decision**

(Full text of the CFI's Decision at

[https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2021/HCAL000411\\_2021.doc](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2021/HCAL000411_2021.doc))

#### **JR Leave Application**

8. The CFI dismissed the JR Leave Application on the ground that there are no reasonably arguable grounds against the Director's refusal decision. (§30) In so doing, the CFI sets out the following principles concerning an applicant's request to make a subsequent claim:-
  - (a) The possibility of being able to make a subsequent claim gives rise to an obvious avenue, or loophole, for a non-refoulement claimant to abuse the system in order to prolong his/her stay in Hong Kong. (§27)
  - (b) The safeguard against such abuse viz the triple requirements of:-
    - (i) to provide sufficient evidence that,
    - (ii) there has been a significant change of circumstances since the previous

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<sup>2</sup> Relevantly, the gist of section 27(2) of the High Court Ordinance (Cap. 4) is that the CFI may make a vexatious litigant order if it is satisfied that the person against whom the order is to be made has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.



claim was finally determined or withdrawn, and  
(iii) that the change, when taken together with the material submitted in support of the previous claim, would give the subsequent claim a realistic prospect of success,

ought to be applied robustly to ensure that the system will not be abused by claimants seeking merely to prolong their stay in Hong Kong. (§28)

(c) The Court should not lightly interfere with the Director's assessment unless grounds for judicial review are clearly established. (§29)

(d) The Court must be astute to see that the system of permitting a non-refoulement claimant to make a subsequent claim is not being abused. (§29)

## Section 27 Application

9. The CFI sets out the principles governing the Court's exercise of its discretion to make a section 27 order, having reviewed the relevant authorities, in particular, on the condition that must be satisfied before the CFI may make a section 27 order i.e. "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings" ("**Condition**"):-

(a) On the element of "habitually and persistently", the CFI held that it involves an element of repetition and two sets of proceedings on the same subject matter may be sufficient. (§35(1))

(b) On the element of "vexatious legal proceedings", the CFI held that the proceedings may be regarded as vexatious if they disclose no reasonable cause of action, are an abuse of the process of the Court, are brought for collateral purposes, are so obviously untenable or manifestly groundless as to be utterly hopeless, or have little or no basis in law. (§35(2))

(c) Repeated actions evidencing a calculated attempt by a defendant to delay an inevitable judgment or its execution, or a refusal to accept the unfavourable final result of a litigation, or seeking to re-open matters already determined in a previous action, may be regarded as "vexatious legal proceedings". (§35(4))

(d) The consideration of finality of judicial process is a matter of particular importance in the context of non-refoulement claims. (§35(5))



10. The CFI held that the Condition was satisfied in the present case having regard to the following facts and circumstances, and granted a vexatious litigant order against Iswanti:-

- (a) Her leave applications for JR and subsequent appeals in respect of the Original NRC are all obviously untenable or manifestly groundless as to be utterly hopeless, and constitute an abuse of the Court's process. (§36(1))
- (b) Her applications all relate to the same subject matter, namely, the rejection of her non-refoulement claim. (§36(2))
- (c) Her JR Leave Application in respect of the subsequent NRC manifests a refusal by her to accept the unfavourable outcome of the rejection of her non-refoulement claim, even though the same has been finally and conclusively determined by the CFA in the context of the Original NRC. (§36(3))
- (d) Her applications in the CA and the present JR Leave Application are evidence of her intention to delay the outcome of her first JR leave application. (§36(4))
- (e) The whole circumstances and history of her applications amount to institution of vexatious legal proceedings on a habitual and persistent basis. (§36(5))

11. In the circumstances, the CFI granted a section 27 order against Iswanti in the terms including that no legal proceedings relating to any non-refoulement claim shall be instituted by her without leave of the CFI, that no other legal proceedings relating to any non-refoulement claim previously instituted by her shall be continued by her without leave of the CFI, and that the order shall cease to have effect at the end of 5 years.

12. The CFI also ordered costs against Iswanti in respect of both the JR Leave Application and the Section 27 Application, having considered that the JR Leave Application amounts to an abuse of process of the Court. (§41)

13. Separately, on the same day (9 June 2021), the CFI also handed down Reasons For Decision regarding another non-refoulement claimant (MD Hasnain) with similar factual matrix in which the CFI also granted a section 27 application made by the



Director with similar legal principles being laid down. (HCAL 409/2021 & HCMP 603/2021) [2021] HKCFI 1610 (Full text of the CFI's Reasons for Decision at [https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2021/HCAL000409\\_2021.doc](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2021/HCAL000409_2021.doc))

**Civil Division**

**Department of Justice**

**June 2021**