

1. This is an appeal against the decision of Deputy High Court Judge Woodcock on 15 September 2017 refusing leave to the applicant to apply for judicial review. The applicant came from the mainland to Hong Kong illegally on 17 September 2013. He was arrested on 30 September 2013. On 5 October 2013 he lodged a non-refoulement claim. The claims were based on threats from a man called Noman, the head of Sipah-e-Sahaba Pakistan group in the applicant's native village where he used to live.

2. The Director decided against the claims on 7 March 2016. The decision covered BOR 3 risk, persecution risk and torture risk. By a supplemental decision of 19 April 2017, the Director also assessed BOR 2 risk in respect of the applicant and decided against the applicant.

3. The applicant appealed to the Torture Claims Appeal Board. After a hearing held on 2 May 2017, the Board dismissed the appeals on 12 June 2017.

4. The intended judicial review was in respect of the decisions of the Director and the decision of the Torture Claims Appeal Board. The Form 86 filed by the applicant on 26 June 2017 did not contain any grounds for seeking relief. In his affirmation of 26 June 2017, he relied on the following grounds,

- (a) Lack of legal representation; and
- (b) Lack of language assistance.

5. The judge reviewed the materials carefully. After summarizing the facts and background of the case and giving due consideration to the decisions of the Director and the Board, she gave the following reasons in refusing leave at [32] to [39] of the CALL-1 Form,

“ 32. I have considered, with rigorous examination and anxious scrutiny the papers and grounds of this application. I find the Director and the adjudicator’s decision to be without fault. They analysed the material, claims and evidence carefully, logically and with caution. I found no substance in the grounds of this application. The applicant had nothing to add or to say during the hearing for leave except to repeat his first ground.

33. The first ground is a complaint by the applicant he was not provided with legal representation for his appeal/petition nor to assist him with the further determination by the Director of the BOR 2 risk. The court is reminded that a “high standard of

fairness” should be maintained but legal representation for this applicant only extended to the claim process before the Director. Once the Director dismissed his claim the applicant received no further free legal advice or assistance. He submits this is a “violation of the principle of achieving high standard of fairness and should be considered a miscarriage of justice”.

34. It is clear that where the applicant’s fundamental human right not to be subjected to torture is involved, it has been held “high standards of fairness” must be observed by the decision-maker when making the relevant administrative decision, see *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, para 44. That frequently referred to standard applies to the assessment undertaken by a decision-maker of a torture claim. That approach for the adjudicator is paramount and cannot be stressed enough. However, the applicant here has taken it out of context by implying it should mean and include the automatic provision of legal representation to him beyond what was provided by the duty lawyer scheme. I do not agree, the fact that it is not presumably automatic cannot be defined as a miscarriage of justice. The fact the applicant was unrepresented in his appeal has not been shown to be procedurally unfair. There is no substance in this ground.

35. The second ground is a complaint by the applicant the duty lawyer service would not provide him with a translation of NCF. This meant the applicant did not know if the interpreter provided correctly translated his evidence. This ground included a complaint that the letter from the Immigration Department inviting the applicant to provide further information in relation to a BOR 2 risk claim was in English and incomprehensible to him. Therefore, he submits the government should provide an interpreter to the applicant as and when required, I quote from paragraph 8 of the affirmation “so as to avoid jeopardising my rights”. He should also have been given a supplementary hearing.

36. The NCF is completed by the applicant with the assistance of the duty lawyer service and an interpreter. It is completed in English hence the need for the assistance of the interpreter. The applicant is suggesting it should have been translated back into his mother tongue to avoid a potential injustice. There is no suggestion from the applicant that from the hearings and the decisions of the Director and the adjudicator his claim was not translated properly and this led to an injustice. There is nothing in this ground.

37. As for his demand for an interpreter at any time, this stems from his claim he could not properly read the Immigration Department’s letter relating to his BOR 2 risk claim. However, I see no complaint raised with the adjudicator nor a request to the Department for language assistance or help to explain the contents

of its letter at the time it was received. In fact, he was able to submit additional facts to the Director within the proposed time frame set out in the letter. He says he should have been entitled to a supplementary hearing. This opportunity to supply any further details after the screening interview is the Director of Immigration being exceptionally cautious. All that needs to be said and needs to be presented under “all applicable grounds” is presented at the earliest opportunity before the Director but the Director, in being very cautious to ensure no misunderstanding seeks any additional facts specific to a BOR 2 risk. No further hearing is required nor was one requested.

38. I do not find any ground that shows there was an error of law by the Director or the adjudicator. I see no evidence of procedural unfairness nor a failure to adhere to a high standard of fairness. The substantive decisions did satisfy the enhanced Wednesbury test; they were not Wednesbury unreasonable.

39. In my judgement, the applicant’s claim is not reasonably arguable. There is no realistic prospect of success therefore, I refuse leave for judicial review.”

6. In the notice of appeal of 29 September 2017, the applicant advanced two grounds of appeal. He reiterated his submissions that he did not have legal representation in dealing with BOR 2 risk and he said the judge erred in holding that there was no merit in his complaint for lack of translation.

7. The applicant agreed by a letter of 29 September 2017 (written in English) that the appeal can be heard by two judges.

8. He lodged written submissions (dated 10 December and received by the court on 11 December) in support of his appeal. In those submissions, written in English (like all the documents he placed before us), he reiterated those grounds.

9. We heard the appeal on 9 January 2018.

10. The intended challenge based on lack of translation has no merit. The judge adequately dealt with the same at [35] to [37] of the CALL-1 Form.

11. As regards the challenge based on lack of legal representation, neither the high standard of fairness laid down in *Sakthevel Prabakar v Secretary for Security* (2004) 7 HKCFAR 187 nor the judgment of *FB v Director of Immigration* HCAL 51 of 2007 prescribed that a CAT claimant or a claimant for BOR 2 or BOR 3 or persecution risks must have an absolute right to free legal representation at all stages of the proceedings. The applicant already had the benefit of legal representation in presenting his case to the Director of Immigration.

12. When he was invited to submit additional facts in April 2017 in respect of BOR 2 risk, he did so by a letter of 13 April 2017 without legal representation. He took the opportunity to put in additional events in 2016 and those had been duly considered by the Director in the Further Decision of 19 April 2017.

13. The applicant's claim under BOR 2 was actually founded on the same primary materials relating to his other claims (prepared with legal representation). The additional facts were not complex and only recited some purported later developments in 2016.

14. The applicant had also advanced his case fully, including his case on BOR 2 risk, before the Board. We do not find anything amiss arising from lack of legal representation in the process before the Board.

15. Having considered the submissions of the applicant in light of the materials before us, we find the judge's observations to be justified. We

do not see any error of law or procedure in the proceedings before the Board and there is no reasonably arguable basis to challenge the fairness of the process. We agree with the judge that leave to apply for judicial review should not be granted.

16. For these reasons, we do not see any prospect of success in the intended application for judicial review and we dismiss the appeal accordingly.

(Andrew Cheung)
Chief Judge of the
High Court

(M H Lam)
Vice President

The applicant appearing in person