



### Summary of Judicial Decision

**DM v Commissioner of Customs & Excise (1<sup>st</sup> Putative Respondent)  
and Secretary for Security (2<sup>nd</sup> Putative Respondent)  
HCAL 460/2022, [2022] HKCFI 3476**

**Decision** : Leave to apply for judicial review refused  
**Date of Hearing** : 18 October 2022  
**Date of Decision** : 24 October 2022

#### Background

1. The Applicant is a Venezuelan national who arrived in Hong Kong in 2015 and was intercepted by officers of the 1<sup>st</sup> Putative Respondent (“**C&E**”) to have cocaine weighing a total of 1.664 kg on her body. Upon trial, the Applicant was convicted of trafficking in dangerous drugs and sentenced to 25 years of imprisonment in 2016. In March 2020, the Applicant’s conviction and sentence were upheld on appeal by the Court of Appeal.
2. In the criminal trial and the appeal, the Applicant raised the defence to the criminal charge, based on the argument that she acted under duress as a credible victim of trafficking in persons (“**TIP**”). The defence was rejected by the CFI Judge (in an application for permanent stay), the jury and the Court of Appeal.
3. No further steps were taken by or on behalf of the Applicant on this matter until February 2022, when the Applicant’s solicitors requested the Security Bureau (“**SB**”) to conduct a fresh assessment of the Applicant under the TIP Guideline and Action Plan, based on the same factual account that was previously rejected by the CFI Judge, the jury, and the Court of Appeal. Against the refusal by the SB to conduct an assessment given in its letter dated 11 March 2022, the Applicant filed the application for leave to apply for judicial review on 10 June 2022 (Form 86).
4. The Applicant sought the following substantive relief: -
  - (i) A declaration that the C&E has failed to conduct an independent Victim Identification Screening (“**VIS**”) pursuant to the Revised



Guideline on Inter-departmental Cooperation (“**the Guideline**”) for the Handling of Suspected Cases of TIP issued by the SB.

- (ii) A declaration that the C&E has failed its procedural obligation to investigate whether the Applicant is a victim of compulsory labour in contravention of Article 4 of the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**BOR4**”).
5. In the Amended Form 86, the headings of the two intended grounds of review identified are as follows:
    - (1) Ground 1 – Failure to conduct VIS;
    - (2) Ground 2 – Criminal process inherently unsuitable.
  6. A rolled-up hearing for leave to apply for judicial review and the substantive application for judicial review was conducted before the Honourable Mr Justice Coleman on 18 October 2022.

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

(Full text of the Court’s judgment at

[https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2022/HCAL000460\\_2022.doc](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2022/HCAL000460_2022.doc))

7. With reference to its recent decision in *AM v Director of Immigration* [2022] HKCFI 1046, the Court reiterated that investigating under the duty imposed by BOR4 – so as to give practical and effective protection against forced labour – is not the same thing as investigating the commission of an offence which might be shown to have occurred as a facet of forced labour. (see §45)
8. However, in the present case, the Court recognised that the relevant duty of investigation is context specific, which might arise in myriad varying circumstances, and each case will require particular and individual consideration. While recognising that a person involved in some aspect of a criminal process simply may not be fairly and properly assessed as to potential victimhood of TIP/forced labour by just the criminal process, the Court pointed out that in the *AM* case (*supra.*), the potential victim of TIP/forced labour was herself the apparent victim of a crime and came to the investigating authorities in that



context, whereas, in this particular case, the Applicant was herself the apparent perpetrator of a crime and came to the investigating authorities in that context. (see §49) Also, it does not seem that the Applicant was significantly constrained by any fear of self-incrimination. She did not respond to the invitation to give a non-prejudicial statement for the purposes of providing further information, when invited to do so after her legal advisers pressed for a conclusion that she was a TIP victim. (see §63)

9. On behalf of the Putative Respondents, it was submitted that it is an abuse for the Applicant to mount what is a collateral attack on the previous decisions made by the judges and the jury in the criminal trial and the underlying appeal especially when it was clear from those decisions that the threshold question of whether the Applicant had demonstrated a credible case of being a TIP victim was fairly address and squarely rejected.
10. The threshold question of whether the Applicant had demonstrated a credible case that she was the victim of TIP was fairly addressed and squarely rejected in the criminal trial and the underlying appeal. Any finding to the contrary by the Government or by a Judge in a judicial review which casts doubt on those decisions would amount to or permit a collateral attack on those decisions in the way which is objectionable as a matter of policy. The concepts of *res judicata* or issue estoppel must also apply in judicial review proceedings. What matters is whether the essential elements of the matter which the Applicant now seeks to pursue were adjudicated upon. Although success in the judicial review proceedings would not lead to the conclusion that the outcome of the criminal trial must inevitably have been different, it would seriously undermine the reliability of both the rulings of criminal trial and underlying appeal. The Applicant's application in these judicial review proceedings must, therefore, be dismissed as an abuse of court process. (see §§70-82)
11. The duty under BOR4 applies to the entirety of any potential assessment of victimhood. It applies also to the initial assessment of whether there is a credible suspicion. If no credible suspicion is identified, that is the end of the process, and no further continuing constitutional obligation exists. If a credible suspicion is identified, the constitutional obligation continues, with potential further assessment and the identification of relevant assistance and protection



as might be provided. In this case, it is obvious that the question of whether the Applicant was a credible victim has been processed in the criminal trial. Unless the position is taken that the criminal process can in no circumstances be sufficient to meet the duty under BOR4 (a position expressly, and rightly, not taken by the Applicant's counsel), engaging BOR4 itself is insufficient to establish special circumstances calling for the disapplication of abuse of process. More is required to justify a departure from the usual application of the abuse of process principle. (see §§86-87)

12. While the Court would not consider there must or could be no utility in the application for judicial review as should lead to the refusal of leave, as the Applicant had failed to give precise submissions as to what might happen if the relief sought by the Amended Form 86 were to be granted, it is considered difficult to exercise subsequent discretion as to the grant of relief. (see §§93-94)
13. Last but not least, the Court pointed out that the more detrimental to the position of the Applicant is the significant delay in bringing these proceedings. In this case, the Applicant's grounds of review arose when the Prosecution refused to grant prosecution immunity or to consent to the stay application in September 2016. The Applicant's conviction was in October 2016. There was also a significant time lapse after the Court of Appeal's decision in March 2020 until the request to the SB for a fresh assessment in February 2022. The Court accepted the Putative Respondents' submissions that it would be detrimental to the good administration of justice to allow an extension of time to a convicted person to challenge again, albeit collaterally, the safety of his/her conviction years after the conclusion of criminal proceedings. There must be finality in criminal litigation. (see §§97-100)
14. For the above reasons, the Court dismissed the application for leave to apply for judicial review with costs to the Putative Respondents.
15. In Postscript, the Court states that perhaps in another case, before a charge is pressed or before any trial commences, an independent VIS outside the criminal investigation and prosecution process might be done and then possibly taken into account in the criminal process without risk of disturbing any findings to be made



in that process as might bring the administration of justice into disrepute. (see §107).

**Civil Division**

**Department of Justice**

**November 2022**