

HONG KONG / JUDGMENT

RE IQBAL MUHAMMAD AND OTHERS

[2025] HKCA 778

COURT

Court of Appeal

DECIDED

1 September 2025

BEFORE

Hon Chu VP and Barma JA in Court
Date of hearing: 11 August 2025
Date of Judgment: 1 September 2025

CASE / FILE NUMBER

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CAMP 124/2024, [2025] HKCA 778
On an intended appeal from [2024] HKCFI 130
IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO. 124 OF 2024
(ON AN INTENDED APPEAL FROM HCAL NO. 314 of 2019)
RE
IQBAL MUHAMMAD
NURUL HAERANI
IQBAL FALEN
IQBAL MINAHIL
LUISHA
MUHAMMAD BALACH
suing by his father and next friend IQBAL MUHAMMAD
1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant
6th Applicant

Before:

Hon Chu VP and Barma JA in Court
Date of hearing: 11 August 2025
Date of Judgment: 1 September 2025

JUDGMENT

Hon Chu VP giving the Judgment of the Court:

Introduction

The 1st and 2nd applicants (respectively “A1” and “A2”) are husband and wife. The 3rd to 5th applicants (respectively “A3” to “A5”) are their daughters. The 6th applicant (“A6”) is their son. He is a minor.

By a summons dated 10 July 2024, A1 to A6 jointly applied to this Court for leave to appeal out of time against the decision of Deputy High Court Judge Bruno Chan (“the Judge”) dated 30 May 2024. By that decision, the Judge refused to extend time for them to appeal his earlier decision dated 9 January 2024 which refused to give them leave to apply for judicial review. From reading the papers, it is apparent to us that the applicants are seeking to extend the time for appealing the Judge’s refusal of leave to apply for judicial review. We have therefore treated the summons as the applicants’ renewed application for extension of time to appeal the Judge’s decision of 9 January 2024.

On 13 June 2025, we directed that the applicants’ renewed application be listed for a rolled-up hearing so that if extension of time is granted to any of the applicants the hearing will be treated as the hearing of his/ her appeal.

A1 to A5 act in person in the present application. On 31 October 2024, legal aid was granted to A1 to act for A6. Solicitors and counsel have since been assigned by the Director of Legal Aid. In order to comply with Order 80 rule 2 of the Rules of the High Court, Cap. 4A, we directed at the hearing that the summons be amended by substituting “MUHAMMAD BALACH suing by his father and next friend IQBAL MUHAMMAD” as the 6th applicant.

A1 had lodged a written submission on behalf of himself and A2 to A5. Mr Wong has also lodged a written submission for A6.

The Torture Claims Appeal Board (“the Board”), as the Putative Respondent, and the Director of Immigration (“the Director”), as the Putative Interested Party, had been given notice of the hearing. They had separately informed the court by letter that they would adopt a neutral stance and would not attend the hearing.

Background

The applicants’ intended judicial review is against the decision of the Board dated 16 November 2018 dismissing their appeal against the decisions dated 18 May 2012 and 26 October 2017 of the Director, which rejected their claims for non-refoulement protection.

A1 is a Pakistani national aged 59. A2 is an Indonesian national aged 54. They met and married in Malaysia, and subsequently moved to live in Indonesia between 1997 and 2001. A3 was born in Indonesia on 12 February 1998. A4 and A5 were born in Pakistan on 29 September 2002 and 1 December 2004 respectively. A6 was born in Hong Kong on 5 June 2008.

A1 to A5 entered Hong Kong illegally on 30 June 2007. They were arrested by the police and released on recognizance on 4 July 2007. On 16 February 2012 and after the birth of A6 in Hong Kong, the applicants jointly lodged a torture claim.

The applicants' claim, as advanced by A1, is based on their fear of being harmed by A1's step-siblings in Pakistan. According to A1, his step-siblings have held grudges against him since he refused to undergo a marriage arranged in the family. In 2001, A1 together with A2 and A3 returned to live in Pakistan to look after A1's ailing father. As a result of their father's decision to give a piece of farmland to A1, the step-siblings' animosity towards A1 intensified. He and his family had been subjected to various forms of bullying, harassment and assaults by his step-siblings. After the death of their father in 2003, the incidents escalated to bloody attacks on A1 after he refused to transfer the farmland to the step-siblings. At the same time, A2 was made to do all the household chores and was also assaulted, including during her pregnancy.

The step-siblings had also physically and verbally abused A3, who was then a minor. She was not allowed to go to school, always insulted with degrading remarks and frequently beaten over trivial matters. On one occasion, she was so badly beaten by one of A1's step-siblings that she had a scapular fracture in her left shoulder blade. She has since not been able to sit up straight and has difficulty moving her neck while walking and requires medication to ease her pain. On another occasion in 2007, one of the step-siblings poured hot water over A3, who was at the time holding A5's hands. Both girls were scalded with A3 sustaining burning injuries to her chest and A5 being injured in the arm. As a result of this incident, A1 and A2 decided to leave Pakistan with their daughters as they could no longer put up with the ill-treatment inflicted upon the family. A1 therefore transferred the ownership of the farmland to one of his step-siblings and left with the family for Rawalpindi in Pakistan in May 2007. They left Pakistan on 11 June 2007 for Mainland China, and eventually arrived in Hong Kong illegally on 30 June 2007.

The Director's decisions

The applicants' torture claim was jointly assessed by the Director. By a decision dated 18 May 2012, the Director rejected their claim on the torture risk ground. Their appeal was rejected by the Board on 21 June 2012.

Upon the commencement of the Unified Screening Mechanism, the applicants' claims were further assessed under on all applicable grounds except the torture risk ground. By a second decision dated 26 October 2017, the Director rejected their claims based on the BOR 3 risk, BOR 2 risk, and persecution risk grounds, and also the United Nation Convention on the Rights of the Child ("UNCRC").

The Board's decision

The applicants appealed the Director's decisions to the Board. The Board heard their appeals together on 5 September 2018. At the hearing, A1 acted for himself and also on behalf of A2 to A6. He adopted the evidence he had previously filed with the Director and answered questions put by the Board. A3 also gave evidence at the hearing.

By its decision dated 16 November 2018, the Board dismissed their appeals. The Board approached the appeals on the basis that the claims of A2 to A6 were based on A1's claim. In summary, the Board accepted A1's claim that he was the victim of a land dispute and also his evidence on the series of incidents perpetrated by his step-siblings which led to their departure from Pakistan. The Board, however, did not accept that the applicants would be killed or harmed by A1's step-siblings if they return to Pakistan, taking into account: (1) A1's evidence that his step-siblings have since 2007 become the legal owners of the farmland in dispute; (2) the step-siblings have had no further contact with the applicants for more than 11 years since May 2007; (3) there was no evidence or reliable evidence to show that the step-siblings had any real intention to harm or to kill the applicants, or that they have any interest in the applicants apart from the ownership of the farmland, or would spend effort locating and tracking down the applicants.

The Board also noted that A1's step-siblings are non-state actors and there is no evidence of any state involvement or that the state was not willing to help the applicants. The Board also took into account there was no evidence the applicants had sought assistance from the authorities in the period from 2001 to 2007, and also the country-of- origin Information (COI) which shows that state protection would be available to the applicants. As regard the BOR 3 risk ground, the Board held that the applicants had never been subjected to torture or CIDTP as they had "at most been assaulted but they have all recovered", and in the case of A3, although she testified that she still suffered from lingering pain she no longer needed to see a doctor.

As for A3 to A6's reliance on Articles 22, 37 and 3(1) of the UNCRC, the Board had regard to the established position that the UNCRC is not part of domestic Hong Kong law and also the effect of section 11 of the Hong Kong Bill of Rights Ordinance, which precludes persons not having a right to enter and remain in Hong Kong from relying on the rights under the UNCRC. The Board concluded that Articles 22, 37 and 3(1) of the UNCRC were not engaged and they were not applicable to the applicants.

On the issue of internal relocation, the Board assessed that the applicants could relocate to Lahore or Islamabad in Pakistan, if Rawalpindi is considered unsuitable based on A1's evidence. The Board also assessed that relocation to Indonesia is a viable option if the applicants wish to avoid Pakistan, given that A1 and A2 had lived there after they married and A3 was born there. In conclusion, the Board found that the applicants had failed to establish the requirements for non-refoulement protection under any of the applicable grounds.

The Board did not undertake a separate consideration or assessment of the claims relating to A4 to A6, who were all minors at the time their appeal went before the Board. A4 and A5 have since reached adulthood.

The Judge's decision

By a Form 86 filed on 1 February 2019 as amended on 13 April 2023, the applicants applied for leave to judicially review the Board's decision. The application was supported by an affirmation made by A1. Both documents did not contain any specific ground for seeking relief.

The Judge heard the application at an oral hearing held on 5 December 2023, during which A1 made submissions on behalf of himself and A2 to A6.

By a Form CALL-1 dated 9 January 2024, the Judge refused to give leave to the applicants to apply for judicial review, finding that the intended judicial review had no reasonable prospect of success. He gave his reasons at §§15 to 23 as follows:

“15. In the Applicants’ case, the Board rejected their claims on its finding of no evidence of any further risk from A1’s step-siblings over their land dispute for the thorough and detailed analysis and reasoning set out in paragraphs 30 - 76 of its decision and with the benefit of hearing A1 in his oral evidence and his answers to questions raised of their claims during their appeal hearing, and in the absence of any error of law or judicial unfairness in his process before the Board or in its decision being clearly and properly identified by the Applicants, I do not find any reasonably arguable basis to challenge the findings of the Board.

16. Furthermore, the fact is that it has also been established by both the Director and the Board in their respective decision that the risk of harm in the Applicants’ claims if real or still exist that it is a localized one and that it is not unreasonable or unsafe for them to relocate to other part of Pakistan away from A1’s home district or to anywhere in 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.
17. I am of course mindful of the fact that A6 being still a minor at the age of 15 is not legally represented in these proceedings as required by Order 80 rule 2 of the Rules of the High Court, nor was he or A4 and A5 who were also minors without legal representation at the time of their appeal before the Board, where in the determination of the non-refoulement claims of minors even if they are based on the same set of primary facts of their parents’ claims, as in the present case that it would be an error of law if the decision-maker simply decided all the claims as though they were one composite claim without giving separate consideration to the personal circumstances of each claimant separately, that it does not necessarily follow from the dismissal of a parent’s claim that the children’s claims could be dismissed without further consideration of their personal situations, and that ill-treatment which does not reach the level of persecution in the case of an adult may do so in the case of a child, hence it would be necessary for this Court to separately consider and examine whether their cases have been properly considered and determined by the Board in a

manner sufficient to meet the high standard of fairness in proceedings of this nature, and to see whether there are matters that may support potential minor-specific non-refoulement bases which might not have been properly advanced to the Board due to lack of legal representation in their appeal process before the Board: see Fabio Arlyn Timogan [2020] HKCA 971 at [34].

18. There is however no proposition that any decision of the Board in relation to children claimants of tender age must be quashed if they were not legally represented, as what the applicable high standard of fairness requires in a case depends on the facts of that case, as held by the Court of Appeal in *Re Jasvir Singh* [2021] HKCA 53:

‘31. ... the court should also consider on a case-by-case basis whether there exist matters that may support potential minor-specific non-refoulement bases which had not or had not been properly advanced to the Board because of the absence of legal representation before the Board. See Fabio Arlyn Timogan at [47] - [54].

32. If the court finds that it is reasonably arguable that the Board had not considered the minor’s non-refoulement claim in a manner consistent with the above propositions, or that there are underlying matters in that particular case which may show that there may be grounds specific to the minor’s claim which had not or had not been adequately advanced to the Board on his behalf because of the lack of legal representation, the court should consider granting leave to the minor to apply for judicial review and direct that he be represented by the official solicitor to continue his judicial review application pursuant to Order 80, rule 2 of the RHC. Alternatively, as in the case in Fabio Arlyn Timogan where the court did find such underlying materials, with the consent of the Director, the court may at the same time dispose of the substantive judicial review application and remit the minor’s non-refoulement claim to the Board for reconsideration, directing that legal representation to be provided for him at the rehearing before the Board. See: Fabio Arlyn Timogan at [50] - [53], [56] - [57].

33. Third, on the other hand, if the court is satisfied the Board had achieved high standard of fairness in dealing with the minor’s claim consistently with the above propositions and there is no such underlying matter that may support minor-specific non-refoulement grounds which had not been advanced before the Board, it is open to the court to conclude that the minor’s intended judicial review is without any merit. In such a case, the court can dismiss his leave application notwithstanding that he has not been legally represented before the Board and in the judicial review leave application, treating the non-compliance with Order 80, rule 2 as a mere irregularity as explained in *Zoraydah v Torture Claims Appeal Board* [2020] HKCA 442, discussed in [57] of Fabio Arlyn Timogan.’

19. In the present case, as noted above the non-refoulement claim of A6, now the only minor amongst the Applicants, and for that matter of A4 and A5 who were then minors at the time of their appeal before the Board, was entirely premised on their father’s claim which has been rejected by the Board as no longer real or foreseeable since 2007 after he had given his step-siblings the farmland which was the crux of their dispute upon which the Applicants’

claimed risk of harm arose, and given A1's confirmation at the appeal hearing to the Board that his step-siblings have since become the legal owner of the land that it was found by the Board, entirely correctly in the circumstances, that such risk no longer exists to A1 upon his return to Pakistan, let alone to his family or children in particularly A6 who was not even born at the time of the dispute and that there is no evidence to suggest that the step-siblings would even be aware of his existence in order to form any desire to cause him harm.

20. Furthermore, as noted in [62] - [65] of the decision, the Board did go on to consider any other possible grounds or underlying risk which may be specific to the children including A6 as advanced by A1, and again correctly rejected each of them in the way they were advanced, and that it also found that none exists.
21. It is pertinent to note again that A6 was born in Hong Kong and has never been in Pakistan to personally face any such risk, of which even if real or still persists that the Board also correctly found that state protection and internal relocation would be available to A6 in both Pakistan and Indonesia where he will no doubt also continue to be under the care and protection of his parents. As there is no suggestion of any other possible risk to A6 due to racial or religious issues in either country, and as I am similarly unable to see any underlying matter which may be specific to A6's claim but which had not or had not been adequately advanced to the Board on his behalf due to lack of legal representation, I do not find any arguable merits in A6's intended application for judicial review either.
22. 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 each of the Applicants' claims.
23. For the reasons given I am not satisfied that there is any prospect of success in the Applicants' intended application for judicial review, I refuse to grant leave and accordingly dismiss their leave application, including that of A6 notwithstanding that he had not been legally represented before the Board or in this judicial review leave application, thus treating the non-compliance with Order 80 rule 2 in his case as a mere irregularity as explained in *Zoraydah v Torture Claims Appeal Board* [2020] HKCA 442, and discussed in *Fabio Arlyn Timogan* in [57].

F.

Applications for extension of time

Pursuant to Order 53, rule 3(4) of the Rules of the High Court, an applicant may appeal to the Court of Appeal against an order refusing leave within 14 days after such refusal. The 14-day period for the applicants to appeal the Judge's order expired on 23 January 2024.

By a summons filed 15 April 2024 together with an affirmation made by A1, the applicants applied for extension of time to appeal the Judge's decision. The Judge heard the application at a hearing held on 16 May 2024. At the hearing, A1 explained that they received the Judge's decision late due to the confused setting of the letter boxes where they lived and also because until they were advised by the immigration officer they did not know how to proceed with an appeal.

By his decision of 30 May 2024, the Judge refused their application. The Judge found that the delay of 2 months and 3 weeks was substantial and inordinate. He noted that the court record showed that the decision was sent to the applicants' last reported address and had not been returned through undelivered post, and there was no evidence to corroborate A1's explanation. The Judge also did not accept that their ignorance of the legal process could amount to a valid reason for non-compliance with the time limit. The Judge further considered that the intended appeal had no prospect of success given that the applicants had not identified any errors in his decision.

On 10 July 2024, the present summons was filed. As mentioned above, we take this as the applicants' renewed application for extension of time to leave the Judge's refusal of leave to apply for judicial review.

G.

Our reasons for decision

G.1

Legal Principles

In considering whether to extend time for appealing a decision refusing leave to apply for judicial review, the Court will have regard to: (1) the length of delay; (2) the reasons for the delay; (3) the prospect of success of the intended appeal; and (4) the prejudice to the putative respondent if extension of time was granted.

Even if the Court does not accept that the applicants' explanation for delay is reasonable, the Court would have regard to the merits of the intended appeal. Generally, an applicant must at least show that there is a reasonable prospect of success before extension of time is granted. When the delay is inexcusable, the Court will adopt a higher threshold by examining if there is a real prospect of success: *Sumarsih v Director of Immigration* [2020] HKCA 565; *Re Ansar Muhammad* [2018] HKCA 227; and *Re Muhammad Shehbaz* [2020] HKCA 256.

In assessing the merits of the intended appeal, we would adopt the legal principles which have been set out comprehensively by the Court of Appeal in *Nupur Mst v Director of Immigration* [2018] HKCA 524 at §14. In an appeal against refusal of leave to apply for judicial review in non-refoulement cases, the Court of Appeal would examine the decision of the judge in light of the grounds advanced by the applicant. If no viable ground is put forward to reverse the judge's decision, the appeal should be dismissed. It is not the role of the Court of Appeal to examine the decision of the Board afresh as if it is a fresh application for judicial review.

G.2

Delay

The applicants were 2 months and 3 weeks late when they filed the 15 April 2024 summons. This is a substantial delay in the context of the statutory limit of 14-days. Like the Judge, we do not consider that the delay has been satisfactorily explained. Notwithstanding that, the most important consideration is the merits of the intended appeal. We also accept Mr Wong's submission that as A6 is a minor, he should not be prejudiced by A1's delay in bringing the appeal if there are merits in his intended appeal.

G.3

Merits of A1 to A3's intended appeal

In both the summons and the accompanying affirmation made by A1, no ground has been put forward to support the applicants' intended appeal.

In his written submission lodged on 2 May 2025 on behalf of himself and A2 to A5, A1 repeated the basis of his claim and stated that the threats of harm from his step-siblings still persist. He asserted that resolution of land disputes in Pakistan is informal and often takes place at the village level and he worried that the step-siblings would exert their influence in the village. He further said that internal relocation was not viable as the authorities would not protect them and A1's step-siblings were well-connected and could easily locate them.

At the hearing before us, A1 stressed that he and his family have been in Hong Kong for 18 years, during which time they have been law-abiding. He also said that there is law and justice in Hong Kong and he asked that due consideration be given to the interest of his children.

We are of the view that the above submissions and matters put forward by A1 do not amount to viable grounds of appeal.

First and importantly, the Judge had given due consideration to the materials before him and the reasons in the Board's decision. Like the summons and affirmation, A1's submissions do not point to any errors in the Judge's analysis and reasons for concluding that their intended judicial review of the Board's decision had no prospect of success.

Second, assessment of evidence and risks of harm are matters for the Director and the Board, who are the primary decision makers. The Court may only interfere with their findings by way of judicial review if it can be shown that their decisions are wrong in law, irrational or procedurally irregular or unfair. Both before the Judge and in the present application, A1 to A3 had not pointed to any errors, irregularities or unfairness in the process before the Director or in the appeal before the Board.

Third, while A1 expressed worry that his step-siblings may exert influence and cause harm, the Board had assessed that there was no real or substantial risk of harm to the applicants if they were to return to Pakistan. In coming to this view, the Board had taken into account: (1) the long

lapse of time since A1 and his family left Pakistan in 2007; (2) A1 had already transferred the farmland to his step-siblings; (3) there is no evidence that, other than the interest in the farmland, the step-siblings have any interest in the applicants or have any reason to pursue or harm them; and (4) state protection is reasonably available. In our view, these are relevant and pertinent considerations based on which the Board was entitled to assess that the applicants face no real or substantial risk of harm from A1's step-siblings.

Fourth, with regard to the issue of relocation, the Board had considered that there was no evidence that A1's step-siblings would take the trouble to locate or track down the applicants, in addition to the fact that they had no further contact with A1 since 2007 and A1 had already transferred the farmland to them. These are relevant and valid considerations that the Board was entitled to take into account in assessing whether relocation within Pakistan is reasonably viable. The Board was further of the view that the applicants could relocate to Indonesia if they wished to avoid Pakistan. Again, this is a view that the Board was entitled to take based on the evidence, including the fact that A2 is an Indonesian national, A3 was born in Indonesia and A1 to A3 had previously lived in Indonesia. We see no proper basis for disturbing the Board's findings on the viability of relocation within Pakistan or to Indonesia.

In short, A1 to A3 have failed to show that their intended judicial review against the Board's decision and their intended appeal against the Judge's refusal to give leave for judicial review has any prospect of success. In the circumstances, it would be futile to extend time for them to appeal the Judge's decision. Their application for extension of time to appeal falls to be dismissed.

G.4

Merits of A4 and A5's intended appeal

In the case of A4 and A5, their claims are founded entirely on the basis of A1's claim and the risk of harm from A1's step-siblings. In the present application, they rely on A1's written and oral submission. We have, for the reasons given in §§34 to 37 above, explained that these submissions do not amount to viable grounds to challenge the Board's findings and the Judge's decision.

A4 and A5 were minors at the time of their appeal to the Board and were not legally represented. In light of this Courts' decision in *Fabio Arlyn Timogan* [2020] HKCA 971 and *Re Jasvir Singh* [2021] HKCA 53, it is necessary to separately consider whether their claims had been properly assessed and determined by the Board in a manner sufficient to meet the high standards of fairness required, and to see whether there are matters that may support potential minor-specific non-refoulement bases that had not been made to the Board owing to the lack of representation.

In its decision, the Board had given consideration to the grounds that A1 had specifically raised on behalf of his children, notably Articles 22, 37 and 3(1) of the UNCRC, but did not accept them. In light of the established position that the application of the UNCRC is subject to an immigration reservation, we do not think the Board had erred in rejecting these grounds or that the Judge's decision in this regard was in error.

We, however, notice that the Board had mistakenly stated in its decision that the pouring of hot water incident (see §11 above) concerned A3 and A4 when the incident was in fact related to A3 and A5. Having regard to the overall circumstances of the case, we do not consider that this mistake should adversely affect the correctness of the Board's assessment of the risk of harm that A4 and A5 might face if refoiled.

The Judge was aware that A4 and A5 were both minors at the time of the appeal before the Board, but he did not consider that the intended judicial review would have any prospect of success as their claims were premised entirely on A1's claim which was rejected by the Board. We see no basis to differ from the Judge's conclusion. We note that, both in the applications before the Judge and in the present application, there has been no suggestion of any real risk of harm that A4 and A5 may separately face in Pakistan. On the materials before the court, we cannot discern any matter that may give rise to a concern that there are potential non-refoulement grounds relating specifically to A4 and A5 but which had not been advanced to, or considered by, the Board due to their lack of legal representation.

For the above reasons, A4's and A5's intended appeal against the Judge's decision has no prospect of success. It would therefore be futile to extend time for them to appeal the decision. Their application for extension of time to appeal should be refused.

G.5

Merits of A6's intended appeal

In the case of A6, Mr. Wong has advanced three grounds in support of his intended judicial review:

Ground 1: The Board's finding that A1's failure to take advantage of all the opportunities he had to claim non-refoulement protection was detrimental to his credibility was problematic, unfair and irrational.

Ground 2: The Board misapplied the law in finding that there was no evidence of torture or CIDTP and the BOR 3 risk ground was not made out.

Ground 3: The Board failed to separately assess the risk of harm applicable to A6.

Mr Wong fairly draws our attention to the fact that these grounds had not been raised before the Judge, but submits that this Court has a discretion, albeit not one to be exercised lightly, to allow new grounds to be canvassed in the interest of justice, relying on *Rinku v Torture Claims Appeal Board* [2024] 2 HKLRD 523 at §19 which applied *Re MD Zahidur Rahman Manik* [2018] HKCA 766 at §13. Having regard to the circumstances of A6, including the fact that he is a minor and was

not legally represented before the Board and the Judge as well as the merits of the new grounds, we take the view that it is in the interest of justice that we should allow these new grounds to be canvassed in this application.

Ground 1 concerns the Board's finding that A1's failure to take advantage of all the opportunities he had to claim non-refoulement protection was detrimental to his credibility. It is argued that the finding was unfair and irrational as there is no evidential basis for the finding that opportunities to claim non-refoulement protection were available or accessible or known to A1, and the issue or the Board's concern had not been drawn to A1's attention.

We accept that the evidence and materials before the Board did not provide a basis for finding that while in Mainland China, A1 had only made cursory enquiries but did nothing more to seek protection and had failed to take advantage of all the opportunities he had to claim non-refoulement protection:

A1's evidence, which was acted upon by the Director and the Board, is that he and his family went from Pakistan to Kashgar, Urumqi, and later to Guangzhou and then Shenzhen before entering Hong Kong illegally. A1 had also explained to the Board that when he was in Mainland China he had enquired about the United Nations High Commissioner for Refugees ("UNHCR") but no one could understand English and he was told only certain people could seek protection.

In finding A1's explanation not credible, the Board had relied on certain internet material. From the copy produced by Mr Wong, the webpage shows that refugee registration and refugee status determination in China were conducted by the UNHCR Beijing Office, which was accessible to asylum seekers who were in Beijing, and the Chinese authorities were not substantially involved in the process.

In the absence of evidence that A1 and his family had stayed in Beijing and were aware of the work of the UNHCR, the Board's rejection of A1's explanation and its finding that A1 failed to make use of all the opportunities he had to seek non-refoulement protection when they were in Mainland China do not seem to be justified.

Mr Wong submits that it is reasonably arguable that the Board's adverse finding on A1's credibility may have unfairly given a seriously different flavour to the case and affected the Board's assessment of the applicants' claims generally. He, however, accepts that he is inviting the Court to draw an inference as he has not pointed to any part of the Board's decision as providing objective support to his submission. In our view, although there is substance in the complaint against the Board's adverse finding on A1's credibility, Ground 1 is not determinative of the correctness of the Board's assessment of the applicants' claims because, among other things, notwithstanding this adverse finding on credibility, the Board ultimately had accepted the factual basis of A1's claim.

Turning to Ground 2, Mr Wong submits that the only reason given by the Board in finding that the applicants have not made out a case under BOR 3 risk as they have never been subjected to torture or CIDTP is that they have at most been assaulted but they have all recovered. Relying on *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, Mr Wong argues that the Board's assessment should have been based on all the circumstances of the case, such as the nature and context of the ill-treatment suffered by the applicants.

In *Ubamaka*, the Court of Final Appeal discussed what must be established factually under the BOR3 risk ground, and held that (at §§172 and 173):

“172.

For him to do so successfully, he must meet two main requirements: he must establish (i) that the ill-treatment which he would face if expelled attains what has been called “a minimum level of severity” and (ii) that he faces a genuine and substantial risk of being subjected to such mistreatment. It is clear that a very high threshold must be surmounted to establish each of those requirements.

173. In *R (Limbuela) v Secretary of State for the Home Department*, Lord Hope of Craighead, citing decisions of the Strasbourg Court, described what was required to meet the “minimum level of severity”, pointing out that it generally involves actual bodily injury or intense physical or mental suffering and that its assessment is ultimately a matter of judgment:

“... the European court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression ‘inhuman or degrading treatment or punishment’: Ireland v United Kingdom (1978) 2 EHRR 25, 80, para 167; A v United Kingdom (1998) 27 EHRR 611, 629, para 20; V United Kingdom (1999) 30 EHRR 121, 175, para 71. In Pretty v United Kingdom 35 EHRR 1, 33, para 52, the court said:

‘As regards the types of “treatment” which fall within the scope of article 3 of the Convention, the court's case law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.’

It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3. ... So the exercise of judgment is required in order to determine

whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied.”

There is some force in the submission that the Board had not correctly applied the law in considering the BOR 3 risk ground in that the Board appeared to have focused only on the assaults on A1 to A5, but have not given consideration to the overall context of the applicants’ claims, including what had been said about the nature, duration and intensity of the various ill-treatments and assaults that A1’s step-siblings had inflicted on them. Arguably, this would in turn impact on the Board’s view that the applicants had not been subjected to ill-treatment or CIDTP that meet the minimum level of severity.

We, however, do not think this line of argument will assist A1 to A5 in their intended judicial review or appeal against the Judge’s refusal of leave to bring judicial review in light of the Board’s assessment on the future risk of harm. As we have held above, there is no basis for the Court in its judicial review jurisdiction to disturb the Board’s assessment of future risk of harm faced by A1 to A5, which had taken into account the long lapse of time, the transfer of the land to A1’s step-siblings, and the viability of relocation within Pakistan and to Indonesia.

We turn next to consider Ground 3. A6 is a minor. He was 10 years old when his appeal went before the Board. In assessing his claim, the following principles established in *Fabio Arlyn Timogan*, *supra*, at §34 and *Re Jasvir Singh & others*, *supra*, at §§31 to 33 are relevant:

Non-refoulement claims by children, even if based on the same set of primary facts, are separate from the claims advanced by their parents and need to be considered as such having regard to the personal circumstances of the children.

Even if the claims are based on the same set of primary facts, it would be an error of law if the decision-maker simply decided all the claims as if they were one composite claim without giving separate consideration to the personal circumstances of each claimant separately. It does not necessarily follow from the dismissal of the claim by a parent that the children’s claims should be dismissed without further consideration of their personal situations.

Ill-treatment which does not reach a level constituting persecution in the case of an adult may do so in the case of a child.

Mr Wong submits that when the Board assessed A6’s case, separate consideration should have been given to the fact that (a) the Supplemental Claim Form (SCF) of A6 showed that his nationality is Pakistan, and there is no evidence that A6 could relocate to Indonesia; (b) it is likely that A6 as a 10 year-old child would be an easier target of, or vulnerable to ill-treatment; and (c) A6 can only speak English, Sasak (Indonesian dialect) and Cantonese, and has never been to Pakistan such that there would be concerns as to whether he may be able to integrate if refouled and whether he may suffer undue hardship upon relocation within Pakistan.

A6 was not yet born when the incidents of harm occurred in Pakistan in 2001 to 2007. He was born in Hong Kong and has never been to Pakistan. His appeal before the Board proceeded on the basis that his claim was based on A1's claim. The Board's assessment of the evidence, the risk of harm and the viability and reasonableness of internal relocation were all based on and/or related to the experience of his parents and siblings (i.e. A1 to A5). The Board seemed also to have been influenced by the consideration that there was no evidence that A1's step-siblings know of the existence of A6.

We agree with Mr Wong that separate consideration and assessment should be given to A6's claim in light of the established principles. In this regard, it is pertinent to note that although A4 to A6 were all minors at the time of their appeal to the Board, A6's personal circumstances differ from his siblings in that, unlike them, he was born and grew up in Hong Kong and has never been to Pakistan or Indonesia. We are of the view that it is reasonably arguable that the Board had not, or had not sufficiently, given separate consideration to A6's personal circumstances and the matters identified by Mr Wong in his submissions, such as whether he could relocate to Indonesia as a Pakistani national, the potential language barrier faced by him and the impact on him being uprooted from a settled environment. These matters are relevant considerations for the Board when assessing the issue of internal relocation to Lahore or Islamabad in Pakistan or relocation to Indonesia. It would be for the Board to inquire into the impact and viability of these relocation options for A6, and whether or not he would be able to relocate and reside with his parents and siblings as a family unit.

The Judge had in his reasons given consideration to A6 being a minor and was being unrepresented before the Board and before him. He was of the view that the grounds advanced by A1 for his children were correctly rejected by the Board. He further considered there was no suggestion of any other possible risk to A6 due to racial or religious issues in Pakistan and Indonesia. Due to the fact that A6 did not have legal aid in the proceedings below, the Judge's attention had not been drawn to the potential impact of A6's personal situation on the adequacy and correctness of the Board's assessment on A6's claim. The judge was thus led to conclude there was no underlying matter specific to A6's claim that had not been adequately advanced on his behalf or considered by the Board. For the reasons discussed above, we are unable to agree with the Judge that there is no prospect of success in A6's intended judicial review of the Board's decision on his appeal and that A6's application for leave to apply for judicial review should be dismissed.

G.6

Disposal of A6's application

We are therefore minded to allow A6's renewed application for extension of time to appeal the Judge's decision, treat the hearing of the application as the hearing of the appeal, give directions for A6 to file a notice of appeal, and upon the filing of the notice of appeal to allow his appeal and his application for leave to judicially review the Board's decision.

It is close to 17 years since A6's non-refoulement claim was raised. As discussed with Mr Wong at the hearing, it is in the interest of justice that the legal proceedings arising from A6's claim be resolved expeditiously. With a view to saving time and costs, we consider it is appropriate that time should be given for the Department of Justice, who represents the Director, to consider this judgment and for A6's legal representatives to discuss with the Department the further conduct of A6's intended judicial review, including exploring the possibility of a disposal by consent. We direct that A6's solicitors shall within 21 days from the date of this judgment write to inform the Court the outcome of the discussion with the Department of Justice. Thereafter we will make a formal order disposing of A6's present application.

G.7

Costs

Having regard to the fact that the Director and the Board have maintained a neutral stance and have taken no part in these proceedings, we are of the view that it is appropriate to make no order as to costs, save that A6's own costs be taxed under the Legal Aid Regulations.

H.

Disposition

We make the following orders:

The summons dated 10 July 2024 is dismissed as against the 1st, 2nd, 3rd, 4th and 5th applicants.

The solicitors for the 6th applicant shall within 21 days from the date of this judgment inform the court by letter of the outcome of the discussion with the Department of Justice on the further conduct of the 6th applicant's intended judicial review.

There is no order as to the costs of these proceedings save that the 6th applicant's own costs be taxed under the Legal Aid Regulations.

(Carlye Chu)

Vice-President

(Aarif Barma)

Justice of Appeal

The 1st, 2nd, 3rd, 4th and 5th applicants, unrepresented, acted in person.

Mr. Anson Wong Yu Yat, instructed by Cedric & Co, assigned by the Director of Legal Aid, for the 6th applicant.

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