

Case Summary for:  
*T v DIRECTOR OF IMMIGRATION*<sup>1</sup>

<b>Court:</b>	Court of First Instance
<b>Judges:</b>	Hon Wilson Chan J
<b>Applicant (and Counsel):</b>	T (Ms. Katherine Olley, instructed by Messrs Daly & Associates)
<b>Respondent (and Counsel):</b>	Director of Immigration (Ms. Ann Lui, instructed by Department of Justice)
<b>Date heard:</b>	15 October 2018
<b>Date promulgated:</b>	8 January 2019
<b>Full text:</b>	<a href="https://v2.hklii.hk/en/cases/hkcfi/2019/22">https://v2.hklii.hk/en/cases/hkcfi/2019/22</a>
<p><b>ABSTRACT:</b> The Applicant was detained by the Department of Immigration (the “Immigration Department”) for one and a half years for illegal immigration. He first sought to challenge the detention by way of judicial review. He was released on recognizance before the application was heard. Eight months after he was released, the Applicant made an amended application to seek a court declaration that the detention was unlawful and that he was entitled to exemplary damages.</p> <p>The Court dismissed the amended application on two grounds. First, it was time-barred. The application was made five months late; the Applicant was unable to show good reasons for the delay, nor did he apply for extension of time. Second, a private law writ action was an alternative, available and more appropriate avenue than judicial review to seek the intended relief. The Applicant should have first pursued a private law action, given judicial review is generally regarded as a remedy of last resort.</p>	
<b>Key words:</b>	Exemplary damages for unlawful detention; private law writ action as appropriate remedy; judicial review as last resort

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

<sup>1</sup> [2019] HKCFI 22. Also cited as: [2019] HKCU 126, HCAL 241/2016, and HCAL 241A/2016.

## SUMMARY:

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### **Facts and Procedural History:**

The Applicant was detained by the Immigration Department pursuant to various provisions of the Immigration Ordinance (Cap 115) between 9 December 2015 and 13 May 2017 for one and a half years in total (the “**Detention**”). Aggrieved at the length of the Detention, the Applicant first made an application via Form 86 to seek leave to apply for judicial review. The application sought the Court’s order to quash the Director of Immigration’s decision on his detention. Before the application was heard, the Applicant was released on recognizance.

Eight months after the release, the Applicant made an amended application to the original application (the “**Amended Application**”). The Amended Application sought to ask the Court to declare the Detention to be unlawful and hence grant him damages for the alleged unlawful detention.

### **Issues:**

Whether the Applicant could seek a declaration of unlawful detention and obtain exemplary damages for the alleged unlawful detention via the Amended Application.

### **Judgment:**

The Court dismissed the Applicant’s original application as well as the subsequent Amended Application for leave to apply for judicial review.

### **Reasons for Judgment:**

Given the fact that the Applicant was released at the time of hearing, the Court found that the issue of the original application (i.e., whether the Applicant ought to be released) had become academic. The Court stated the general principle that it would not entertain a judicial review where the issue is or has become academic (para 13).

Then, the Court gave two reasons for dismissing the Amended Application. First, it was time-barred (para 17). Second, a private law writ action was more appropriate in pursuing the intended action and remedy (para 19).

Regarding the first issue, the Court stated the general rule that the Applicant ought to file a Form 86 within three months after he was released from the Detention (para 17). This was especially the case when the Applicant sought to introduce new grounds and reliefs (i.e., a declaration and damages) into the Amended Application. Since the Applicant only filed the Amended Application eight months after his release without any good reasons or attempts to apply for extension of time, the Court found the action to have been time-barred.

Additionally, the Court found that the Applicant should seek the relief of exemplary damages through a private law writ action instead of judicial review. The Court restated the general

rule that judicial review is a remedy of last resort and that remedy in judicial review would not be granted if there is an effective alternative remedy (para 19). Since this case would involve the determination of factual disputes (e.g., the period of unlawful detention, the nature, severity, and cause of the Applicant's mental distress, etc.) as well as cross-examination of witnesses, a private law writ action in the District Court would be most appropriate and effective (paras 20-22). The Applicant should have first exhausted this alternative, available remedy before seeking judicial review.

**Other Considerations:** N/A

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### **Legal Provisions considered:**

1. Rules of the High Court (Cap 4A): Order 18, rule 8(3); Order 53, rule 4(1)  
<https://v2.hklii.hk/en/legis/reg/4A>
2. High Court Ordinance (Cap 4): section 21K(6)  
<https://v2.hklii.hk/en/legis/ord/4>

### **Key Cases cited:**

1. *Ruddy (AP) v Chief Constable, Strathclyde Police and Another* [2012] UKSC 57 (judicial review would be inept for a claim of damages of injury and damage sustained as the result of a conduct that involves a public law dimension) <https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2012/57.html>
2. *Tsang Kin Chiu v Commissioner of Police* [2015] 4 HKLRD 71 (an applicant who intends to seek exemplary damages from unlawful detention should pursue a private law writ action instead of judicial review because the claim would involve the determination of factual disputes rather than the legality and reasonableness of an administrative decision) <https://v2.hklii.hk/en/cases/hkcfi/2015/1183>