



Summary of Judicial Decision

**AM v Director of Immigration, Commissioner of Police and Secretary for Justice
HCAL 466/2021, [2022] HKCFI 1046**

&

**CB v Commissioner of Police & Secretary for Justice
HCAL 617/2021, [2022] HKCFI 1046**

Decision : **AM (HCAL 466/21): Leave to apply for judicial review refused**
CB (HCAL 617/21): Leave to apply for judicial review granted; Substantive JR application allowed

Date of Hearing : **28-29 March 2022**

Date of Decision : **22 April 2022**

Background

1. Each applicant in the present two cases is a Philippine national who worked in Hong Kong as a foreign domestic helper (“**FDH**”). Both applicants sought leave to apply for judicial review to challenge the Director of Immigration and/or Commissioner of Police’s failure to provide them practical and effective protection against forced labour under BOR4, and their failure to screen them as victims of forced labour (and as victim of trafficking in person (“**TIP**”) in the case of CB). CB also challenged that such alleged failures were caused by the lack of a bespoke offence criminalising forced labour.
2. On AM’s factual claim, she alleged that during the FDH contract from 2011 to 2013, she never worked for her employer as stated in the employment contract; that she was instead arranged by the employment agency to run a boarding house and care for other FDHs waiting employment, which required her to travel to Mainland and Macao; and that she was never paid a salary, and that she had to “escape” from the agency upon being threatened physical harm. Subsequently, in 2016, AM was criminally convicted of making false representations to the Immigration Department (“**ImmD**”) in circumstances where, contrary to the factual basis upon which her working visa was obtained



(i.e. to work as a FDH in Hong Kong), she had been found working illegally in Mainland China.

3. On CB's factual claim, she was recruited in Hong Kong to work as a FDH for Z since September 2018, replacing Z's former FDH, Janice. From September 2018 to April 2019, CB was subject to various forms of sexual abuse/exploitation by Z. In December 2019, CB reported the sexual abuses to Police. The ensuing investigation led to the prosecution of Z, and his conviction, on two charges of indecent assault. Upon screening conducted by the Police, CB was found not to be a victim of TIP nor forced labour.
4. The legal basis for protection against TIP is solely a matter of policy, as the Palermo Protocol¹ is not applicable to Hong Kong. On the other hand, the right for protection against forced labour is grounded in BOR4(3), which is constitutionally entrenched via Article 39 of the Basic Law.
5. The Government adopts a single framework in tackling TIP and forced labour. In terms of victim identification, investigation and protection, there are an Inter-Departmental Guideline first published in December 2016 and revised in March 2019 by a steering committee headed by the Chief Secretary for Administration to law enforcement agencies and the Labour Department, and an Action Plan to Tackle TIP and to Enhance Protection of FDHs in Hong Kong published in March 2018. In terms of offences criminalising TIP and forced labour, there are over 50 legal provisions against various forms of conduct including but not limited to physical abuse, false imprisonment, criminal intimidation, fraud, unlawful custody of personal valuables, child abduction, child pornography, and exploitation of children.
6. A rolled-up hearing for leave to apply for judicial review and the substantive application for judicial review of the two cases was conducted before the Honourable Mr Justice Coleman on 28 and 29 March 2022.

Issues in dispute

¹ Palermo Protocol, which is an instrument adopted by the United Nations ("UN") to supplement the 2000 Convention against Transnational Organized Crime. The protocol was adopted to prevent, suppress and punish TIP.



AM

- (i) Whether an extension of time should be granted to AM to apply for leave to apply for judicial review.

CB

- (i) Approach to issues in this JR;
- (ii) Whether the Police failed to conduct an effective investigation under TIP and BOR4;
- (iii) If the Police failed to conduct an effective investigation under BOR4, whether it was a result of the absence of a bespoke offence criminalising forced labour.

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/2021/HCAL000466_2021.doc)

AM

- 7. The Court found that there was no good reason to justify any extension of time for the application for leave to apply for judicial review:
 - (1) The Court noted that while AM claimed that she was a victim of forced labour in or before September 2013, the Form 86 was issued only in April 2021. There is no offered explanation for the substantial delay between at least mid-2016 and mid-2019. Even if there is some explanation for the delay from mid-2019 due to the pursuit of legal Aid and some interruption from the pandemic restrictions, waiting for legal aid is not a good enough reason to justify extending the time further (§§96-97).
 - (2) The Court accepted that there has been actual prejudice suffered by the Government caused by the delay, not least because the relevant case file was destroyed in 2018 in accordance with standing procedures (§98).
 - (3) The proposed challenge is fact-sensitive and in any event falls under the old regime prior to the issuing of the said Action Plan in 2018. There was clearly some investigation of the circumstances and there was an understandable reason why no further prosecutions were brought. The merits of the proposed challenge is not so strong to warrant significant period of extension of time (§99).



8. For the above reasons, the Court dismissed the application for leave to apply for judicial review with no order as to costs on a *nisi* basis (§§266-267)

CB

Approach to issues in this JR

9. To start with, the Court did not accept the Government's contention that on proper analysis, CB cannot be classified as a TIP victim or a forced labour victim, and as such the entire judicial review challenge is moot and academic (§154).
10. The Court's reasons are two-fold. First, identification of victims is made through the screening process and any further investigations. The present challenges require the Court to look at the steps taken in that process, not just CB's victim status (§156). Second, it is trite that judicial review protects the integrity of the decision-making process itself rather than as a test of merits of the decision (§160). A judicial review challenge does not necessary fail simply because the Court would have reached the same answer as the decision-maker did. Logically, that decision could still be challenged and quashed based on the conventional public law grounds (§161).
11. As such, the Court decided to address the present challenges by reference to the steps taken to screen for TIP and forced labour (§163).

Whether the Police failed to conduct an effective investigation under TIP and BOR4

12. Citing the United Kingdom Supreme Court's judgment in *In re McQuillan* [2022] 2 WLR 49, the Court acknowledged that there are only very limited circumstances in which the Court will interfere with decisions made by law-enforcement investigatory and prosecutorial bodies (§164). However, in the context of constitutionally required investigation (such as the present case in relation to the BOR4 decision challenge), a high level of scrutiny will come into play (§167).
13. Further, citing the Court of Final Appeal judgment in *ZN v Secretary for Justice* (2020) 23 HKCFAR 15, the Court found that BOR4 entails (1) a procedural obligation to investigate situations of potential forced labour and/or exploitation,



(2) which does not depend on a prior complaint, (3) where the investigation must be independent from those implicated in the events, (4) where there is a requirement of expedition and urgency; and (5) where the victim (as may potentially be found) must be involved in the procedure (§195).

14. On the facts, the Court found that there were failures to conduct an effective investigation under TIP and BOR4 because *inter alia*,

(i) the assessing police officer completely failed to take into relevant evidence such as video of Z engaging in sexual acts with his previous FDHs, including Janice which was demonstration of a larger and more organised scale of activity (§177);

(ii) the assessing officer accepted evidence that was exculpatory of Z at face value (§181);

(iii) the assessing officer failed to investigate or follow-up in relation to any of Z's previous FDH employees (§189);

(iv) there was no contemporaneous document generated by the assessing officer that made any reference to addressing forced labour (§199).

(v) the assessing officer's reasons for not assessing CB as a victim as provided in the affirmation were rejected by the court as they were irrelevant or that minimal weight should be attached to those reasons (§201).

Possible Need for a Bespoke Offence

15. Having found a breach of BOR 4 duties owed to CB, the Court also found that the "causal connection" between the particular failures in the case and the lack of bespoke criminal offence is established for the following reasons: -

(i) A bespoke criminal offence provides a clear and precise reference of the mischief that is sought to be regulated, as well as a focal point for law enforcement action. As exemplified by the facts of the CB case, in the absence of a bespoke criminal offence, none of the investigative steps of the Police were taken directly for the purpose of investigating into CB's TIP/forced labour position. Without an applicable legislative framework directing and regulating the conduct of investigations into possible specific forced labour



offences, officers are left to revert to focusing on an available existing offence, here indecent assault (§§218, 231 & 243);

(ii) Regardless of the Police’s view on whether she was also a victim of forced labour, given that CB’s complaint would have been processed through the criminal justice system in the same manner from investigation to prosecution, the Court found that the failures as identified demonstrate that the constitutional investigative duty imposed by BOR4 does not fit well with a criminal justice system which has no specific criminal offence targeting forced labour (§§240-241). Further, it is clear that forced labour is an additional dimension to the existing criminal offence of indecent assault (§249);

(iii) As demonstrated by the evidence, the manner in which the investigation focused on conventional sexual offences may be different from an investigation specifically into forced labour offences, where a more nuanced or subtle approach to questions of consent may be warranted. The essence of forced labour may also involve patterns of behaviour, so focusing on the “results” as regards one victim may not suffice if the position of other possible victims is not also properly addressed (§§252 & 255);

(iv) Further, the lack of any proper written record of a separate negative finding of forced labour is another clear sign that the lack of a specific offence criminalizing forced labour has led to systemic failure in addressing the gravity of the fundamental rights under BOR4 (§257).

16. Accordingly, the Court held that there should be bespoke legislation and it should not be limited only to the context of FDH employment. That said, the Court stopped short of identifying detailed features of the bespoke legislation, which would be a matter for the Legislature with the assistance of the Executive (§§264-265).

17. The Court ordered the following relief (§270):

- (1) Leave to apply for judicial review is granted.
- (2) The decisions that CB were not victim of TIP nor forced labour are quashed.
- (3) The questions as to whether CB was a victim of TIP and/or forced labour are



remitted to the Commissioner of Police for renewed consideration.

(4) For the avoidance of doubt, the renewed consideration directed in paragraph (3) above shall include consideration as to other possible unlawful acts by Z (besides those which he has already been convicted) including as regards his other FDHs.

(5) A declaration that the failures as regards the investigation as to whether CB was a victim of TIP and/or forced labour in this case were causally connected to the absence of specific legislation criminalising forced labour.

Civil Division

Department of Justice

April 2022