Summary of Judgment

Ma Chun Man v Commissioner of Correctional Services

HCAL 979/2024
[2024] HKCFI 3531

Decision : **Leave to apply for judicial review granted on Ground 5 (procedural unfairness) only; Substantive judicial review dismissed**
Dates of Hearing : **22-23 October 2024**
Date of Judgment : **6 December 2024**

Background

1. The Applicant was convicted after trial of the offence "Incitement to Secession", an offence endangering national security (**"OENS"**) contrary to Articles 20 and 21 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("**NSL**"). After a successful appeal against sentence, his sentence was reduced to 5 years of imprisonment. Having served about two-third of his sentence, based on the alleged routine granting of one-third remission to inmates on the ground of "industry and good behavior", the Applicant expected to be released on 25 March 2024.

2. The Safeguarding National Securities Ordinance (6 of 2024) ("**SNSO**") came into operation on 23 March 2024. On the same day, the Correctional Services Department ("**CSD**") notified the Applicant of the intended recommendation of the "Board of Assessment on Person in Custody Having Committed Offence Endangering National Security" (**"Assessment Board"**) to the Commissioner of Correctional Services ("**Commissioner**"), that he should not be satisfied that an early release of the Applicant would not be contrary to the interests of national security under section 6(3A) of Post-Release Supervision of Prisoners Ordinance, Cap. 475 ("**PRSPO**"). In the morning on 25 March 2024, the Applicant submitted a written representation to the Commissioner. Thereafter, he was given a summary of the Assessment Board's considerations and he expressed that he had no further representation to make. Later on the same day, the Applicant was notified of the Commissioner's decision under section 6(3A) of the PRSPO that his case would not be referred to the Post-Release Supervision Board ("**Supervision Board**") for consideration of early release (**"Release Decision"**).

3. On 3 April 2024, the Committee for Safeguarding National Security (**"NSC"**) issued an opinion stating that it would be contrary to the interests of national security if remission or early release is granted to the Applicant ("**NSC Opinion**").

4. On 21 June 2024, the Applicant sought leave to apply for judicial review challenging **(a)** the decision said to have been made on or around 23 March 2024 reversing an alleged prior decision on 24 February 2024 (**"Original Decision"**) to grant him remission and release him on 25 March 2024 ("**Reversal Decision**"); **(b)** the Release Decision and **(c)** the Commissioner's decision contained in a letter of 21 June 2024 refusing the Applicant's solicitors' request for disclosure of materials (**"Non-Disclosure Decision"**).

5. During the course of the hearing on 22-23 October 2024, the Applicant's Counsel acknowledged that the Non-Disclosure Decision alone would not be determinative of the present application.

Department of Justice's Summary of the Court's Decision
(Full text of the Court's Judgment at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=164881&currpage=T)

6. The Court found the following in respect of the statutory framework governing the present case:-

*On the remission regime under Prison Rules (Cap. 234A) ("**PR**")*

(a) The Commissioner's power to grant remission under PR69 was discretionary. Prisoners would not have a right to remission (§§32, 87);

On SNSO broadly

(b) There is now a statutory definition of "national security" as provided under section 4 of the SNSO, which bears the same meaning as that in the Mainland. Such is entirely natural because HKSAR is an inalienable part of the PRC and because of the foundational principle of "One Country, Two Systems". The statutory definition of "national security" is not less precise and is even more certain than the working definition of "national security" in the United Kingdom (§§107- 109);

(c) It can hardly be disputed that, under section 8 of the SNSO, the Commissioner in performing a function (such as those conferred by the Prisons Ordinance (Cap. 234) and the PRSPO) has a duty to safeguard national security and must regard national security as "the most important factor" and give appropriate consideration to it accordingly (§64);

On the amended PR and PRSPO

(d) It is clear that the legislative intent behind the amendments to PR and PRSPO introduced by the SNSO is to impose a more stringent condition for the early release of prisoners serving sentences for OENS which is over and above the requirement of "industry and good conduct". They underline the crucial importance of safeguarding national security and protecting the public from serious harm (§§60, 114);

(e) Under section 6(3A) of the PRSPO, the Commissioner is tasked to perform a holistic, evaluative and predictive exercise based on a consideration of all the relevant factors. In performing the said exercise, once the Commissioner decided that he was not satisfied that the early release of a prisoner would not be contrary to the interests of national security, he had no discretion in the matter and was duty bound not to refer the prisoner's case to the Supervision Board. There is no "presumption" against referral with the burden of rebuttal falling on the prisoner concerned, as suggested by the Applicant (§§76, 81-83);

(f) Non-referral of an OENS prisoner's case to the Supervision Board pursuant to section 6(3A) of the PRSPO is a preventive measure and serves as an adjunct to the rehabilitation of the prisoner. The non-referral does not of itself increase the sentence and should not be regarded as punishment (§§87-89, 118);

(g) The test under section 6(3A) of the PRSPO (i.e. whether early release of an OENS prisoner would not be contrary to the interests of national security) is neither vague nor arbitrary. To the contrary, it is sufficiently precise and certain, capable of giving sufficient guidance to a prisoner as to how he or she should conduct himself or herself in prison for earning an early release (§§107-109, 115); and

(h) Applying the jurisprudence of the United Kingdom and of the European Court

of Human Rights, section 6(3A) of the PRSPO does not violate the principle that retrospective criminal penalties are prohibited, because that section is a result of legislative changes in the execution or enforcement of a penalty affecting existing prisoners. A sentence of imprisonment provided legal authority for the prisoner's detention throughout the term of the sentence, notwithstanding his expectation to be released before the end of that sentence (§99, 117-118).

7. Specifically on the present case, the Court found the following[1]:-

(a) It did not accept the existence of "the Original Decision", as there was no direct evidence of existence of the same and it was inconsistent with the factual circumstances of the case. Hence, it was only the Release Decision that mattered in the present case (§§67, 71);

(b) Based on the findings summarized in paragraph 6 above, Ground 1 (prescribed by law), Ground 2 (retrospectivity) and Ground 3 (legitimate expectation) are considered devoid of merits.

(c) On Ground 5 (procedural unfairness), the Applicant was given a reasonable and sufficient opportunity to prepare his representation, oral hearing was not necessary, and adequate reasons had been given to the Applicant. Certain pieces of information considered by the Assessment Board was initially unavailable to the Applicant but that had been remedied by the provision of a summary of the Assessment Board's considerations to the Applicant shortly afterwards, and the Applicant chose not to make further representations. The decision-making process as a whole was not procedurally unfair and in the event no actual prejudice was caused to the Applicant. Therefore, while Ground 5 was considered reasonably arguable, the substantive judicial review on this ground was dismissed (§§156, 160, 161);

(d) The Commissioner considered the recommendation of the Assessment Board and the supporting materials, the Applicant's circumstances, all relevant factors and the Applicant's representations. He had made sufficient inquiries in arriving at the Release Decision. Ground 6 (*Wednesbury* unreasonable) is plainly not reasonably arguable (§166); and

[1] Ground 4 (*ultra vires*) abandoned by the Applicant

(e) On Ground 7 (irrationality/disproportionality), the Applicant failed to identify any of his constitutional right which was said to be prejudiced by the non-referral, so the issue of proportionality was simply not engaged (§§170-171).

8. Finally, on the NSC Opinion, the Court expressed that full weight should be given to the same as to whether the Applicant's early release would not be in the interests of national security, and it is a matter to which the Court should defer to the executive (§177).

Conclusion

9. Leave to apply for judicial review was granted to the Applicant on Ground 5 (procedural unfairness) but not on the other grounds, with the Applicant's substantive judicial review ultimately dismissed and an order *nisi* that there be no order as to costs.

Department of Justice
December 2024