

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 270 OF 2023

BETWEEN

|                             |                           |
|-----------------------------|---------------------------|
| Juwarti                     | 1 <sup>st</sup> Applicant |
| Juwarti Jazlyn Malika Putri | 2 <sup>nd</sup> Applicant |
| and                         |                           |
| Torture Claims Appeal Board | Putative Respondent       |
| and                         |                           |
| Director of Immigration     | Putative Interested Party |

Application for Leave to Apply for Judicial Review  
NOTIFICATION of the Judge's decision (Ord 53 r 3)

Following:

- ☐ consideration of the documents only;                      or
- ☒ consideration of the documents **and** oral submissions by the Applicants in open court;

Order by **Deputy High Court Judge Bruno Chan**:

- 1. Leave to amend Form 86 to include the 1<sup>st</sup> Applicant's daughter, Juwarti Jazlyn Malika Putri as the 2<sup>nd</sup> Applicant be granted; and***
- 2. Leave for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants to apply for judicial review be refused.***

Observations for the Applicants:

1. The 1<sup>st</sup> Applicant ("A1") is a 31-year-old national of Indonesia who last arrived in Hong Kong on 21 January 2020 with permission to continue to work as a foreign domestic helper until the expiration of her employment contract on 28 August 2021 or within 14 days of its early termination, but when her employment was prematurely terminated on 28 February 2021, she did not depart and instead overstayed, and on 10 March 2021 she surrendered to the Immigration Department and raised a non-refoulement claim for protection on the basis that if she returned to Indonesia she would be harmed or killed by her stepfather who had sexually abused her in the past. She was subsequently released on recognizance pending the determination of her claim.

2. A1 was born and raised in Dorowati, Indonesia by her maternal grandmother after her father had abandoned the family when she was just a small child and that her mother had to work to support the family, during which her mother married another man known as Taman.

3. At the age of 15 A1 returned to reside with her mother and treated Taman as her stepfather who however for the next several years had persistently in the absence of her mother sexually abused A1, and threatened her not to disclose to anyone of the same.
4. As a result A1 never revealed the abuses to anyone including her mother, even though on occasions she had been driven to be suicidal, and eventually in order to stay away from her stepfather she left the country in 2011 to work as a housemaid or servant in Malaysia until 2017 when she returned to Indonesia.
5. However, upon her return and notwithstanding that she was now an adult, her stepfather was still trying to sexually abuse her, and so A1 departed Indonesia again in October 2017 to come to Hong Kong to work as a foreign domestic helper, during which her stepfather also insisted that she sent him money for his use, and when her last employment was prematurely terminated, A1 was afraid to return to Indonesia and therefore overstayed in Hong Kong and subsequently raised her non-refoulement claim for protection, for which she completed a Non-refoulement Claim Form (“NCF”) on 11 December 2021 and attended screening interview before the Immigration Department with legal representation from the Duty Lawyer Service (“DLS”).
6. By a Notice of Decision dated 17 January 2022 the Director of Immigration (“Director”) rejected A1’s claim on all the applicable grounds including risk of torture under Part VIIC of the Immigration Ordinance, Cap 115 (“Torture Risk”), risk of her absolute or non-derogable rights under the Hong Kong Bill of Rights Ordinance, Cap 383 (“HKBOR”) being violated including right to life under Article 2 (“BOR 2 Risk”), risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of HKBOR (“BOR 3 Risk”), and risk of persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention relating to the Status of Refugees (“Persecution Risk”).
7. In his decision the Director took into account of all the relevant circumstances of A1’s claim and found no substantial grounds for believing that there will be any real and substantial risk of her being harmed or killed by her stepfather upon her return to Indonesia due to the low intensity and frequency of past ill-treatment from him, that there is no evidence of any real intention of her stepfather to seriously harm or kill her, that in any event in the absence of any official involvement that state or police protection would be available to A1 if resorted to, and that reliable and objective Country of Origin Information (“COI”) show that reasonable internal relocation alternatives are available in Indonesia with a large population of 275 million people spread across a vast territory of more than 1.8 million square kilometers that it would not be unduly harsh for A1 as an able-bodied adult with working experience to move to other areas of the country away from her home district in large cities such as Jakarta where it would be difficult if not impossible for her step-father to locate her.
8. On 26 January 2022 A1 lodged an appeal to the Torture Claims Appeal Board (“Board”) against the Director’s decision, and for which she attended an oral hearing on 15 December 2022 before the Board during which she gave evidence and answered questions raised of her claim by the Adjudicator for the Board. On 10 February 2023, her appeal was dismissed by the Board which also confirmed the Director’s decision.
9. In its decision the Board found material inconsistencies and discrepancies in A1’s evidence that it doubted the credibility of her claim of fear of harm from her stepfather that caused her to overstay in Hong Kong to seek protection, that her credibility was further undermined by her failure to raise her non-refoulement claim for protection upon her first arrival in Hong Kong until years later and only upon her subsequent arrest by the police, that even if such claim were real that there was no reliable evidence of any real intention of her stepfather to seriously harm or kill her other than angry words and empty threats,

and that in any event it was a private family dispute between the 2 of them only without any official involvement that state or police protection would be available to A1 upon her return to Indonesia as well as reasonable internal relocation alternatives for her to move safely to other parts of the country away from her home district without any risk of being located by her stepfather that her claim for non-refoulement protection failed on all applicable grounds.

10. While being released on recognizance pending the determination of her claim, A1 met and formed a relationship with a local Chinese man, and out of which she on 4 December 2022 gave birth to a daughter, the 2<sup>nd</sup> Applicant (“A2”) in Hong Kong, and for whom A1 subsequently also raised a non-refoulement claim on the bases of her own claim of fear of harm from her stepfather, and also of fear of rejection by A1’s mother as A2 was born out of wedlock as an illegitimate child that she would bring shame to the family, and for which A1 also completed a NCF for A2 and attended another screening interview before an immigration officer with legal representation from DLS.

11. By a Notice of Decision dated 3 July 2023 the Director also rejected A2’s claim on all applicable grounds upon finding no evidence of any threats from A1’s stepfather who was not even aware of the birth of A2 on A1’s own admission of having no further contact with her own mother since January 2022 before A2’s birth, that any threats from A1’s stepfather or rejection by A1’s mother were all A1’s own speculations, and that in any event these were all private disputes between them within the family without any official involvement that state or police protection and reasonable internal relocation alternatives would similarly be available to A2 if needed upon her refoulement with her mother to Indonesia, while relevant COI also show that there are laws in Indonesia to protect women and children from abuses and that supports and assistances from various governmental departments and NGOs as well as proper education will also be available to A2 as a citizen having derived her citizenship from her mother that her claim for non-refoulement protection also failed on all the applicable grounds.

12. On 13 July 2023 A1 also lodged an appeal for A2 to the Board against the Director’s decision, and for which A1 on her behalf attended an oral hearing on 16 November 2023 before the Board to give oral evidence for her claim and also answered questions raised by the same Adjudicator as in A1’s own claim. On 1 December 2023 A2’s appeal was also dismissed by the Board which also confirmed the Director’s decision.

13. In this decision the Board noted that it being an appeal by a minor that the Board had earlier made a request to the DLS for legal representation for A2 but that the request was refused, and that having earlier rejected the credibility of her mother’s claim similarly found no reliable evidence of any risk of harm from A1’s stepfather to A2, or of any risk that A2 would not be accepted by A1’s mother or the family for being born out of wedlock or that the matter would be reported to the police in Indonesia, that in the absence of any official involvement that state or police protection as well as reasonable internal relocation alternatives will similarly be available to A2 upon her refoulement with her mother to Indonesia, and that relevant COI also show that according to the law of Indonesia being a child born out of legal wedlock from an Indonesian mother would also be legally regarded as a citizen entitled to all the rights and benefits as any other citizens, and that there is no other risk that A2 in her personal circumstances may be exposed to or justify non-refoulement protection under any of the applicable grounds.

14. Meanwhile going back to early 2023 that A1 filed her Form 86 on 22 February 2023 for leave to apply for judicial review of the earlier decision of the Board for dismissing her appeal, and in her supporting affirmation of the same date A1 put forward the following grounds for her intended challenge:

- (1) That the Adjudicator did not consider her claim properly and dismissed it without even taking any time to think about the risk to her life;
- (2) That the Adjudicator unreasonably refused to allow her to submit supporting documents without translation and also refused to give her time to arrange for translation for those documents;
- (3) That the interpreter was not helpful to her and was impatient with her during her appeal hearing before the Board.

15. At the hearing of her leave application on 19 November 2024, A1 requested to include A2 in her leave application to apply for judicial review of the later decision of the Board as regard A2's own claim given the factual bases of both claims are the same or similar, and as both decisions are from the same Adjudicator, to save time and costs as well as for good case management, I acceded to A1's request and granted leave to her to amend her Form 86 accordingly to include A2 as the second application of her application, and invited her to put forward her proposed grounds for A2 but which she confirmed are the same as those stated for her intended challenge of the Board's decision as regard her own claim and as listed above.

16. However, these are all just bare and vague assertions of A1 without any particulars or specifics or elaborations as to how they apply to their cases or how the Board or the Adjudicator had erred in the decisions, or in what way were the decisions unfair or unreasonable or that the Adjudicator had acted unfair or unreasonable, or how did the Adjudicator fail to consider their claims or to allow them to submit their documents without translation when even up to now in the present application that A1 still fail to identify or produce those documents that she had sought to submit in support of their application, or in what way was the interpreter unhelpful to A1 during the appeal hearings before the Board. As such, and as none of these assertions were properly elaborated or presented with any relevant particulars or specifics by the Applicants, I do not find any of them reasonably arguable for their intended challenge of the Board's decisions.

17. As has been repeatedly emphasized by the Court of Appeal, judicial review does not operate as a rehearing of a non-refoulement claim when the proper occasion for the Applicant to present and articulate his claim is in the screening process and interview before the Immigration Department and in the process before the Board where the evaluation of the risk of harm is primarily a matter for the Director and the Board as they are entitled to make such evaluation based on the evidence available to them that the court will not usurp their role as primary decision makers in the absence of any legal error or procedural unfairness or irrationality in their decisions being clearly and properly identified by the Applicant, as judicial review is not an avenue for revisiting the assessment by them in the hope that the court may consider the matter afresh: *Re Lakhwinder Singh* [2018] HKCA 246; *Re Daljit Singh* [2018] HKCA 328; *Re Mudannayakalage Chaminda Pushpa Kumara* [2018] HKCA 400; and *Nupur Mst v Director of Immigration* [2018] HKCA 524.

18. In the case of both Applicants, the Board rejected their claims essentially on its adverse finding on A1's credibility for the thorough and detailed analysis and reasoning set out in both of its decisions with the benefit of hearing A1 in her oral evidence and her answers to questions raised of their claims not just in one but 2 hearings, and in the absence of any error of law or procedural unfairness in their processes before the Board or in its decisions being clearly and properly identified by the Applicants, I do not find any reasonably arguable basis to challenge the findings of the Board.

19. Furthermore, the fact is that it has also been established by both the Director and the Board in both of their decisions that the risk of harm in the claims of both A1 and A2

even if real are localized ones and that it is not unreasonable or unsafe for them to relocate to other part of Indonesia, there is simply no justification to afford them with non-refoulement protection in Hong Kong: see *TK v Jenkins & Anor* [2013] 1 HKC 526.

20. In the premises, and having considered the decisions of both the Director and the Board with rigorous examination and anxious scrutiny, I do not find any error of law or procedural unfairness in either of them, nor any failure on their part to apply high standards of fairness in their consideration and assessment of the claims of both A1 and A2.

21. I am of course mindful of the fact that A2 was, and still is, a minor at the age of just 1 year old in her appeal before the Board and without legal representation, nor was she in these proceedings as required by Order 80 rule 2 of the Rules of the High Court, Cap. 4A, and that it would be necessary to separately consider and examine whether her claim had been properly considered and determined by the Board in a manner sufficient to meet the high standards of fairness in proceedings of this nature, and to see whether there are underlying matters that may support potential minor-specific non-refoulement bases which had not been properly advanced to the Board due to lack of legal representation in the appeal before the Board, as held to be necessary by the Court of Appeal in *Fabio Arlyn Timogan* [2020] HKCA 971 and in *Re Jasvir Singh* [2021] HKCA 53, in that non-refoulement claims of children even if based on the same set of primary facts of their parents are separate from those advanced by their parents and need to be considered as such having regard to their personal circumstances and matters which may support potential minor-specific non-refoulement bases but which may not have been properly advanced to the Board due to lack of legal representation, and that ill-treatment which may not reach the level of persecution in the case of an adult may do so in the case of a child.

22. The fact is that A2's claim was due to circumstances noted above actually presented to the Board separately from her mother's claim, and was indeed dealt with and considered by the Board as such when it is clear from the decision that the same Adjudicator did also consider the personal circumstances specific to A2 for any potential non-refoulement bases specific to her as a minor at aged one year old born in Hong Kong out of wedlock to an unidentified father and has never been to the home country of her mother (see [54] – [59] of the Board's decision).

23. As such, I am also satisfied that the Board had properly and separately assessed and determined A2's claim and duly given reasons for rejecting it, and that there is nothing before the Court to indicate that the merits of her claim had not been fully or adequately explored before the Board or of any underlying matter that may support her minor-specific non-refoulement claim that had not been advanced before the Board due to lack of legal representation such that high standards of fairness were not met. Accordingly, and as there is no merit in her intended application, I shall treat A2's lack of legal representation as a mere irregularity as adopted in *Zoraydah v Torture Claims Appeal Board* [2020] HKCA 442, and applied in *Jasvir Singh supra*.

24. In the premises, and for all these reasons I am not satisfied that there is any prospect of success in the intended application of either A1 or A2 for judicial review, I therefore refuse to grant leave and accordingly dismiss their application.

Dated the 17<sup>th</sup> day of December 2024

(Chung Lai Fan, Christine)  
for Registrar, High Court

Where leave to apply has been granted, Applicants and their legal advisers are reminded of their obligation to reconsider the merits of their application in the light of the Respondent's evidence

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### Notes for the Applicant:

If leave has been granted, the Applicant or the Applicant's solicitors must:

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| a) serve on the respondent and such interested parties as may be directed by the Court the order granting leave and any directions given within 14 days after the leave was granted (Order 53, rule 4A); | Sent to the Applicants on 17 December 2024<br><br><b>Juwarti</b><br><b>Juwarti Jazlyn Malika Putri</b><br><br>Applicants' ref. no.: Nil. | Sent to the Putative Respondent / the Putative Respondent's solicitors / such Putative Interested Parties as may be directed by the Court / the Putative Interested Parties' solicitors on 17 December 2024<br><br><b>Torture Claims Appeal Board</b><br>Putative Respondent's ref. no.:<br>USM 19825<br>USM 21936<br><br><b>Director of Immigration</b><br>Putative Interested Party's ref. no.:<br>QA T/C 2444/21 (Formerly RBCZ 5000001/21)<br>QA T/C 416/23 (Formerly RBCZ 5000386/23)<br><br><b>Department of Justice,<br/>Senior Assistant Law Officer<br/>(Civil Law)<br/>(Civil Litigation Unit 2)</b> |
| b) issue the originating summons within 14 days after the grant of leave and serve it in accordance with Order 53, rule 5; and                                                                           |                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| c) supply to every other party copies of every affidavit which the Applicant proposes to use at the hearing, including the affidavit in support of the application for leave (Order 53, rule 6(5)).      |                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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Form CALL-1