



Summary of Judgment

N v Secretary for Security, Commissioner of Police, Commissioner of Customs and Excise, Director of Immigration and Commissioner for Labour
HCAL 961/2021, [2024] HKCFI 1983

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M v Secretary for Security, Commissioner of Police, Commissioner of Customs and Excise, Director of Immigration and Commissioner for Labour
HCAL 1034/2021, [2024] HKCFI 1983

Decision : **N (HCAL 961/2021): Extension of time and leave to apply for judicial review rejected**
M (HCAL 1034/2021): Extension of time and leave to apply for judicial review granted on Ground 1, but refused on other grounds;
Substantive application allowed for Ground 1 but no relief granted

Date of Hearing : **15-16 August 2022**

Date of Decision : **31 July 2024**

Background

1. Both Applicants (“**N**” and “**M**”) are Kenyan nationals who worked in Hong Kong as a foreign domestic helper. They were recruited by the same employment agency and they worked for the same employer (“**Employer**”). Both applicants sought leave to apply for judicial review to challenge (a) the Government’s classification of the Applicants as non-victims of trafficking in person (“**TIP**”) and (b) the Government’s decision not to enact bespoke offences against acts in breach of Article 4 of the Hong Kong Bill of Rights (“**BOR4**”) and TIP.
2. The Applicants contended that they were misled by the recruitment agent that during their first 3-month of work they were subject to a probation period, during which they were not entitled to rest days, and they were required to pay exorbitant agency fees to the Agent. They also alleged that they were subject to poor living conditions at the Employer’s residence, with long working hours, inadequate food and restrictions on their ability to use their mobile phones



during work hours. The Employer had also wrongfully withheld wages and had wrongfully denied the Applicants of their entitled rest days (§§49-62, 75-102).

3. In relation to N, on 26 February 2020, N was interviewed by Immigration Department (“ImmD”) where she was cautioned for the offence not having applied for a HKID card within the prescribed time and breach of conditions of stay. N refused answering further questions upon being cautioned. N was also screened by ImmD for TIP victimhood on the same day, and the screening result was negative (§64). By a letter dated 17 April 2020, ImmD informed N that she had been negatively screened for TIP victimhood after preliminary assessment (§65). Form 86 against ImmD’s decision was filed on 8 July 2021, with a delay of about 1 year and 3 months (§229).
4. In relation to M, on 16 August 2019, M was interviewed under caution regarding her suspected breach of conditions of stay for working in the residence of the recruitment agent (§103). Based on the screening completed by ImmD on 16 August 2019, three indicators were checked positive among the seven TIP indicators (§118). M was informed of her classification not as a TIP victim on 12 May 2020. M filed her Form 86 against ImmD’s decision on 21 July 2021, with a delay of about 1 year and 2 months (§229).
5. 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.
6. The Government adopts a single framework modelled upon the Palermo Protocol in tackling TIP and forced labour. A brief summary of the Government’s framework in combating forced labour can be found at in ***ZN v Secretary for Justice*** (2020) 23 HKCFAR 15 at §§110-113.
7. 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 15 and 16 August 2022.

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



Issues in dispute

8. There are four intended grounds of review in each case:-

- (1) **Ground 1:** On classifying the Applicants as non-TIP victims, the Government failed to adhere to its published policy and procedures for screening TIP victims (**Ground 1A**); the Government's policy and procedures for TIP victim screening is procedurally improper and the screening results were tainted by irrationality (**Ground 1B**); and there were a failure to separate the criminal investigation from the screening for victimhood and an infringement of rights to silence (**Ground 1C – N's case only**);
- (2) **Ground 2:** The Government failed to discharge its investigative duty owed to the Applicants under BOR4;
- (3) **Ground 3:** The current patchwork of offences are ineffective and impractical to address the prohibition against forced or compulsory labour under BOR4, thus it is necessary to enact bespoke criminal offences against violation of BOR4; and
- (4) **Ground 4:** Based on various international conventions ("**Conventions**") applicable to Hong Kong, bespoke criminal offences should be enacted against TIP activities for the purposes prohibited under BOR4 and all forms of exploitation.

Department of Justice's Summary of the Court's rulings

(Full text of the Court's judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=161699&currpage=T)

9. In respect of N, Ground 1 fails:-

- (1) The Court finds that the Government did not breach its own policy since none of the 7 indicators existed for N. There was no need to proceed to the full debriefing under the Government's own procedures (§147);
- (2) The screening mechanism is an investigative process to identify and offer appropriate assistance to TIP victims. An investigator should not be asked



to conduct a substantive interview with N or to invite her to make representations, which amounts to imposing him the role of an adjudicator making findings on legal rights and obligations. The screening process was not procedurally unfair nor was N entitled to any legitimate expectations to be afforded procedures which are not part of the policy. N's classification was not *Wednesbury* unreasonable (§§156-157); and

- (3) The Court takes the view that it is permissible under the policy to collect information regarding potential TIP victimhood during criminal interrogation against the potential victim. The design of the screening procedure does not entail actual breach or any heightened risk of breaching the subject's right to silence or right to against self-incrimination; a potential TIP victim is not compelled to provide any information to prove her TIP victimhood (§§160-162).

10. In respect of **M**, **Ground 1** met the reasonable arguability threshold for granting leave and is established substantively:-

- (1) Three TIP indicators existed in M's initial screening. M's case was referred for Tier 2 full debriefing but no records were produced to show that a full debriefing was conducted. The Court found that reaching a final decision on M's victimhood without conducting a Tier 2 full debriefing as suggested by the policy is unreasonable in the public law sense (§§172-173); and
- (2) The Court finds that M's statement in relation to the allegation of theft was taken for a different purpose (namely the reporting of crime) and not a Tier 2 full debriefing as required by the policy (§174).

11. **Ground 2** is held to be not reasonably arguable. BOR4 imposes a positive duty on the Government to provide practical and effective protection against BOR4 breaches but not necessarily a formal recognition of a person's victim status (§§191-192). The Applicants have not explained how the current investigative measures was unable to deliver effective and practical protection (§196).

12. In respect of **Ground 3**, since the Court has already decided that the Government did not breach their investigative duty under Ground 2, it is unnecessary to decide whether any breach was caused by the absence of a bespoke offence (§209).



13. **Ground 4** is found not reasonably arguable because:

- (1) Under the dualist principle, international treaties do not confer nor impose any rights or obligations on individual citizens unless and until they are made part of the domestic law. It would render the dualist principle meaningless if a ratified but undomesticated international treaty could create a substantive legitimate expectation that the treaty obligations would be implemented on a domestic level (§§216-218);
- (2) The ten articles from the Conventions relied by the Applicants (“**Articles**”) are irrelevant to how BOR4 should be constructed since BOR4 is very different from the Conventions as a whole and very different from any of the Articles (§222); and
- (3) The Articles were framed in aspirational and promotional language instead of imposing an absolute and immediate obligation or leading to the conclusion that a bespoke offence prohibiting BOR4 violations should be enacted (§224).

14. Accordingly, the Court decided that:

- (1) For N, extension of time and leave to apply for judicial review are rejected for all grounds of review (§232);
- (2) For M, extension of time and leave to apply for judicial review are granted for Ground 1 only, which is also substantively established. However, no relief is granted to M for the lack of benefit or practical utility in overall circumstances (§233); and
- (3) On a *nisi* basis, no costs order is made.

Civil Division

Department of Justice

August 2024