

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

MISCELLANEOUS PROCEEDINGS NO 54 OF 2018
(ON AN INTENDED APPEAL FROM HCAL 430/2017)

BETWEEN

NUPUR MST

Applicant

and

DIRECTOR OF IMMIGRATION

Putative
Interested Party

Before: Hon Lam VP and Barma JA in Court

Date of Hearing: 14 August 2018

Date of Judgment: 16 August 2018

J U D G M E N T

Hon Lam VP (giving the Judgment of the Court):

1. By a summons filed by the applicant on 3 May 2018, the applicant seeks an extension of time to appeal against the decision of Deputy High Court Judge Woodcock given on 11 April 2018 refusing leave to apply for judicial review. The intended judicial review was against the decision of the Torture Claims Appeal Board/adjudicator of the Non-Refoulement Claims Petition Office dated 23 June 2017 dismissing the applicant's appeal

against the decisions of the Director of Immigration dated 18 April 2016 and 10 March 2017 respectively rejecting the applicant's non-refoulement claim.

Background

2. The applicant is a national of Bangladesh. She entered Hong Kong on 26 October 2013 and was permitted to work as a domestic helper. Her permission allowed her to remain until 26 October 2015, or 2 weeks after the termination of her employment contract, whichever the earlier. Her employment contract was terminated prematurely on 5 July 2014, and accordingly she should have departed Hong Kong on or before 19 July 2014. She did not do so, but instead overstayed. She was later arrested by the police on 22 September 2015. After her arrest, she lodged two non-refoulement claims on 26 September 2015 and 23 October 2015 respectively.

3. The applicant's claim was based on her fear that, if she returned to Bangladesh, she, being a member of the Bangladesh Nationalist Party ("BNP"), would be harmed, or even killed, by the members of its political rival, the Awami League ("AL").

4. By a Notice of Decision dated 18 April 2016 ("the Director's First Decision"), the director decided against the applicant's claim. The director's decision covered the BOR 3 risk¹, the persecution risk², and the torture risk³.

¹ This refers to the risk of torture or cruel, inhuman or degrading treatment or punishment under article 3 of the Hong Kong Bill of Rights.

² This refers to the risk of persecution with reference to the non-refoulement principle under article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

³ This refers to the risk of torture under Part VIIC of the Immigration Ordinance, Cap 115.

5. By a Notice of Further Decision dated 10 March 2017, the director also assessed the applicant's claim based on the BOR 2 risk⁴, and decided against her.

6. The applicant appealed to the Torture Claims Appeal Board. A hearing was scheduled on 15 June 2017. However, the applicant did not appear after the board had waited for more than 90 minutes. The applicant later explained that she had a headache that morning and she got stranded. The board did not accept the explanation and decided to determine the appeal in her absence.

7. The board rejected the applicant's appeal by its decision dated 23 June 2017 ("the Board's Decision"). The board found that the applicant's case was based on unsupported assertions, speculation and unreliable evidence. It took the view that the AL members no longer had any reason to continue to find and harass the applicant. Furthermore, the AL members acted in their personal and private capacity without the involvement of the state. The applicant was able to stay with her friend and to look for an overseas job without encountering any problem with the AL members. The board was also satisfied at [29] that state protection was available for the applicant and at [32] that internal relocation was viable. Accordingly, the applicant's appeal was dismissed.

The deputy judge's decision

8. The applicant filed a form 86 on 20 July 2017. The form 86 contained no ground for seeking relief. In the affirmation in support of the leave application dated the same date, the applicant advanced the following:

⁴ This refers to the risk of violation of the right to life under article 2 of the Hong Kong Bill of Rights.

(a) The board did not give her sufficient time for her to submit supporting documents;

(b) The applicant also referred to the death certificate of her late husband, and claimed the said death certificate stated that her late husband was killed by a person unknown.

9. The application for leave to apply for judicial review was listed for hearing on 15 December 2017. The applicant did not attend the hearing. The judge decided to deal with the application on paper.

10. After summarizing the facts and background of the case and giving due consideration to the decisions of the director and the board, the judge gave the following reasons in refusing leave to apply for judicial review at paragraphs 20 to 25 of the CALL-1 form:

“ 20. The applicant filed an affirmation but it contains no grounds; she only submits that the decision to dismiss is wrong. She submits she was not given enough time to submit supporting documents and will submit her husband’s death certificate. She reiterates that she has enemies in a country and her life will be in danger if she returns.

21. Notwithstanding the fact there are no grounds, I have considered with rigorous examination and anxious scrutiny the papers of this application. I have considered the fact the adjudicator did not afford the applicant a second rearranged oral hearing after she was late for the original hearing. Was it fair?

22. The applicant was 90 minutes late for her hearing without a satisfactory explanation. When she did not arrive on time the applicant said over the telephone that she was on her way and in Tsimshatsui which is not far from the Wanchai office of the TCAB by bus or MTR. When she had not arrived half an hour later, the TCAB called her phone again but she did not answer. When she did eventually arrive, the appeal had adjourned which meant I am sure, the interpreter had been released. The applicant had no reasonable explanation except that she got stranded or got lost. She did not elaborate or give a full picture of where she went during that time which made her so late.

23. The adjudicator did not ask her to elaborate and applied section 15 of schedule 1A of the Immigration Ordinance Cap 115 and paragraph 11 of the petition guide. The adjudicator was not satisfied with the applicant's written explanation and determined the appeal despite her absence. Was it reasonable or fair or a harsh decision? It is harsh but not procedurally improper or irrational.

24. The adjudicator has, despite her absence, carefully considered her claim and evidence. He has made a finding on credibility and she has not had an opportunity to give any explanation on those inconsistencies he highlights which does trouble me. However, it is not only inconsistencies that leads him to doubt her but also the implausibility of her evidence which comes from hearsay, speculation and bare assertions which could not have been improved by her presence and oral evidence at an appeal hearing.

25. After considering his decision and his analysis of her evidence, I do not find any ground that shows there was an error of law by the adjudicator. I see no evidence of procedural unfairness nor a failure to adhere to a high standard of fairness. The substantive decision did satisfy the enhanced Wednesbury test; it was not Wednesbury unreasonable."

11. According to the court record, a copy of the CALL-1 form and the sealed of the deputy judge's order were sent to the applicant on 11 April 2018.

12. After reading the papers, this Court listed the application for hearing on 14 August 2018. The Director, as the putative interested party was notified.

13. We heard the application on 14 August 2018. The applicant did not appear in court at the appointed time whilst the Director appeared by counsel. After waiting for some time, the court dismissed her application. The applicant subsequently turned up and she said she went to the wrong courtroom. We re-opened the case and heard submissions from her and counsel for the Director.

General principles

14. Before we address the applicant's case, it is necessary to highlight the following general propositions:-

(1) The role of the Court in a judicial review is not to provide a further avenue of appeal. The primary decision makers are the Director and the Board. Though in non-refoulement cases the Court will adopt an enhanced standard in scrutinizing the decision of the Board due to the seriousness of the issue at hand, the Court should not usurp the role of the Board. Assessment of evidence and COI materials and risk of harm, state protection and viability of internal relocation are primarily within the province of the Board (and the Director). The Court will not intervene by way of judicial review unless there are errors of law or procedural unfairness or irrationality in the decision of the Board: see *Re Zunariyah* [2018] HKCA 14; *Re Qadir Sher* [2018] HKCA 160; *Houngpedji Messanh v Torture Claims Appeal Board* [2018] HKCA 152; *Re Rizwan alias Rizwan Gulistan* [2018] HKCA 162; *Re Lakhwinder Singh* [2018] HKCA 246 and *Re Masoom Parvez* [2018] HKCA 163.

(2) An appeal against the refusal of leave by a judge in the Court of First Instance is not the occasion for regurgitating arguments advanced and rejected by the judge or for running arguments which could and should have been raised but were not raised before the judge. In the determination of an appeal, the Court of Appeal focuses on the decision of the judge and we would only reverse that decision if an appellant can demonstrate that the judge made errors of law or failed to take account of relevant

matters already placed before the court or was otherwise plainly wrong: see *United Muslim Association of Hong Kong v Yusuf Yu* [2018] HKCA 451 at [38] and [39]; 秦錦釗及香港特別行政區 [2018] HKCA 167 at [8]; 秦錦釗及東區法院裁判官陳炳宙 [2018] HKCA 448 at [32]; 黃碩雄及范荏愷[2018] HKCA 168 at [4]; 關媛薇 [2018] HKCA 205 at [9]; 陳碩謙對醫院管理局 CACV 43/2015, 14 December 2015.

(3) It follows from the above that in an appeal, the scope for admission of fresh evidence and for new arguments to be run is limited. In respect of fresh evidence, the general rule is that an appellant has to satisfy the requirements in *Ladd v Marshall* [1954] 1 WLR 1489, see *Houunkpedji Messanh v Torture Claims Appeal Board* [2018] HKCA 152; *Re Romail* [2018] HKCA 186; *Fayomi v Chief Secretary for Administration* [2018] HKCA 194.

(4) In respect of new argument, this Court will not generally entertain new arguments which are fact-and-evidence sensitive which have not been canvassed at the Court of First Instance and for which leave has not been sought within time: see *Re Daljit Singh* [2018] HKCA 328; *Re Qadir Sher* [2018] HKCA 160; *United Muslim Association of Hong Kong v Yusuf Yu* [2018] HKCA 451 at [40] and [41].

(5) Further, due to the difference in the role of the Court in a judicial review and the role of the primary decision makers, an applicant cannot rely on materials which have not been produced before the Board or the Director to contend that the latter erred in not taking those into account unless the decision

makers have a positive duty to elicit such materials on their own volition.

- (6) In an appeal against refusal of leave to apply for judicial review in non-refoulement cases, the Court of Appeal would only examine the decision of the judge in light of the grounds advanced by the applicant. If no viable ground is put forward to reverse the judge, the appeal should be dismissed. It is not the role of this Court to examine the decision of the Board afresh as if it is a fresh application for judicial review. Otherwise, an applicant could flagrantly disregard the stringent time limit in Order 53, rule 4(1) of the Rules of the High Court (Cap 4A). See: *Re Qadir Sher* [2018] HKCA 160; *Re Rizwan alias Rizwan Gulistan* [2018] HKCA 162; *Re Ali Haider* [2018] HKCA 222; *Re Fitri Ambarwati & Maria Zubair* [2018] HKCA 461; and *Re Muhammad Usman* [2018] HKCA 474.

15. Pursuant to Order 53, rule 3(4) of the Rules of the High Court, Cap 4A, an applicant has 14 days to lodge an appeal against a judge's refusal to grant leave to apply for judicial review. An applicant who fails to do so cannot appeal unless extension of time to appeal is granted. In considering whether to extend time for appealing against a decision refusing leave to apply for judicial review, the court will have regard to: (1) the length of delay; (2) the reasons for the delay; (3) the prospect of the intended appeal; and (4) the prejudice to the respondent if an extension of time were granted.

The 3 letters as fresh evidence

16. On 8 May 2018, the Registrar of Civil Appeal gave a set of directions for the conduct of this application, including a direction for

lodging written submissions. Notwithstanding the directions, the applicant did not lodge any written submissions. Instead, she furnished the court with a 3-page document on 29 May 2018.

17. The said 3-page document appears to be translation of 3 documents which had been attached to her affirmation of 3 May 2018 (without translation): (1) a letter bearing a date of 5 April 2002 from Keraniganj Branch of BNP; (2) a letter of 7 June 2013 by the applicant to the Keraniganj Police Station endorsed with a seal of that police station; and (3) a letter of 2 August 2013 by an unknown person to Dhak Medical College Hospital regarding the dead body of Nur Nabi (the late husband of the applicant).

18. The translations were not certified but we have gone through the gist of these documents at the hearing with the assistance of the Bengali interpreter engaged by the Court Interpreter Services. We shall proceed in this application by taking the translations at their face value.

19. The documents were not produced before the Board. Nor were they produced at the court below. The production of these documents at this very late stage is to be considered in the following context.

20. The applicant had been made aware of the need to have documents to support her claim since her preparation of her non-refoulement claim form [“NCF”] in November 2015. A letter of 27 November 2015 from the immigration officer set out the time limit for lodging such documents. In the NCF of the applicant prepared with the benefit of legal advice from the Duty Lawyer scheme, she indicated she needed more time to lodge documents. In light of that, the decision by the Director was postponed, see paras 6 to 9 of the Director’s Decision of 18 April 2016.

21. Despite that, she did not produce the documents before the 5 April 2016 deadline set by the Director. Nor did she produce the documents in the appeal to the Board or at the court below.

22. She did not explain in any of her affirmation the reason for not producing these documents before. These documents, on their face, were in existence since mid-2013. At the hearing, she said she obtained these documents only a few months before because she had not been able to contact her family for a long time. She only resumed contact about 5 months ago through a distant relative and her family had moved from Keraniganj to Naraaynganj. The latter was a town about 1 to 1.5 hour's drive away from Keraniganj. Through her family, she obtained the documents she now produced.

23. We cannot accept her explanation that she had lost contact with her family for such a long time. With due diligence, it is incredible that she could not get in touch at least with her distant relative before the Board hearing. As mentioned above, she was aware of the need to produce documents to support her case way back in November 2015. The Board hearing took place in June 2017.

24. Moreover, it was her case before the Director and the Board that she did not make any report to the police. It was surprising that she now sought to produce what appeared to be a letter of 7 June 2013 purportedly recording her report of the threats and attacks on her and her family to the Keraniganj Police Station.

25. It is equally surprising that the letter from the Keraniganj Branch of BNP purportedly certified that the husband of the applicant was murdered in January 2013. This is inconsistent with her case before the

Director and the Board that her husband was killed in August 2013. Her letter of 7 June 2013 to the police also suggested that her husband was alive in June 2013. At the hearing she tried to explain that what actually happened was that her husband was abducted in January 2013. That explanation was inconsistent with: (1) her version of event in the NCF where she said she was informed by her husband as to the threat when she was received training as domestic helper in July 2013; and (2) the purported report of 7 June 2013 in which no reference was made to such abduction.

26. In our judgment, the documents now produced by the applicant do not constitute reliable evidence as to her relationship with Nur Nabi. Nor can they provide credible proof on the nexus between the demise of Nur Nabi and her perceived risk of returning to Bangladesh.

27. Further, these documents could not assist the applicant in respect of the findings by the Director and the Board on state protection and internal relocation. In light of such findings, the applicant's intended application for judicial review is doomed to fail.

28. In the circumstances, we do not find sufficient basis for exercising our discretion to admit these documents as evidence by way of exception to the general propositions set out at [14] above.

Application for extension of time to appeal

29. The time for lodging an appeal in the present case expired on 25 April 2018. The applicant failed to do so by that time. She only applied for an extension of time to appeal on 3 May 2018. It was deposed in her supporting affirmation of the same date that she could not read and write English in which the deputy judge's order was written.

30. She told the master at a hearing on 2 May 2018 (when her attempt to lodge a second judicial review was dismissed as abuse of process) that she did not receive the order of the judge because of her change of address to Flat 2, 5/F Ying Cheong Building, No 23 Kau Yuk road, Yuen Long. She had not notified the Court as to her latest change of address though she had done so in December 2017 when she changed her address to Room 3 Flat C, 5/F Far East Mansion, No 15 Tai Fung Street, Yuen Long. The order was sent to her at the latter address.

31. Obviously, the real reason for her delay was her failure to inform the Court of her change of address. It is the duty of a litigant to provide the Court with an up-dated address so that relevant notification can be given to her effectively and timely. The consequence of any delay occasioned by the ineffectiveness of such an address would fall on the shoulders of the litigant, see: *Islam Raja Rais v Director of Immigration* HCMP 881/2017, 26 June 2017; *Said Umair v Torture Claims Appeal Board* [2018] HKCA 82; and *Re Saqlain Muhammad* [2018] HKCA 346.

32. Although we do not accept that the applicant's explanation for delay is reasonable, we should also examine if she has merit in the intended appeal, see: *Re MK* HCMP 2609/2016, 10 January 2017; *Chu On Fong Winter v The Appeal Panel (Housing)* HCMP 982/2017, 20 July 2017; *Islam Raja Rais v Director of Immigration* HCMP 881/2017, 26 June 2017; *Re Gurung Min Bahadur* [2018] HKCA 226; and *Re Saqlain Muhammad* [2018] HKCA 346.

33. The crucial question on the merit of the intended appeal is whether the applicant can show that there is a reasonable prospect of success in persuading this Court to reverse the decision of the judge.

34. Having read the materials available to us, we are satisfied that the deputy judge's observations are justified in light of the grounds raised and the materials before her. We also held earlier that the 3 letters could not be relied upon. Further, as we have pointed out in [27] above, the intended appeal cannot succeed in the light of the findings by the director and the Board on state protection and internal relocation, which the applicant has not challenged.

35. For these reasons, we do not see any prospect of success in the intended appeal. We will not grant extension of time. The summons of 3 May 2018 is dismissed accordingly. We made no order for costs as the Director only appeared to provide this court with assistance, for which we are indebted.

(M H Lam)
Vice President

(Aarif Barma)
Justice of Appeal

The applicant appearing in person

Mr Lewis Law, instructed by the Department of Justice, for the putative interested party