CACV 165/2024, [2025] HKCA 191

On appeal from [2024] HKCFI 1083

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

CIVIL APPEAL no. 165 of 2024

(on appeal from HCAL NO. 179 of 2024)

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| RE | DOAN VAN KHUYEN | Applicant |

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Before: Hon Chu VP and Au JA in Court

Date of Judgment: 4 March 2025

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JUDGMENT

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

*Introduction*

1. This is the applicant’s appeal against the decision of Deputy High Court Judge To (“the Judge”) given on 18 April 2024[[1]](#footnote-1) refusing to extend the time for applying for judicial review and dismissing his application for leave to apply for judicial review. The intended judicial review was in respect of the decision the Torture Claims Appeal Board (“the Board”) dismissing his appeal against the decision of the Director of Immigration (“the Director”) rejecting his non‑refoulement protection claim.
2. The applicant had lodged a written submission to support his appeal. He had consented to the disposal of his appeal on paper by the Court of Appeal.

*The applicant’s claim*

1. The applicant is a Vietnamese national aged 34. He entered Hong Kong illegally and was arrested by the police on 20 November 2020. He subsequently raised a non-refoulement claim based on fear of being harmed or killed by a moneylender due to his inability to repay his debt. His claim was set out in details in [8] to [26] of the Board’s decision and summarized by the Judge in [7] to [11] of the Form CALL-1. It is not necessary to repeat them here.

The Director’s and the Board’s decisions

1. By a Notice of Decision dated 14 September 2021, the Director rejected the applicant’s non-refoulement claim having regard to the torture risk[[2]](#footnote-2), BOR 2 risk[[3]](#footnote-3), BOR **‍**3 **‍**risk[[4]](#footnote-4) and persecution risk[[5]](#footnote-5).
2. The applicant’s appeal against the Director’s decision was heard before the Board on 3 November 2022, during which the applicant gave evidence and answered questions from the Board. By a decision given on 5 May 2023, the Board dismissed the appeal.
3. In gist, the Board found the applicant’s evidence incredible and rejected it in its entirety. The Board also found, as an alternative, that even on the applicant’s case and evidence, it did not show a manifest intention or ability on the part of the moneylender to seriously harm the applicant, and that the moneylender was probably seeking to pressurize the applicant to make repayment and had no intention to seriously harm him. The Board assessed the risk of harm, if any, to be low, and concluded that the applicant failed to prove his entitlement to non-refoulement protection under any of the applicable grounds, both on the facts and in law.

The Judge’s decision

1. The applicant filed a Form 86 and an affirmation on 18 January 2024 to seek leave to apply for judicial review against the decision of the Board. The applicant did not provide any grounds for seeking relief. The application was also seriously out of time. Order 53 rule 4(1) of the Rules of the High Court, Cap. 4A provides that an application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose. The applicant’s application was more than five months late. He did not provide any explanation for the delay.
2. The Judge heard the leave application on 9 April 2024. By a Form CALL-1 dated 18 April 2024, he refused to extend the time and dismissed the application on the basis that the intended judicial review had no realistic prospect of success. His reasons were encapsulated in [24] and [25] as follows:

“24. Having rigorously examined the Decision, the papers and the evidence with anxious scrutiny, the Court is satisfied that the Board had correctly set out the law and key legal principles relating to the four applicable grounds under the USM; the burden of proof and standard of proof; correctly identified the issues and observed a very high standard of fairness. The primary basis of the Board’s Decision is that it found the Applicant’s evidence incredible and rejected his case in its entirety. He had therefore failed to establish the factual basis in support of his claim for protection. As he bears the burden of proof, albeit on a low standard, this finding is necessarily fatal. It was on that basis that the Board found that the Applicant had failed to prove his entitlement to non-refoulement protection under any of the four applicable grounds. These are finding of facts which are exclusively within the province of the Board, which the Court on a judicial review will not interfere save when such finding involved error of law, procedural unfairness and irrationality.

25. The secondary basis of the Board’s Decision is that even if his case were accepted, he is not entitled to protection as a matter of law and fact. Furthermore, it found on the basis of authoritative and credible COI that adequate state protection and internal relocation are available to prevent or avoid the risks if they turn out to be real. Insofar as these are finding of facts, they are exclusively within the province of the Board, which the Court on a judicial review will not interfere save when such finding involved error of law, procedural unfairness and irrationality. Insofar as these are finding of law, the Court could not detect any error of law in the Decision or procedural unfairness at any stage of the non-refoulement proceedings. The Decision does satisfy the enhanced Wednesbury test. It is not Wednesbury unreasonable or irrational. The Decision is utterly without fault.”

*The appeal*

1. By a notice of appeal dated 29 April 2024, the applicant appealed the Judge’s decision to this court. The notice of appeal stated that the Judge’s decision was reached unfairly without giving the applicant an opportunity to clarify his case and the situation in his country.
2. The written submission that was attached to the notice of appeal stated that: (1) the applicant did not have legal advice or language assistance in his appeal; (2) the applicant speaks Vietnamese and English is not his first language; (3) the determination and the outcome of the appeal to the Board have not been read or translated to the applicant in his first language, which has hindered his application and appeal to the court; and (4) the decisions were accordingly procedurally unfair as they did not conform to the high standard of fairness.

Our reasons for decision

1. The general principles regarding an appeal in a non‑refoulement case have been set out comprehensively by the Court of Appeal *in Nupur Mst v Director of Immigration* [2018] HKCA 524 at §14. In sum, 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 issue at hand, the court should not usurp the role of the Board. Assessment of evidence and Country of Origin Information 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.
2. For the reasons set out below, we are of the view that the matters set out in the notice of appeal and the written submission have no merits:
3. The complaint that the Judge did not afford the applicant an opportunity to clarify his case or the situation in his home country is untenable. The Judge heard the applicant’s application for leave to apply for judicial review at an oral hearing on 9 April 2024. The applicant attended the hearing and addressed the court with the assistance of a Vietnamese interpreter. It was thus open to the applicant to make whatever clarification he wished to make.
4. As to the complaint that the applicant did not have language assistance as English is not his language, both the Director’s and the Board’s decisions were not in the English language. They were made out in the Chinese language. That English is not the applicant’s first language is therefore not relevant.
5. The applicant has not indicated that he does not know Chinese or whether he is conversant with the Chinese language. Further, the Director’s decision was sent to the applicant through his lawyer[[6]](#footnote-6). We would expect his lawyer to have explained the decision to him. The assertion that he could not properly make his application to the court because he did not know the content of the decisions of the Director and the Board is not made out.
6. Moreover, the applicant had attended the hearing before the Judge and was assisted by an interpreter. He did not inform the Judge that he did not know the content of the Director’s and the Board’s decisions or had difficulty understanding them. In fact, he only raised the complaint about lack of legal and language assistance for the first time in this appeal. As a matter of procedure, it is not open to him to advance a ground that has not been included in the application made to the Judge, especially when this point about lack of legal and language assistance is fact-sensitive.
7. We have also considered the Judge’s decision and are in agreement with his reasons and conclusion.
8. For the above reasons, the applicant’s appeal is devoid of merits. Accordingly, we dismiss the appeal.

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| (Carlye Chu)  Vice-President | (Thomas Au)  Justice of Appeal |

The applicant, unrepresented, acted in person

1. [2024] HKCFI 1083 [↑](#footnote-ref-1)
2. This refers to the risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383. [↑](#footnote-ref-2)
3. This refers to the risk of being arbitrarily deprived of life under article 2 of section 8 of the Hong **‍**Kong Bill of Rights Ordinance (Cap 383). [↑](#footnote-ref-3)
4. This refers to risk of torture or cruel, inhuman or degrading treatment or punishment under Article **‍**3 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383). [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. K K Lai & Co (黎國光律師事務所) [↑](#footnote-ref-6)