

Case Summary for:
ALI FAYZAN v TORTURE CLAIMS APPEAL BOARD AND ANOTHER¹

Court:	Court of First Instance
Judges:	Deputy High Court Judge Bruno Chan
Applicant (and Counsel):	Ali Fayzan (acting in person and absent in open court)
Respondent (and Counsel):	Torture Claims Appeal Board and the Director of Immigration
Date heard:	N/A (hearing on paper)
Date promulgated:	6 December 2019
Full text:	https://v2.hklii.hk/en/cases/hkcfi/2019/2545
<p>ABSTRACT: The Applicant is a Pakistani national who was late in submitting his non-refoulement claim form and the notice of appeal. The Torture Claims Appeal Board (“TCAB”) refused to extend time for the Applicant’s late filing of the notice of appeal. Although the Applicant’s subsequent application for leave to apply for judicial review was also out of time, the Court granted extension of time and leave to apply for judicial review for the reason that the application was reasonably arguable. In particular, TCAB as the decision-maker failed to give adequate consideration of all the circumstances of the Applicant’s case by making enquiries with the Applicant about his reasons for late filing and the basis of making a non-refoulement claim.</p>	
Key words:	Late filing of non-refoulement claim; judicial review; <i>Wednesbury</i> reasonableness

The Justice Centre is grateful for the assistance rendered by Morrison & Foerster on this case summary.

¹ [2019] HKCFI 2545. Also cited as: [2019] CU4603, and HCAL 787/2018.

SUMMARY:

Facts and Procedural History:

The Applicant is a Pakistani national. He first made a written signification with the Department of Immigration (the “**Immigration Department**”) in December 2013 to indicate his intention to make a non-refoulement claim. It was only until July 2016 that the Immigration Department responded to the Applicant’s signification and asked him to complete and submit a non-refoulement claim form before 12 August 2016. During that time, the Applicant was detained at Castle Peak Bay Immigration Center (“**CIC**”), and he failed to comply with the deadline. The Immigration Department subsequently closed his case.

Eight months later, the Applicant wrote to the Immigration Department to re-open his case. The Immigration Department decided not to re-open it. In a letter of decision dated 22 May 2017, the Immigration Department told the Applicant (who was then held in Tai Lam Correctional Institution) that he may file a notice of appeal by 7 June 2017 if he intended to challenge the Immigration Department’s decision. He eventually lodged his appeal to TCAB on 14 June 2017 from CIC, seven days later than the specified deadline.

In the notice of appeal, the Applicant explained that he failed to meet the deadline because he only received the Immigration Department’s letter on 5 June 2017, two days before the deadline, while in prison. He also set out the basis of his non-refoulement claim in the notice of appeal. On 8 September 2017, TCAB made a preliminary decision (without a hearing) refusing to extend time for the Applicant’s late filing of his notice of appeal.

Eight months later, the Applicant made a late application for leave to apply for judicial review of both the Immigration Department’s and TCAB’s decisions with this Court (the “**Application**”), which formed the subject of this case. One of the Applicant’s arguments was that the adjudicator of the Immigration Department and TCAB failed to make sufficient enquiry before finalizing his determination and failed to give the Applicant sufficient chance to arrange relevant evidence for his non-refoulement claim as well as his appeal (para 15).

Issues:

- (1) Whether the Application was time-barred; and
- (2) If not, whether it was reasonably arguable that TCAB failed to take into consideration all the circumstances of the Applicant’s case in refusing the late filing of his notice of appeal, or was *Wednesbury* unreasonable in disallowing his late filing.

Judgment:

The Court allowed the late filing of the Application and granted leave to the Applicant to apply for judicial review of TCAB’s decision.

Reasons for Judgment:

In considering whether the Application was time-barred, the Court took into consideration the following factors pursuant to *Re Thomas La²* (para 15): (1) the length of the delay, (2) the reason for the delay, (3) the merits of the intended application, and (4) any prejudice to the putative respondent and to public administration.

Regarding (1) and (2), the Court found that the five-month delay was substantial, and the Applicant failed to explain for the late filing in person or by his supporting affirmation. When considering (3), however, the Court found that the Application “is not without merit” after a close examination of TCAB’s decision (para 19).

Although TCAB’s decision directed itself to the three-stage approach set out in *The Secretary of State for the Home Department v Begum³*, the Court found TCAB to have failed to make sufficient enquiries with the Applicant and evaluate all the circumstances of the case before making the decision to reject the Applicant’s late filing of the notice of appeal. Particularly, TCAB failed to consider that the Applicant was in prison when he received the Immigration Department’s decision.

Citing para 24 of *Re Qasim Ali⁴*, the Court stated that one may reasonably presume that an **imprisoned applicant would have to go through more hurdles or difficulties in arranging his affairs**. In such a situation, TCAB should have made enquiries with the Applicant to understand if there were any circumstances in prison which rendered him receiving the Immigration Department letter late and, as a result, not having as many as 14 days to fill in the notice of appeal. Additionally, given that the Applicant had set out the basis of his non-refoulement claim in the notice of appeal, TCAB ought to have also properly evaluated them before making the decision.

Other Considerations: N/A

Legal Provisions considered:

1. Immigration Ordinance (Cap 115): section 37ZT.
<https://v2.hkii.hk/en/legis/ord/115>
2. Rules of the High Court (Cap 4A): Order 53, rule 4(1).
<https://v2.hkii.hk/en/legis/reg/4A>

Key Cases cited:

1. *AW v Director of Immigration* [2016] 2 HKC 393 (extension of time ought not to be granted if there is an undue delay and if any extension would result in detriment to good

² [2014] 6 HKC 1

³ [2016] EWCA Civ 122

⁴ [2019] HKCA 430

administration, i.e., require the primary decision maker to assess the same issues twice when the caseload of torture claims is huge) <https://v2.hklii.hk/en/cases/hkca/2015/519>

2. *Re Qasim Ali* [2019] HKCA 430 (decision-makers should make enquiries as to whether there are circumstances in prison causing some inevitable delay to an applicant, for instance certain measures or inspections conducted by the institution on incoming mails before such mails could reach the applicant as an inmate) <https://v2.hklii.hk/en/cases/hkca/2019/430>
3. *Re Thomas Lai* [2014] 6 HKC 1 (four factors that the court should consider when deciding whether or not to grant extension of time to a late judicial review application) <https://v2.hklii.hk/en/cases/hkcfi/2014/371>
4. *The Secretary of State for the Home Department v Begum* [2016] EWCA Civ 122 (a three-stage approach which decision-makers should take when exercising discretion to waive an applicant's failure to comply with certain rules) <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/122.html>