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AW v DIRECTOR OF IMMIGRATION & ANOR

COURT OF APPEAL
CIVIL APPEAL NO 63 OF 2015
LAM VP, KWAN AND POON JJA
20 OCTOBER, 3 NOVEMBER 2015

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Administrative Law – Judicial review – Leave for judicial review more than six months out of time – Legal principles to extend time – Legal aid application – Whether leave should be granted for humanitarian protection – Seriousness of potential prejudice to applicant – High Court Ordinance (Cap 4) s 21K(6) – Rules of the High Court (Cap 4A) O 53 r 4(1)

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行政法 — 司法覆核 — 逾期申請司法覆核許可六個月 — 延長時限的法律原則 — 申請法律援助 — 應否基於人道保護而批准許可 — 對申請構成潛在不利的重要性 — 《高等法院條例》(第4章)第21K(6)條 — 《高等法院規則》(第4A章)第53令第4(1)條

D

The applicant was born in Pakistan in 1973 and was a follower of the Ahmadiyya faith. He alleged that since 2006 he was under threat of physical and mental torture by others in his home town because of his faith. He left Pakistan for Mainland China on 16 November 2011 and crossed the border illegally from Shenzhen to Hong Kong on 12 December 2011. He was arrested by the police the same day for being an illegal immigrant and was referred to the Immigration Department.

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On 15 December 2011, he lodged a claim for protection with the Director stating that he wanted to apply for 'torture claim' as his life was in danger in his home country on account of his religion. On 20 February 2012, he lodged an application for the recognition of his refugee status with the United Nations High Commissioner for Refugees (UNHCR).

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On 22 June 2012, the Director refused his torture claim, treating it as only being concerned with art 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). He lodged a petition against the Director's determination to the Chief Executive on 3 July 2012. On 8 August 2012, his petition was dealt with by way of a paper review by Mr William Lam, who was an Adjudicator (Torture Petitions). This was the only decision sought to be challenged by judicial review.

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Before the judge (for leave to apply for judicial review), the applicant sought to attribute the six-month delay in filing his application to the following matters:

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(1) the time taken to apply for and obtain legal aid;

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(2) the time taken to obtain relevant documents from the Immigration Department;

(3) the need to consider the three judgments (handed down between November 2012 to March 2013, which the applicant's legal advisors considered relevant to the intended judicial review) before filing his application; and

(4) the time taken for applications to the Legal Aid Department to extend the scope of the legal aid certificate, for him to make the contribution of $2,000 and to obtain the anonymity order.

The judge dismissed the application on these grounds:

(1) the applicant failed to provide any valid grounds to justify the delay or to show good reasons for an extension of time;

(2) it was unnecessary to comment on the merits of his substantive challenge, as his intended application for judicial review would serve no useful purpose because he had filed a fresh claim under the Unified Screening Mechanism (USM); his rights would be sufficiently assessed and protected under the USM and the refusal to extend time would not lead to grave consequence to the applicant; and

(3) to extend time in the circumstances would be detrimental to good administration.

The applicant appealed.

Held, dismissing the appeal:

The legal principles to extend time

(1) There were two relevant statutory provisions: O 53 r 4(1) and s 21K(6) of the High Court Ordinance (Cap 4). The relationship between these provisions was explained in *R v Stratford-on-Avon District Council, ex p Jackson* and approved in *R v Dairy Tribunal, ex p Caswell*. Whenever there was a failure to act promptly or within three months, there was 'undue delay'. Even though the court might be satisfied in the light of all the circumstances there was good reason for that failure, nevertheless the delay, viewed objectively, remained 'undue delay'. The court therefore retained a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considered that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. *R v Stratford-on-Avon District Council, ex p Jackson* [1985] 3 All ER 769, [1985] 1 WLR 1319 and *R v Dairy Tribunal, ex p Caswell* [1990] 2 AC 738, [1990] 2 WLR 1320 considered (paras 23-26).

(2) In *Re Thomas Lai* [2014] 6 HKC 1, G Lam J considered the relevant authorities and stated the principles to be applied in an application to extend time for judicial review as follows:

(a) While in the public law field it was essential that the courts should scrutinise with care any delay in making an application, the provisions of O 53 r 4(1) and s 21K(6) were not intended to be applied in a technical manner. As long as no prejudice was caused, the courts would not rely on these provisions to deprive a litigant who had behaved sensibly and reasonably of relief to which he was otherwise entitled. R*v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All E R 1033 referred to.

(b) However, it must also be borne in mind that unless a disciplined approach to applications for judicial review out of time was taken, there was a real

A risk that public administration would be unduly disrupted and policies and decisions put into uncertainty for many months after they had been made and acted upon.

(c) What might constitute a good reason for extending time could not be defined. In most cases, this would be a 'multi-faceted question' the answer to which would depend on the circumstances of each case (para 27).

B (3) The principles in *Re Thomas Lai* were no less applicable to cases involving claims for humanitarian protection. There was no need to create a special category for these cases with principles that were to apply peculiarly to them. As stated in *Re Thomas Lai*, this was a multi-faceted exercise. No comprehensive definition of 'good reason' for the purpose of extending time could be given, and the weight to C be given to any factor usually to be considered would vary depending on the particular circumstances. It would not be right to lay down a rigid approach that in cases involving fundamental human rights, the scales must necessarily be tipped in favour of extending time, regardless of the weight to be attached to any relevant factor as might be appropriate in a particular situation. *Re Thomas Lai* D (above) followed (para 35).

Whether there was 'undue delay'

(4) The court agreed with the judge below that the four grounds for delay could not account for the failure to file the notice of application within time. (i) Quite clearly, the time taken to apply for and obtain legal aid could not account for the failure to file the notice of application within time. (ii) The documents sought E from the Immigration Department were provided on 12 December 2012, but the notice of application was filed only in May 2013. (iii) The decisions of the so-called test cases handed down during November 2012 to March 2013 had not substantially affected the position of the applicant. He could have filed his application in any event and later sought amendment in view of the current F development. (iv) The time taken to apply for extension of the scope of legal aid, to make legal aid contribution and to obtain anonymity order were hardly matters that could constitute valid grounds justifying any delay. *ST v Betty Kwan & Ors* [2013] 3 HKC 87, (2013) 18 HKPLR 308, *Ubamaka v Secretary for Security* [2013] 2 HKC 75, (2012) 15 HKCFAR 743 and *TK v Michael Jenkins* [2013] 1 HKC 526, (2013) 18 HKPLR 140 referred to (paras 37-40, 43, 48-49).

G *Lack of useful purpose in the judicial review*

(5) Given the circumstances the adjudicator reached his decision in the CAT claim, and in light of subsequent decisions on the need for an oral hearing after the decision of the Court of Appeal in *ST v Betty Kwan*, it was most unlikely that what had transpired in the CAT proceedings could have much relevance to the H fresh proceedings relating to the BOR 3 risk and persecution risk claims under the USM. *ST v Betty Kwan* (above) referred to (para 65).

(6) The court was not persuaded that the present judicial review would serve any useful or practical purpose. It agreed with the judge's assessment in §36 that the rights of the applicant were sufficiently assessed and protected under the USM and that the refusal to extend time would not lead to grave consequence to him I (para 66).

(7) It was well-established that the court might exercise discretion not to grant a remedy on judicial review if it would serve no practical purpose, where it might have become otiose or pointless to grant a remedy because the relevant detriment to the applicant had been removed (para 67).

Detriment to good administration

(8) There was ample basis for the judge's assessment in §34. It would clearly be detrimental to good administration to require the primary decision maker to assess the same issues twice, particularly given the large number of pending torture claims to be processed (para 72).

Cases referred to

BH v Director of Immigration [2015] HKCU 798; (HCAL 105/2014, Chow, 14 April 2015, unreported) (CFI)

C v Director of Immigration [2013] 4 HKC 563, (2013) 16 HKCFAR 280, (2013) 18 HKPLR 416 (CFA)

Chan Kam Chuen & Ors v Director of Lands [2015] HKCU 550; (HCAL 145/2014, Au, 5 March 2015, unreported) (CFI)

Chan Mei Yiu Paddy v Secretary for Justice (No 3) [2008] 2 HKLRD 154, [2007] HKCU 1330 (CFI)

HKSAR v Vu Thang Duong & Anor [2015] 3 HKC 293, [2015] 2 HKLRD 502 (CFI)

Ho Thi Diem, Re [1994] 2 HKC 708 (HC)

Law Chun Loy v Secretary for Justice [2006] HKCU 1795; (HCAL 13/2005, Hartmann, 26 October 2006, unreported) (CFI)

Po Fun Chan v Winnie Cheung [2007] 5 HKC 145, (2007) 10 HKCFAR 676, [2008] 1 HKLRD 319 (CFA)

R v Commissioner for Local Administration, ex p Croydon London Borough Council [1989] 1 All ER 1033, [1989] Fam Law 187 (QBD)

R v Council for Licensed Conveyancers, ex p Bradford & Bingley Building Society [1999] COD 5

R v Dairy Tribunal, ex p Caswell [1990] 2 AC 738, [1990] 2 All ER 434, [1990] 2 WLR 1320 (HL)

R v Hertfordshire County Council, ex p Cheung; R v Sefton Metropolitan Borough Council, ex p Pau The Times, 4 April 1986

R v London Borough of Newham, ex p Laronde (1995) 27 HLR 215

R v Secretary of State for Health, ex p Furneaux [1994] 2 All ER 652; 17 BMLR 49 (CA, Eng)

R v Secretary of State for the Home Department, ex p Bugdaycay & Ors [1987] 1 AC 514, [1987] 1 All ER 940, [1987] 2 WLR 606 (HL)

R v Stratford-on-Avon District Council, ex p Jackson [1985] 3 All ER 769, [1985] 1 WLR 1319 (CA, Eng)

R (Tofik) v Immigration Appeal Tribunal [2003] EWCA Civ 1138, [2003] All ER (D) 348 (Jul) (CA, Eng)

RI, Re [2014] HKCU 757; (HCMP 3295/2013, Lam VP, Barma JA and Au J, 25 March 2014, unreported) (CA)

RI, Re [2014] HKCU 2186; (HCMP 3295/2013, Lam VP, Barma JA and Au J, 18 September 2014, unreported) (CA)

Secretary for Security v Prabakar (2004) 7 HKCFAR 187, [2005] 1 HKLRD 289, [2004] HKCU 638 (CFA)

Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No 2) [2006] 4 HKC 111, (2006) 9 HKCFAR 478, [2006] 3 HKLRD 487 (CFA)

Super Lion Enterprises Ltd & Ors v The Commissioner of Rating and Valuation [2006] HKCU 113; (HCAL 71/2005, Hartmann, 17 January 2006, unreported) (CFI)

ST v Betty Kwan & Ors [2013] 3 HKC 87, (2013) 18 HKPLR 308 (CFI)

ST v Betty Kwan & Ors [2014] 4 HKC 419, [2014] 4 HKLRD 277, (2014) 19 HKPLR 504 (CA)

Thomas Lai, Re [2014] 6 HKC 1, [2014] CPR 190, (2014) 19 HKPLR 355 (CFI)

TK v Michael Jenkins [2011] HKCU 2037; (HCAL 126/2010, Lam, 21 October 2011, unreported) (CFI)

TK v Michael Jenkins [2013] 1 HKC 526, (2013) 18 HKPLR 140 (CA)

TH v Director of Immigration [2015] HKCU 1660; (HCAL 114/2014, Chow, 20 July 2015, unreported) (CFI)

Ubamaka v Secretary for Security [2011] 1 HKC 508, [2011] 1 HKLRD 359, (2011) 16 HKPLR 63 (CA)

Ubamaka v Secretary for Security [2013] 2 HKC 75, (2012) 15 HKCFAR 743, (2013) 18 HKPLR 189 (CFA)

Legislation referred to

High Court Ordinance (Cap 4) s 21k(6)
Hong Kong Bill of Rights art 3
Rules of the High Court (Cap 4A) O 53 r 4(1)

Other sources referred to

Administrative Law by Wade and Forsyth (11th Ed) pp 204-205
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3
De Smith's Judicial Review (7th Ed) §§18-054 to 18-056
Sir Clive Lewis, Judicial Remedies in Public Law (5th Ed) §9-035
Supperstone, Goudie and Walker, Judicial Review (5th Ed) §18.18.1

[*Editorial note*: For judicial review generally, see *Gordon and Mok*, Judicial Review in Hong Kong, (2009, LexisNexis); for review of decision as to refugee status, see *Halsbury's Laws of Hong Kong,* Title 215, Immigration, [215.051].]

Appeal

This was an appeal against the judgment of P Li J on 26 January 2015 dismissing the applicant's application for an extension of time under O 53 r 4(1) of the Rules of the High Court (Cap 4A) and for leave to apply for judicial review. The applicant was a torture claimant under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. His application for leave to apply for judicial review was filed more than nine months after the decision under challenge and more than six months out of time. The facts appear sufficiently in the following judgment.

Nigel Kat SC (Daly & Associates assigned by Director of Legal Aid) for the appellant.

Sara Tong 'Law Officer (Civil Law)' for the Department of Justice.

Lam VP:

1. I have read the judgment of Kwan JA in draft and I agree with it. In light of the submissions of Mr Kat SC, it is necessary for us to state clearly the proper approach in considering an application for leave to apply for judicial review brought out of time. As Kwan JA shall explain, the approach in *Re Thomas Lai* [2014] 6 HKC 1 is applicable irrespective of the rights at stake. The requirement of anxious scrutiny in cases involving fundamental rights, or as Mr Kat put it, where life and limb may be put at risk, does not change the general approach of the court in deciding whether extension of time should be granted. However, as G Lam J explained, what constituted a good reason for extending time is a multi-faceted question and it has to be considered in light of the facts and circumstances of the case. The seriousness of the potential consequences is part of the factual matrix which the court must take account in applying that flexible test. Possibly, amongst other things, the seriousness of the potential consequences for an applicant should affect the standard of scrutiny in the court's assessment on the merits of the substantive application and the balancing exercise in considering potential prejudice. Though the intensity of scrutiny may be different, the underlying approach is still the same.

2. It should be noted that I refer to the potential consequences for the applicant as opposed to the mere fact that an applicant is bringing a CAT claim (or for that matter, any claim which involves fundamental rights). I do so after giving the matter careful thoughts. A fallacy in Mr Kat's submissions is that undue weight is attached to the identification of the nature of the claim of the applicant without paying any regard to the actual practical consequences in view of the ongoing USM process. In my view, Mr Kat's approach is a flawed one.

3. In effect, counsel is contending for a rigid rule that whenever an applicant advanced a claim involving risk to his or her personal safety or security, the court must proceed as if there would be devastating consequences for the applicant if leave is not granted. As the facts of the present case show, this assumption is not always valid. By reason of the alternative of obtaining appropriate redress from the USM proceedings which the applicant has already taken on board, and because of the adequacy of redress in the context of such proceedings (as further explained by Kwan JA in her judgment), there is simply no real prejudice to the applicant if extension of time is refused for him to proceed with the judicial review in respect of the CAT claim.

4. Mr Kat further urged this court to take account of the duty to uphold the rule of law and grant leave when this is a clear case where the Adjudicator had gone wrong. Again, with respect, that submission adopts a very narrow view on the court's role in the judicial review. I accept the

correction of errors of law of an inferior tribunal is a relevant facet of the exercise of the court's supervisory role in judicial review. However, this is not the only consideration. In the present context, as far as errors of law are concerned, cases decided by the courts (including those of the Court of Final Appeal and some decisions of this court) subsequent to the decision of this adjudicator in the present case have set out the legal position clearly.

5. The availability of alternative redress is a well-established consideration when the court determined whether leave should be granted for judicial review. In the present case, it is patently clear that this consideration looms large in the judge's refusal to grant extension of time. I cannot see how the judge could be said to be wrong in so exercising his discretion. Nor can I see that as undermining the court's role in upholding the rule of law.

6. In respect of the explanation for the delay on account of pending cases in the Court of Appeal, I respectfully agree with Kwan JA's analysis. I only wish to elaborate on the reference to *TK v Michael Jenkins*. For our purposes, the relevant period should be the time between 4 October 2012 (when legal aid was granted to the applicant) and 10 May 2013 (when the applicant made an application to the court for an anonymity order). The first instance decision in *TK v Michael Jenkins* [2011] HKCU 2037, HCAL 126 of 2010 was handed down on 21 October 2011. Insofar as the principle of passive aquiescence was said to be relevant to the present case, such principle was discussed in the first instance decision. Though there had been an appeal by the applicant in that case, there was no cross-appeal by the Director and the issues raised in the Court of Appeal focused on internal relocation, which was not an issue in the present case. Thus, it is difficult to see how that appeal could be regarded as a reason for not proceeding with the present application.

7. I also agree with Kwan JA as to the proposed order to be made in this appeal.

Kwan JA:

8. This is an appeal against the judgment of P Li J on 26 January 2015 dismissing the applicant's application for an extension of time under O 53 r 4(1) of the Rules of the High Court and for leave to apply for judicial review. The applicant is a torture claimant under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). His application for leave to apply for judicial review was filed more than nine months after the decision under challenge and more than six months out of time.

9. In this appeal, Mr Kat SC sought to argue that in cases involving claims for humanitarian protection, the court should be circumspect about applying the principles in relation to the exercise of discretion to extend

time to apply for leave for judicial review and it ought not to apply the principles too rigorously. He also submitted that the delay in making the application was not unjustifiable, that there are strong merits in the substantive challenge, that there is no evidence of prejudice to the Director of Immigration (the Director) or any detriment to good administration which may be caused by extending time and granting leave to apply for judicial review. Lastly, he contended that the judge was wrong to refuse the application on the basis that the intended proceedings for judicial review would serve no useful purpose, as administration beyond law is an unlawful decision and should be quashed in the interest of the rule of law.

Background

10. The relevant background matters, taken largely from the judgment under appeal, may first be stated as follows.

11. The applicant was born in Pakistan in 1973 and is a follower of the Ahmadiyya faith. He alleged that since 2006 he was under threat of physical and mental torture by others in his home town because of his faith. He left Pakistan for Mainland China on 16 November 2011 and crossed the border illegally from Shenzhen to Hong Kong on 12 December 2011. He was arrested by the police the same day for being an illegal immigrant and was referred to the Immigration Department. On 15 December 2011, he lodged a claim for protection with the Director stating that he wanted to apply for 'torture claim' as his life was in danger in his home country on account of his religion. On 20 February 2012, he lodged an application for the recognition of his refugee status with the United Nations High Commissioner for Refugees (UNHCR).

12. On 22 June 2012, the Director refused his torture claim treating it as only being concerned with art 3 of CAT. He lodged a petition against the Director's determination to the Chief Executive on 3 July 2012. On 8 August 2012, his petition was dealt with by way of a paper review by Mr William Lam, who is an Adjudicator (Torture Petitions). This is now the only decision sought to be challenged by judicial review.

13. On 16 August 2012, the adjudicator's decision came to the applicant's attention and he made an application to the Director of Legal Aid on the same day for the purpose of bringing proceedings for judicial review to challenge the adjudicator's decision. He received the Legal Aid offer on 17 September 2012 and legal aid was granted by a certificate issued on 4 October 2012 to apply for leave to seek judicial review against the adjudicator's decision, with his present solicitors assigned as his legal representative.

14. On 29 October 2012, his solicitors made a request to the Immigration Department for the files of the applicant. On 27 November 2012, the Immigration Department provided a list of the documents relating to the applicant. After confirmation by the solicitors of the scope

of the documents requested and the payment of fees, the solicitors received copies of the documents sought on 12 December 2012.

15. On 17 December 2012, the applicant's solicitors requested the Director of Legal Aid to assign counsel and counsel was assigned on 20 December 2012.

16. During November 2012 to March 2013, these judgments were handed down and the applicant's legal advisers considered them relevant to his intended judicial review. They are: *TK v Michael Jenkins* [2013] 1 HKC 526, CACV 286/2011, on 21 November 2012; *Ubamaka v Secretary for Security* [2013] 2 HKC 75, (2012) 15 HKCFAR 743, on 21 December 2012; and *C v Director of Immigration* [2013] 4 HKC 563, (2013) 16 HKCFAR 280, on 25 March 2013.

17. On 26 March 2013, the applicant's legal aid certificate was extended to cover obtaining leave to seek judicial review of the Director's determination rejecting his torture claim on 22 June 2012.

18. On 2 April 2013, the Legal Aid Department requested the applicant to make a contribution of $2,000. On 5 April 2013, the applicant's solicitors wrote to the Legal Aid Department to seek extension of the legal aid certificate to cover challenging the decisions of the Chief Executive and the Secretary for Security[1]. The Legal Aid Department replied that the legal aid certificate would not be extended unless the applicant made the contribution of $2,000. After the applicant had made the contribution on 25 April 2013, the legal aid certificate was extended on 6 May 2013 as requested.

19. On 10 May 2013, the applicant made an *ex parte* application for an anonymity order, which was granted on 14 May 2013. The notice of application for leave to apply for judicial review was eventually filed on 22 May 2013.

20. Before the judge, the applicant sought to attribute the six-month delay in filing his application to the following matters:

(1) the time taken to apply for and obtain legal aid;

(2) the time taken to obtain relevant documents from the Immigration Department;

(3) the need to consider the three judgments aforesaid before filing his application; and

1. The additional challenge was founded on the decisions of the Court of Final Appeal in *Ubamaka v Secretary for Security* and *C v Director of Immigration*, and was premised upon the failure to screen the applicant for cruel, inhumane and degrading treatment and punishment (CIDTP) under art 3 of the Hong Kong Bill of Rights (BOR 3 risk) and persecution risk with reference to the non-refoulement principle under art 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (persecution risk). At the hearing before the judge on 10 June 2014 and 30 September 2014, the applicant did not pursue the additional challenge, in view of the implementation by the government of the Unified Screening Mechanism (USM) on 3 March 2014.

(4) the time taken for applications to the Legal Aid Department to extend the scope of the legal aid certificate, for him to make the contribution of $2,000 and to obtain the anonymity order.

21. These were the grounds the applicant relied on before the judge to challenge the adjudicator's decision:

(1) the adjudicator was wrong not to give the applicant an oral hearing or to give notice of his intention not to do so;

(2) he was wrong in law in finding that the applicant's injuries were minor and failed to meet the minimum severity;

(3) there was no sufficient basis in concluding that there was no instigation, involvement or acquiescence on the part of the state and the adjudicator failed to consider the possibility of passive acquiescence; and

(4) the adjudicator failed to make sufficient inquiry into the conditions of the country of origin and the seriousness of religious persecution there.

The judgment below

22. The judge dismissed the application on these grounds:

(1) the applicant failed to provide any valid grounds to justify the delay or to show good reasons for an extension of time;

(2) it is unnecessary to comment on the merits of his substantive challenge, as his intended application for judicial review would serve no useful purpose because he has filed a fresh claim under the USM; his rights would be sufficiently assessed and protected under the USM and the refusal to extend time would not lead to grave consequence to the applicant; and

(3) to extend time in the circumstances would be detrimental to good administration.

The legal principles to extend time

23. There are two relevant statutory provisions: O 53 r 4(1) and s 21K(6) of the High Court Ordinance (Cap 4).

24. Order 53 r 4(1) is in these terms:

> '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 unless the Court considers that there is good reason for extending the period within which the application shall be made.'

25. Section 21K(6) provides as follows:

> 'Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, the court may refuse to grant -

A (a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or
B would be detrimental to good administration.'

26. The relationship between these provisions was explained by Ackner LJ in *R v Stratford-on-Avon District Council, ex p Jackson* [1985] 1 WLR 1319 at 1325F to G and approved of by Lord Goff of Chieveley in *R v*
C *Dairy Tribunal, ex p Caswell* [1990] 2 AC 738 at 746G. Whenever there is a failure to act promptly or within three months, there is 'undue delay'. Even though the court may be satisfied in the light of all the circumstances there is good reason for that failure, nevertheless the delay, viewed objectively, remains 'undue delay'. The court therefore retains a discretion
D to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

E 27. In *Re Thomas Lai* [2014] 6 HKC 1, G Lam J considered the relevant authorities and stated the principles to be applied in an application to extend time for judicial review in §§43 to 45. I take the following summary of these principles from the submission of Ms Sara Tong, who appeared for the Director:

F (1) While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application, the provisions of O 53 r 4(1) and s 21K(6) are not intended to be applied in a technical manner. As long as no prejudice is caused, the courts will not rely on these provisions to deprive a litigant who has
G behaved sensibly and reasonably of relief to which he is otherwise entitled (*R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033 at 1046, per Woolf LJ).

H (2) However, it must also be borne in mind that unless a disciplined approach to applications for judicial review out of time is taken, there is a real risk that public administration will be unduly disrupted and policies and decisions put into uncertainty for many months after they have been made and acted upon.

I (3) What may constitute a good reason for extending time cannot be defined. In most cases, this would be a 'multi-faceted question' the answer to which would depend on the circumstances of each case. The following factors, which are not exhaustive, are likely to be of significance:

(i) **Length of the delay**: Obviously the longer the delay, the more cogent the reason has to be for extending time.

(ii) **Explanation for the delay**: While O 53 r 4(1) requires a good reason for extending time, rather than a good excuse for the delay, it is common sense that the presence of a credibly valid explanation for the delay will strengthen, and conversely the absence of any acceptable explanation will weaken, the applicant's request for what is after all an indulgence to be granted to him in the court's discretion.

(iii) **Merits of the substantive application**: Although merits of the challenge of the administrative decision are a significant matter to be taken into account, it is by no means the sole criterion. Where an applicant is many months out of time, leave may be refused 'however strong the complaint might otherwise be' (*Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676 at 693B to C, per Litton NPJ). An applicant who sleeps upon his rights may be barred from pursuing them in judicial review even though he may have a meritorious case (*Law Chun Loy v Secretary for Justice* [2006] HKCU 1795, HCAL 13/2005, 26 October 2006, at §13, per Hartmann J).

(iv) **Prejudice**: The question of prejudice has two sides: the prejudice to the applicant if time is not extended, and the prejudice to the respondent and to public administration if a challenge is allowed to proceed out of time.

(v) **Questions of general public importance**: Whether the application raises questions of general public importance, and whether those questions are likely to have to be resolved by the courts in any event.

28. The principles and approach stated in *Re Thomas Lai* have been applied in recent cases: *Chan Kam Chuen & Ors v Director of Lands*[2], [2015] HKCU 798, HCAL 145/2014, 5 March 2015, at §36, per Au J; *BH v Director of Immigration* [3], [2015] HKCU 1660, HCAL 105/2014, 14 April 2015, at §98, per Chow J; *TH v Director of Immigration* [4], HCAL 114/2014, 20 July 2015, at §72, per Chow J.

2. An application to judicially review the decision of the Director of Lands to create easements and permanent rights on land for the purpose of a public work project
3. The application for judicial review was to challenge the decision of the Director of Immigration in refusing a dependent visa application. Chow J considered that the merits of the application and the public interests involved in having the issue of the proper interpretation of the dependent visa policy resolved by the court outweighed the substantial delay and allowed the application.
4. Also an application for judicial review to challenge the decision of the Director of Immigration in refusing a dependent visa application. Chow J considered that the Director had misapplied the dependent visa policy but was of the view that on the facts there was a high likelihood the

A 29. Ms Tong submitted that the appropriate weight to be given by the court to each relevant factor would differ depending on the facts and circumstances of the particular case. Judicial reviews involving CAT and asylum decisions do not fall into a special category such that the court should adopt a different approach. The same legal principles should apply, B with the court having unfettered discretion to give such weight to any relevant factor as it may deem appropriate in the facts and circumstances of each case.

30. Mr Kat submitted to the contrary. He asked the appeal court to provide guidance as to how the approach and principles stated in *Re* C *Thomas Lai* might be applied in cases involving claims for humanitarian protection. He emphasised that as life and limb may be put at risk as a result of CAT determinations, the courts will on judicial review subject such determinations to 'anxious scrutiny' to ensure 'high standards of fairness' have been met (*Secretary for Security v Prabakar* (2004) 7 D HKCFAR 187 at §45). 'When the remedy of *certiorari* is sought as a means of ensuring the elimination of unacceptable risk to human life, the discretion to refuse relief must be most narrowly confined since risks to life 'call for the most anxious scrutiny': per Lord Bridge of Harwich in *R v Secretary of State for the Home Department, ex p Bugdaycay & Ors* E [1987] 1 AC 514 at 531' (*Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No 2)* [2006] 4 HKC 111, (2006) 9 HKCFAR 478 at §93[5]). Statements to same effect are found in *Super Lion Enterprises Ltd & Ors v Commissioner of Rating and Valuation* [2006] HKCU 113, HCAL 71/2005, at §233, per Hartmann J; *Chan Mei Yiu* F *Paddy v Secretary for Justice (No 3)* [2008] 2 HKLRD 154, [2007] HKCU 1330 at §36, per Saunders J.

31. Mr Kat also prayed in aid the statement of Lord Goff in *R v Dairy Tribunal, ex p Caswell* at 747D to E that it may be thought better to grant G leave to apply for judicial review where there is considered good reason to extend time under O 53 r 4(1), leaving questions of hardship or prejudice or detriment arising under s 21K(6) to be explored in depth on the hearing of the substantive application.

32. Mr Kat made the point that in stating the principles in *Re Thomas* H *Lai*, G Lam J did not refer to the consideration regarding risk to human life in *Shiu Wing Steel*, or the approach in Lord Goff's statement in *R v Dairy Tribunal, ex p Caswell*. He also took issue with the statement in *Re*

I dependent visa application would likely be rejected even if remitted to the Director for fresh consideration. As for the public interests in having the issue of the dependent visa policy resolved by the court, the issue had already been determined twice by the Court of First Instance by the time of this application. He set aside the leave granted to apply for judicial review and dismissed the application for judicial review.

5. The application for leave to bring judicial review was made within the three-month period, there was no 'undue delay' and the Court of Final Appeal was not concerned with the exercise of discretion to extend time for judicial review.

Thomas Lai at §45(2) that where good reason for extending time has been shown, the applicant's request for extension of time is 'after all an indulgence to be granted to him in the court's discretion'. He submitted there is no place for concepts of 'indulgence' or 'favour' in the court's exercise of the 'residual discretion'.

33. In §45(3) of *Re Thomas Lai*, the judge rejected a submission that it is sufficient for an application to extend time to see whether there is a reasonably arguable claim which enjoys a realistic prospect of success, as that is the threshold for applications for leave lodged within time. The judge took the view that where the applicant is out of time, in an appropriate case, the court is entitled to delve more deeply into the merits, as its function is not just to filter out the unarguable, but also to see whether indulgence in the form of extension of time should be granted. Mr Kat took issue with this as well, contending that there is no support for a different or higher merits requirement on an application for extension of time at the leave stage.

34. In short, the constant theme of Mr Kat's submission is that in this kind of cases involving claims for humanitarian protection, the scales are heavily tipped in favour of the applicant by the possibly grave consequences of an unlawful decision to refuse protection. So the court should be astute to ensure that decisions in other cases where less vital interests are at stake and the consequences of refusal less grave (such as in *Re Thomas Lai* and other cases cited above that applied the principles stated) should not guide the court's exercise of the discretion to extend time where fundamental human rights are involved.

35. In my view, the principles and approach stated in *Re Thomas Lai*, which relate to applications for extension of time for judicial review in general, are no less applicable to cases involving claims for humanitarian protection. There is no need to create a special category for these cases with principles that are to apply peculiarly to them. The principles governing the exercise of discretion to extend time for judicial review are well established, and they are meant to be applied flexibly, always with regard to the particular circumstances of each case. As stated in *Re Thomas Lai*, this is a multi-faceted exercise. No comprehensive definition of 'good reason' for the purpose of extending time can be given, and the weight to be given to any factor usually to be considered would vary depending on the particular circumstances. It would not be right to lay down a rigid approach that in cases involving fundamental human rights, the scales must necessarily be tipped in favour of extending time, regardless of the weight to be attached to any relevant factor as may be appropriate in a particular situation. A good illustration is the cases of *BH v Director of Immigration* and *TH v Director of Immigration* mentioned earlier, in which Chow J arrived at different results on extension of time for judicial review in which the same legal issue was raised to challenge

a decision to refuse a dependent visa.

36. I do not think in the statement of Lord Goff taken from *R v Dairy Tribunal, ex p Caswell* at 747D to E, Lord Goff was laying down any general principle as Mr Kat would seem to suggest. Nor do I agree with his criticisms of §§45(2) and (3) in *Re Thomas Lai*. In an application of this kind, the court is engaged in the exercise of discretion whether to grant indulgence in the form of an extension of time to the applicant. And it is entirely appropriate that the court may need to delve deeper into the merits of the substantive challenge to consider what weight should be given to this factor when weighed against other factors in a given situation.

If there was 'undue delay'

(1) The time taken to apply for and obtain legal aid

37. Legal aid was applied for on 16 August 2012, the same day the applicant learned about the adjudicator's decision, and the legal aid certificate was issued on 4 October 2012. The judge found there was plenty of time for the applicant's legal advisers to file a notice of application for judicial review within the three-month time limit. Quite clearly, the time taken to apply for and obtain legal aid could not account for the failure to file the notice of application within time.

(2) The time taken to obtain relevant documents from Immigration Department

38. The judge held that the documents in the applicant's personal file sought from the Immigration Department were not essential in preparing the notice of application for judicial review. The most relevant documents were the decisions of the Director and the adjudicator. The applicant should also have with him the questionnaires in the interview of the Immigration Department, in which he was assisted by the Duty Lawyer Service. The judge concluded that the applicant should have all relevant papers necessary for drafting the application as early as August or October 2012.

39. There is no valid reason to differ from the judge's views. In any event, the documents sought from the Immigration Department were provided on 12 December 2012, but the notice of application was filed only in May 2013.

(3) The need to consider relevant judgments

40. Mr Kat contended that the three judgments the applicant's legal advisers were waiting for – *TK v Michael Jenkins*, *Ubamaka* and *C* – were 'test cases'. For good measure, he added the case of *ST v Betty Kwan*,

which is relevant to the denial of an oral hearing by the adjudicator as a ground for judicial review. He submitted it was sensible and reasonable to wait for those decisions before applying for judicial review. A

41. He cited *R v Hertfordshire County Council, ex p Cheung*; *R v Sefton Metropolitan Borough Council, ex p Pau*, The Times, 4 April 1986, in which Sir John Donaldson MR stated that where a test case was in progress in the public law court, others in the same position as the applicant should not be expected themselves to begin proceedings in order to protect their positions, as that would strain the resources of the court to breaking point and, more importantly, it was a cardinal principle of good public administration that all persons who were in a similar position should be treated similarly. B C

42. Mr Kat contended that even if the decision to wait for those judgments was not justified, the responsibility would lie with the legal advisers and not the applicant and it would be unjust to deny him the opportunity to apply for judicial review or a remedy on that basis, in particular where there is a risk to life and limb. He cited *R (Tofik) v Immigration Appeal Tribunal* [2003] EWCA Civ 1138 at §25 and *R v London Borough of Newham, ex p Laronde* (1995) 27 HLR 215 at 226. D

43. The judge took the view that the decisions of *TK v Michael Jenkins*, *Ubamaka* and *C*, handed down during November 2012 to March 2013, had not substantially affected the position of the applicant. He could have filed his application in any event and later sought amendment in view of the current development. E

44. I agree with the judge's assessment. Of the eight grounds mentioned in the notice of application for judicial review, the first four grounds have nothing to do with the failure to screen the applicant for CIDTP and refugee status, which was premised on the decisions of the Court of Final Appeal in *Ubamaka* and *C*. There is no reason why the applicant could not have filed his application first and sought leave to amend to add further grounds in the light of the subsequent decisions. F G

45. The decision of the Court of Appeal in *TK v Michael Jenkins*, upholding the judgment of Lam J (as he then was) on 21 October 2011 dismissing the application for judicial review, cannot be regarded as a pending test case as far as the applicant is concerned. For *TK v Michael Jenkins* to be a pending test case to the present case, there must be common crucial issues which are determinative of the dispute. There was no attempt to link any crucial issue in the present case with the contended issues in the Court of Appeal decision in *TK v Michael Jenkins* (*Re Ho Thi Diem* [1994] 2 HKC 708 at 712F to G). H I

46. As for the case of *ST v Betty Kwan*, this was simply not relied on before the judge as a relevant decision that the applicant's legal advisers should consider before issuing the present application. The application for judicial review in *ST v Betty Kwan* was argued before Au J on 20 and 21

December 2012 and judgment was given on 8 March 2013. The denial of an oral hearing by the adjudicator did not succeed as a ground for judicial review before Au J ([2013] 3 HKC 87) and it only succeeded on appeal to the Court of Appeal, whose judgment was handed down on 26 June 2014 (see [2014] 4 HKC 419, [2014] 4 HKLRD 277), a year after the applicant here filed his notice of application for judicial review. I am unable to see how any decision to wait for the progress of *ST v Betty Kwan* (which was not relied on in the court below) could have formed part of the reason for the delay.

47. It is not necessary to consider Mr Kat's proposition that if the delay was attributable to the applicant's lawyers, he should not be fixed with his lawyers' errors, save to point out there are statements in other authorities that any delay attributable to the lawyers must nevertheless be satisfactorily explained (*Judicial Remedies in Public Law* by Sir Clive Lewis (5th Ed) §9-035; *R v Council for Licensed Conveyancers, ex p Bradford & Bingley Building Society* [1999] COD 5 at 8; *R v Secretary of State for Health, ex p Furneaux* [1994] 2 All ER 652 at 658d to h).

(4) The time taken to apply for extension of the scope of legal aid, to make legal aid contribution and to obtain anonymity order

48. Mr Kat submitted these matters are beyond the control of the applicant.

49. I agree with the judge these are hardly matters that could constitute valid grounds justifying any delay. There was 'undue delay' in that the application was made outside the three-month period and the court has discretion to refuse to extend time.

Merits of the substantive application

50. Mr Kat placed great reliance on the merits of the substantive challenge. He submitted that the adjudicator was plainly wrong in law and the procedure adopted in dispensing with an oral hearing was unfair in these respects:

(1) The applicant's claim was founded on the refusal and failure of the authorities in Pakistan to take steps to protect him from attacks by non-state actors on account of his religion. But the adjudicator wrongly decided that CAT would require the involvement of a state actor in the maltreatment itself.

(2) The adjudicator failed to make sufficient inquiry into the country conditions and the seriousness of religious persecution in Pakistan and simply dismissed the relevance of the report on persecution of Ahmadis in Pakistan submitted by the applicant without giving adequate reason.

(3) Having found no past torture within art 3 of CAT, the adjudicator

wrongly held on that basis alone there were no substantial grounds for believing that the applicant would be in danger of being subjected to torture in future if refouled.

(4) There was obvious procedural unfairness by the adjudicator in deciding for himself, adversely to the applicant and without putting it to him at an oral hearing or otherwise, on the local police practices in the Punjab and in dismissing the country of origin information as mere background.

51. Mr Kat submitted that in a number of decisions involving the same adjudicator, the Director has not sought to support his decisions on applications for judicial review in view of similar errors made by the adjudicator. I do not think it is right to have regard to those other cases involving the same adjudicator without sufficient information on the specific facts of each case, and in light of Ms Tong informing us that the Director did not make concession on any issues and cases were compromised on a case by case basis.

52. The judge did not find it necessary to comment on the merits of the substantive challenge, as he took the view that the application for judicial review could serve no useful purpose. Ms Tong urged this court to take the same approach and she did not make submissions on the substantive merits. I will leave aside the merits for the time and consider first the point about lack of useful purpose in this judicial review.

Lack of useful purpose in the judicial review

53. The judge took the view it is not necessary to comment on the merits of the applicant's substantive challenge as the subject issues regarding his CAT claim would inevitably be considered under the USM.

54. In response to the judgments of the Court of Final Appeal in *Ubamaka and C*, the government implemented the USM on 3 March 2014 to process non-refoulement claims lodged by persons without a right to enter and remain in Hong Kong against removal to another country on all applicable grounds including:

(1) risk of torture under Part VIIC of the Immigration Ordinance (Cap 115);

(2) risk of CIDTP under art 3 of the Hong Kong Bill of Rights (BOR 3 risk); and

(3) persecution risk with reference to the non-refoulement principle under art 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (persecution risk).

55. For a detailed description of the USM, see the judgment of Zervos J in *HKSAR v Vu Thang Duong & Anor* [2015] 3 HKC 293 at §§7 to 10.

56. In the letter of the Department of Justice to the court dated 9 July

2013, it was suggested on behalf of the Director that in view of the USM, the most sensible course is for the applicant not to pursue his present leave application. In the response of the applicant's solicitors in their letter to the court dated 12 July 2013, these points were made:

(1) it is not clear whether screening under the USM will refer to the earlier decisions made on the CAT claim;

(2) if the government's position is that the decision of the adjudicator will not be re-assessed unless there is an order from the court quashing the decision and the earlier decisions on the CAT claim may be referred to in the USM, this could have a very significant impact on the USM, going, for instance, to credibility issues; and

(3) in light of the above, the applicant is not able to accede to the Director's suggestion not to pursue his present leave application.

57. This remains essentially the stance taken by the applicant in the proceedings below and on appeal. Mr Kat contended that if the adjudicator's decision is allowed to remain standing, the applicant is at personal risk of the 'misuse' of that decision and the adjudicator's findings in the USM proceedings. He expressed concern that the adjudicator's decision may condition or influence the assessment of the BOR 3 risk or persecution risk in the USM proceedings, overtly or covertly, and there is no effective mechanism to prevent this taking place.

58. The judge agreed with these submissions of the Director in §32 of his judgment that the present judicial review would serve no useful purpose:

(1) as the applicant has filed a claim under the USM, he would be assessed on the CIDTP claim[6] based on the information and documents submitted under his CAT claim;

(2) the CIDTP claim is wider in scope in that there is no need to establish involvement by the state or a public official, nor is there any need to consider acquiescence as under the CAT claim;

(3) given the wider scope of the CIDTP claim, the applicant might be accepted under the CIDTP claim despite he had been rejected under the CAT claim;

(4) if he is rejected under the CIDTP claim, there is very little chance he could be accepted under the CAT claim; and

(5) even if he is rejected under the CIDTP claim, he may petition to the adjudicator again and if need be apply for judicial review of the adjudicator's decision.

59. In *RI* [2014] HKCU 757, HCMP 3295/2013, 25 March 2014, the

6. The judge did not mention any claim for persecution risk made by the applicant, but this should not affect his reasoning here.

Court of Appeal was faced with a similar situation and refused to grant an extension of time to appeal against a decision refusing to grant leave to the applicant to apply for judicial review, mainly because the substantive merits of the applicant's case in terms of his fear of persecution or risk of safety to his person should properly be canvassed in his claim under the USM which was on foot. As in the present case, there was no suggestion that the applicant was subject to any risk of removal pending the processing of his claims under the USM.

60. In the subsequent judgment refusing leave to appeal to the Court of Final Appeal (18 September 2014, [2014] HKCU 2186), Lam VP has this to say at §§6 and 7:

> '6. ... Even if the applicant were successful on his intended challenge based on the refusal of the adjudicator to grant him any oral hearing, it would only end up with an order of mandamus directing the adjudicator to hear the matter afresh with an oral hearing. But he can already have the merits of his claim heard by, first the Director, and on a petition by an adjudicator, in the USM proceedings. If he fails in the USM proceedings, it is difficult to see how he could succeed in his CAT claim. Viewed thus, the challenge based on the lack of oral hearing in the context of state involvement or acquiescence is a matter of little moment.
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> 7. Thus, even taking account of the high degree of scrutiny which the court must exercise in these types of cases, we did not think there was anything to be gained by entertaining the appeal in the present circumstances.'

61. Ms Tong made these further submissions on behalf of the Director in respect of the applicant's rights and interests in his BOR 3 risk and persecution risk claims under the USM, to address the concerns expressed by Mr Kat:

(1) the BOR 3 risk and persecution risk claims will be considered afresh by a different immigration officer from the one who rejected the applicant's CAT claim. In the case of any appeal to the Torture Claims Appeal Board (TCAB), the appeal will be handled by a different Board member or adjudicator other than the one who determined his previous appeal in respect of his CAT claim;

(2) the previous decisions made by the Director and the adjudicator in relation to the applicant's CAT claim will not be provided to the new immigration officer or new adjudicator who will handle the applicant's BOR 3 risk and persecution risk claims under the USM;

(3) although the materials previously supplied by the applicant under his CAT claim will be taken into account under the USM, the applicant will also be given an opportunity to provide further information or representations if he should wish to do so.

62. Ms Tong further disavowed it has ever been the position of the government that the findings of fact made in the previous CAT claims may

be taken into account in considering the claims on the BOR 3 risk and persecution risk under the USM.

63. It is not necessary to consider the further materials which Ms Tong sought to place before the court (objected to by Mr Kat in the absence of a summons for this purpose) with the view of showing that her above submissions have merely reflected the stance taken by the Director across the board for quite some time. Regardless of what the Director's stance might have been all along, I am satisfied on the basis of the Director's stance made known to this court by his counsel's submissions that this should eliminate any risk that the decisions under CAT might be 'misused' or that they might influence a decision under the USM on the applicant's BOR 3 risk and persecution risk claims.

64. The Director's stance accords with the principle that an assessing officer has a statutory public duty to make a correct assessment on each occasion, and that no estoppel can avail to prevent him doing so. This principle applies in all situations where powers have to be exercised in the public interest (*Administrative Law* by Wade and Forsyth (11th Ed) at pp 204 to 205). As the Court of Final Appeal has held in *C*, to exercise his statutory power of removal, the Director must carry out his independent assessment and apply his mind independently to the correctness of the determination by the UNHCR (at §§93 to 98). The Director and the TCAB clearly have a public duty to consider the BOR 3 risk and persecution risk claims under the USM unfettered by whatever findings that might have been made in respect of the CAT claim.

65. Furthermore, given the circumstances the adjudicator reached his decision in the CAT claim, and in light of subsequent decisions on the need for an oral hearing after the decision of the Court of Appeal in *ST v Betty Kwan*, it is most unlikely that what had transpired in the CAT proceedings could have much relevance to the fresh proceedings relating to the BOR 3 risk and persecution risk claims under the USM.

66. In view of the above, I am not persuaded by Mr Kat that the present judicial review would serve any useful or practical purpose. I agree with the judge's assessment in §36 that the rights of the applicant are sufficiently assessed and protected under the USM and that the refusal to extend time would not lead to grave consequence to him.

67. It is well established that the court may exercise discretion not to grant a remedy on judicial review if it would serve no practical purpose, where it may have become otiose or pointless to grant a remedy because the relevant detriment to the applicant has been removed (*De Smith's Judicial Review* (7th Ed) at §§18-054 to 18-056; *Judicial Review* by Supperstone, Goudie and Walker (5th Ed) at §18.18.1). I turn to consider if there is any other factor that should be taken into account in the exercise

of this discretion.

Detriment to good administration

68. As there is 'undue delay' in this instance, detriment to good administration is a factor that may be taken into consideration under s 21K(6) in deciding whether to refuse to grant leave for applying for judicial review or to refuse relief in the substantive application. As stated by Lord Goff in *R v Dairy Tribunal, ex p Caswell* at 749G, this statutory provision recognises there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account.

69. As stated by the judge in §33 of his judgment, what constitutes detriment to good administration varies with cases. He regarded it would be detrimental to good administration if the adjudicator's decision were to be quashed and the applicant's CAT claim be remitted to the TCAB for re-assessment. He explained the reasons for his views in this way:

> '34. The volume of cases under CAT claim is already very large. The time and resources spent on these cases is immense. It is to the interest of all parties that these cases should be disposed of promptly and efficiently. This is the interest of good administration in this case. Unnecessary or unmeritorious applications should not be allowed to dwell on causing additional pressure to the administration of the Immigration Department.
>
> 35. As analysed above, in case the applicant's CIDTP claim is rejected, there is very little chance that he would be accepted in his CAT claim. To allow his CAT claim to remain in the pool of cases would not be conducive to good administration.'

70. Mr Kat submitted there is no evidence for the judge's views in §34, and any detriment to good administration must be substantiated by evidence. He prayed in aid the statements of Fok JA (as he then was) in *Ubamaka v Secretary for Security* [2011] 1 HKC 508, [2011] 1 HKLRD 359 at §§184 and 188. The statements in *Ubamaka* were made in the context of whether granting substantive relief in the judicial review would cause hardship or prejudice or would be detrimental to good administration.

71. Ms Tong sought to provide information on the large number of pending torture claims to be processed by the government. This was opposed by Mr Kat for want of a proper summons to adduce further evidence on appeal. But one does not have to look to the additional material sought to be placed before this court, as there is information on this is in the public domain. Zervos J spoke about this in some detail in *HKSAR v Vu Thang Duong & Anor* at §10:

A 'I have been informed by the Duty Lawyer Service that the number of outstanding non-refoulement claims is approximately 9,500 of which 7,893 have been referred to the Duty Lawyer Service. Most immigration related cases are dealt with by the Shatin Magistracy, but some are also dealt with by other Magistracies. The Duty Lawyer Service from its analysis has informed me that in Shatin Magistracy there are 188 cases pending USM decision of which 155 are ongoing. ...'

B

72. There is ample basis for the judge's assessment in §34. I agree with Ms Tong it would clearly be detrimental to good administration to require the primary decision maker to assess the same issues twice, particularly given the large number of pending torture claims to be processed.

C

Conclusion and costs

73. The factors urged in favour of the applicant are the merits of his substantive challenge, and the policy of the court not to allow unlawful administrative decisions to stand in the interest of upholding the rule of law. Like the judge, I do not think it necessary to come to a firm view on the merits of the substantive challenge. As against these factors is the consideration that the present judicial review would serve no practical purpose and that it would be detrimental to good administration. The judge took the view that these factors outweighed the factors urged upon him by the applicant. There is no basis to interfere with the exercise of his discretion against the granting of an extension of time to apply for judicial review and in dismissing the leave application.

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74. I would dismiss the applicant's appeal.

75. I would make an order *nisi* that the applicant should pay the Director's costs of this appeal. The judge made no order as to the costs of the Director in the proceedings below. The applicant has failed before the judge and as none of his arguments have found any success on appeal, I see no reason why costs in the appeal should not follow the event.

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76. I would order that the applicant's own costs be taxed in accordance with the Legal Aid Regulations.

Poon JA:

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77. I agree with the judgment of Lam VP and the judgment of Kwan JA. I also agree with the Orders proposed by her Ladyship.

Reported by Ma Chun Man Amos

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