



Ref: CLO/Cir 17/20 XV
Date: 2nd December 2020
To: All Courts Liaison Officers in the CAT Office
with copy to All Officers in charge for their information
From: Administrator

CIRCULAR

Re: CACV 32/2020 [2020] HKCA 971

1. I have been referred to the latest judgment by the Court of Appeal CACV 32/2020 [2020] HKCA 971 which was just delivered on 27 November 2020 which is also brought to my attention promptly by [REDACTED]
2. The said appeals involving a claimant and her two infant children who were referred to us in 2015 with a duty lawyer assigned as them. The Decisions (unsuccessful) of the Immigration Department was issued on 22 July 2016 and 18 May 2017 (BOR 2) respectively, The duty lawyer advised that there was no ground to file an Appeal. We understand from the judgment that the Claimants had file their Appeal to TCAB by themselves and all of whom appeared in person in the appeal.
3. In paragraph 37 of the judgment, it is stated clearly that "though a barrister was assigned by the Duty Lawyer Scheme to represent the mother as well as the two children in the presentation of their case to the Director, they had no legal representation at the hearing before the Board on 18 May 2017".
4. Please also note that in paragraph 38 of the judgment, the Court of Appeal is concerned with the lack of legal representation for the two children in that " In the Board's Decision, whilst it was correctly stated in paragraph 1 that the appellants were the mother and the two children, the Adjudicator did not address the position of the children separately. Instead, the Adjudicator adopted the reference to the appellant as including reference to the two children unless the context otherwise required".
5. The Court of Appeal has further added in paragraph 49 that "When one is dealing with children claimants of tender age, serious consideration should

be given to have a lawyer assigned by the Duty Lawyer Scheme to represent the children in the Board hearing notwithstanding the rejection of the claims by the Director. Though counsel have made submissions on appointment of litigation friend, we have not directed them to address us on the question of legal representation at the Board hearing."

6. Whilst the appeal of the mother (1st applicant) was dismissed for want of full and frank disclosure and also for the lack of merits, the appeals of the two children (the other two applicants) are allowed on the grounds of lack of legal representation.
7. Before concluding the judgment, the Court of Appeal deems it necessary to send a copy of the judgment to me to remind us that " We would send a copy of this judgment to the administrator of the Duty Lawyer Scheme to remind those acting for children claimants to give careful consideration to any potential child-specific risk when they present non-refoulement claims on their behalf". (paragraph 54 of the judgment)
8. The Court of Appeal has also make the following observations in paragraphs 57 and 58 of the judgment :

"57. It follows from our above analysis that application for judicial review by a child claimant should proceed in accordance with the regime under Order 80 rule 2 with the appointment of next friend and acting by a solicitor (unless the Official Solicitor is appointed as next friend). We are aware that in the past there had been cases where the court chose to proceed with an appeal despite the failure to observe the rule (treating the same as an irregularity). However, we do not think it right to adopt such approach as the norm.

58. In the context of non-refoulement claims, in the absence of legal aid for the claimants (so that the parent as next friend can act by solicitor), the Official Solicitor would have to play a greater role. Having said this, we would leave open the question as to whether the Official Solicitor is obliged to act even if she is of the view that a child's claim has no merit. This Court is not in a position to decide that question without hearing the Official Solicitor."

9. In the circumstances, kindly alerted yourself when the CAT office is facing with similar claims where infant children are involved, we should duly

inform our duty lawyers of the Court of Appeal's direction by referring them to this judgment and for them to consider and advise whether they are in the position to also represent the infant children or that they should be separately represented by another duty lawyer.

Administrator

Encl.