Press Summary (English)

Press Summary (Chinese)

FACV 7, 8, 9 & 10/2013

FACV 7 of 2013

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 7 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO. 45 OF 2011)

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BETWEEN

GA	Appellant (Applicant)
And	
DIRECTOR OF IMMIGRATION	Respondent (Respondent)

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FACV 8 of 2013

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 8 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO. 46 OF 2011)

BETWEEN

PA	Appellant (Applicant)
And	
DIRECTOR OF IMMIGRATION	Respondent (Respondent)

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IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 9 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO. 47 OF 2011)

BETWEEN

FI	Appellant (Applicant)
And	
DIRECTOR OF IMMIGRATION	Respondent (Respondent)

FACV 10 of 2013

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 10 OF 2013 (CIVIL)

(ON APPEAL FROM CACV NO. 48 OF 2011)

BETWEEN

JA	Appellant (Applicant)
And	
DIRECTOR OF IMMIGRATION	Respondent (Respondent)

Court : Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Chan NPJ and Lord Clarke of Stone-cum-Ebony NPJ

Date of Hearing : 8-9 January 2014

Date of Judgment : 18 February 2014

J U D G M E N T

Chief Justice Ma:

A INTRODUCTION

1. The first three Appellants (GA, FI and JA) are mandated refugees and the fourth Appellant (PA) is a screened-in torture claimant. The issue in these appeals, broadly put, is whether a right to work exists in Hong Kong insofar as persons in these categories are concerned.

2. Historically, particularly in the past 70 years, many people from different parts of the world have, for various reasons, left their own country to come to Hong Kong. Some have come for economic gain, others to flee their own country for political, racial, religious, social or other reasons. In the 1970s, there was an influx of refugees from Vietnam – these were colloquially known as the boat people. In more recent years, others have arrived in Hong Kong from other parts of the world. The four Applicants originally came from Burundi, Sri Lanka and Pakistan.

3. Although Hong Kong is not a party to the Refugee Convention[1] and therefore does not grant asylum to persons who seek it, the Hong Kong Government does nevertheless have a policy regarding persons who claim to be refugees. In essence, although the Government[2] maintains it does not have any obligation to admit any person who seeks asylum under the Refugee Convention, nevertheless when a person does make such a claim, that person will normally not be removed or deported until his or her application for asylum is processed. The organ responsible for the processing of such claims for asylum is the United Nations High Commission for Refugees Hong Kong Sub-Office ("the UNHCR HK"), which is mandated by the United Nations General Assembly with responsibility to deal with refugees and their problems. In the present context, the responsibility of the UNHCR HK is to process claims for asylum and, where theyare established, to help provide solutions by way of voluntary repatriation or resettlement into third countries.

4. Where a claim for asylum is established, the DOI may exercise his discretion to allow the person concerned, usually on recognizance, to remain in Hong Kong pending voluntary repatriation or resettlement overseas as arranged by the UNHCR HK. Where the claim is not established, unless that person otherwise has permission to remain, he may be required by the DOI to leave Hong Kong.[3] As mentioned earlier, three of the four Applicants are mandated refugees;[4] in other words they have established their claims as refugees to the satisfaction of the UNHCR HK and await settlement overseas. The evidence before the Court was that as at 31 January 2010, there were 82 such mandated refugees in Hong Kong.

5. PA came to Hong Kong in December 2000 and was a torture claimant. Hong Kong is a party to the Convention known as CAT[5] under which[6] no State Party can expel, return (refoul) or extradite any person to another state where there are substantial grounds for believing that that person would be in danger of being subjected to torture. The responsibility for determining whether a person (a torture claimant) would be so subject rests on the relevant State Party. In Hong Kong, the responsibility for this is given to the Immigration Department (it is now handled by the Torture Claim Assessment Section of that department). The responsibility for determining whether or not a person can properly be screened in as a torture claimant is a different responsibility to the inquiry as to refugee status carried out by the UNHCR HK[7] even though, commonly, claims are made under both Conventions. In May 2005, PA was screened in as a torture claimant[8] but has since remained in Hong Kong on recognizance. The evidence before us indicated that the DOI is still investigating whether it would be safe for PA to return to Sri Lanka.

6. The individual circumstances of the four Applicants have been described in some detail in the judgments of the Court of First Instance and the Court of Appeal[9] and it is therefore unnecessary to repeat these facts in this judgment. However, it is relevant to point out certain characteristics shared by the four Applicants or at least some of them:-

> (1) As noted by the Court of Appeal,[10] the Applicants have been "effectively stranded here in Hong Kong for a prolonged period of time". GA has now been in Hong Kong for nearly 10 years; it has been nearly the same time since he became a mandated refugee; for FI, the period is nearly nine years; for JA, the period has been nearly 12 years and for PA, he has been in Hong Kong for over 13 years and it is nearly six years since he was screened-in as a torture claimant.
>
> (2) The Applicants are not economic migrants. At the commencement of the present judicial review proceedings, they had not been given permission to work.
>
> (3) However, since the proceedings have commenced, GA, FI and PA have each been given permission to work by the DOI on various dates in 2013. The permission to work is not open ended as the permission expires on various dates this year.
>
> (4) JA is at present serving a term of imprisonment for a drugs related offence.

7. I shall presently expand on the precise issues which fall for determination in the present appeals but it would be useful at this stage to identify concisely the respective stances of the parties:-

(1) The Applicants' position[11] is that theyhave a constitutional right to work in Hong Kong and any discretion on the part of the DOI whether or not to grant permission to work must be exercised with such right in mind. Save perhaps in one important respect (see sub-para (3) below),the Applicants do not challengethe existence of a discretion on the part of the DOI, but they say that where the constitutional right to work exists, any exercise of discretion not to permit protected persons to work, which would interfere with the constitutional right, can only be justified by the application of the familiar proportionality test.[12] In this latter respect, the Applicants contend that the DOI cannot justify a policy denying permission to work to a protected person who has been in Hong Kong for more than four years. This contention was the same as that raised in the Court of Appeal.

(2) The constitutional right to work was said to be contained in one or more of the following provisions: Article 14 of the Hong Kong Bill of Rights ("the BOR") [13], Article 6 of the International Covenant on Economic, Social and Cultural Rights ("the ICESCR")[14] and implicitly in one provision, Article 33 of the Basic Law.[15] The Applicants say a right to work alsoexists at common law.

(3) The Applicants also place reliance on Article 3 of the BOR which states that no one shall be subject to "torture or to cruel, inhuman or degrading treatment or punishment". It is common ground that we are in this case only concerned the aspect of "inhuman or degrading treatment" (which for convenience I will refer to simply as "IDT"). Where there is a substantial and imminent risk of IDT, the Applicants argue there is no discretion on the part of the DOI other than to give permission to work; in other words, in such circumstances, there can be no justification to decide otherwise and the proportionality test is of no application.

(4) Accordingly, the Applicants seek appropriate relief quashing the relevant decisions of the DOI, thus enabling them (and others like them) to enjoy the right to work in Hong Kong.

(5) On the Respondent's part[16], it is submitted that the DOI has a broad discretion in relation to immigration control, including, importantly for present purposes, the granting or refusal of permission to work for persons in the Applicants' position. The existence of a constitutional right to work contended for by the Applicants (said to be contained in Article 14 of the BOR, Article 6 of the ICESCR and Article 33 of the Basic Law) is not accepted but it is said that these provisions simply have no application in relation to the subject matter of the present case and therefore in any event cannot benefit the Applicants. Here, reliance is placed on s 11 of the HKBORO[17], the Reservation entered by the Government of the United Kingdom upon ratification of the International Covenant on Civil and Political Rights ("the ICCPR") on 20 May 1976[18] and the Reservation entered into by the United Kingdom upon ratification of the ICESCR also on 20 May 1976 regarding the applicability of Article 6 of that Convention.[19] Regarding Article 33 of the Basic Law, the Respondent places reliance on Article 41 of the Basic Law.[20] Accordingly the Respondent submits, the proportionality test does not come into playat all. In any event, even if the test had to be applied, the DOI's policy satisfies the test. The common law right to work is also disputed.

(6) The Respondent does not of course go so far as to contend that the discretion in immigration matters is without limit. It is accepted that where exceptional circumstances exist, a discretion giving permission to work can be exercised in favour of persons like the Applicants. Further, it is not disputed that the discretion is subject to Article 3 of the BOR regarding IDT.[21] However, the Director submits that in none of the cases before the court can any Applicant demonstrate on the evidence that a genuine and substantial risk of IDT exists. The Applicants argue otherwise on the facts.

B THE DECISIONS OF THE COURTS BELOW

B.1 Court of First Instance

8. There were five Applicants before A Cheung J: apart from the four Applicants before this Court, there was an additional Applicant (called MA) who was a mandated refugee. At the outset of his judgment,[22] A Cheung J identified the broad issue before the court as follows:

> "1. These 5 applications for judicial review, which have been heard together, concern 4 mandated refugees and 1 screened-in torture claimant. They raise some common issues. Stated generally, the main issue raised concerns the circumstances, if any, under which a mandated refugee[s] or a screened-in torture claimant[s], who has been stranded in Hong Kong for a prolonged period of time and has little prospect of resettlement (or departure) in the immediately foreseeable future, may be permitted to take up available employment in Hong Kong, pending resettlement (or departure)."

9. The respective stances of the parties outlined earlier were also argued before A Cheung J (together with other arguments with which we are no longer concerned). He held that by reason of s 11 of the HKBORO, the Applicants were unable to rely on any of the rights under the BOR. For this reason, the Judge found it unnecessary to arrive at a decision regarding IDT, although in para 79 of the judgment, he made this *obiter* remark:-

> "79. I accept that in principle, in the case of a mandated refugee or screened-in torture claimant, a prolonged period of prohibition against taking up employment (even if available), when there is little prospect of the individual being resettled or being able to depart in the immediately foreseeable future, could, depending on the circumstances, amount to inhuman or degrading treatment."

At para 84 of the judgment, he added:-

> "84. So far as individual cases are concerned, all I wish to add at this stage, given the *obiter* nature of my observations, is that where it is medically established that the prolonged prohibition on employment in the circumstances described has resulted in or materially contributed to the development or maintaining of a serious mental condition, such as a major depression, on the part of the mandated refugee or screened-in torture claimant, the case for saying that the individual has suffered, or, if the prohibition is not relaxed, would suffer, inhuman or degrading treatment is strong. However, before one can arrive at any such conclusion, both the mental condition and the requisite causal link must be clearly established by medical or other relevant evidence. Furthermore, in such a case, the appropriate relief may not necessarily lie in the relaxation of the prohibition. It all depends on the form of treatment indicated and the prognosis concerning the individual."

10. A Cheung J also held against the Applicants in relation to their submissions based on Article 6 of the ICESCR, Article 33 of the Basic Law and the alleged right under common law. However, the Judge reiterated the view that the discretion vested in the DOI, though wide in immigration matters, was not without limit. Conventional judicial review principles continued to apply.[23] In the case of MA and GA, the Judge was of the view that the DOI had not properly considered their personal circumstances and had not really dealt with them with an open mind. There was, as he put it[24] "next to no consideration of the individual circumstances" of these two Applicants. For this reason, the decisions of the DOI to refuse these two Applicants permission to work were quashed and the Director was required to consider their request for permission to work afresh.

11. The other applications for judicial review were dismissed.

B.2 Court of Appeal

12. All the Applicants (including MA) appealed to the Court of Appeal.[25] Even though MA and GA had to an extent succeeded in having the relevant decisions relating to them quashed, they, like the other Applicants, wished to contend that they had a constitutional right to work. By a Judgment dated 27 November 2012[26], the Court of Appeal dismissed the appeals. Like A Cheung J, the Court held that Article 14 of the BOR, Article 6 of the ICESCR and Article 33 of the Basic Law did not benefit the Applicants. Reference was made to s 11 of the HKBORO and the two Reservations entered by the United Kingdom Government in relation to the ICCPR and the ICESCR.[27] In these circumstances, the Court of Appeal did not deal with the substance and ambit of any right to work contained in these provisions. The Court also did not accept there was a common law right to work.

13. Before leaving the Judgment of the Court of Appeal, I should just refer to the IDT point that was argued by the Applicants. Although, like A Cheung J, the Court of Appeal was of the view that Article 3 of the BOR had no application (owing to s 11 of the Ordinance), the issue of IDT was nevertheless also discussed *obiter*. In response to the Respondent's submission that the facts of the present case did not in any event amount to IDT, Fok JA said this at para 76:-

> "76. Against this it must be recognized that Recitals 1 and 2 to the ICCPR emphasise the recognition of human dignity and that its protection is, therefore, one of the fundamental purposes of the ICCPR. Moreover, there is more to cruel, inhuman or degrading treatment and human dignity than either destitution or complete mental breakdown. It seems to me that it is certainly arguable that an inability to function economically may well give rise to cruel, inhuman or degrading treatment."

C THE ISSUES BEFORE THE COURT

14. As argued and as contained in the printed Cases of the parties, the following issues fall to be determined in the present appeals:-

> (1) Critical to the outcome of the present appeals is the question whether there exists a constitutional right to work as submitted by the Applicants. Such a right is said to exist by reason of one or more of the following:-
>
> > (a) Article 14 of the BOR: Privacy.
> >
> > (b) Article 6 of the ICESCR.
> >
> > (c) Article 33 of the Basic Law.

(2) However, even before going into the question of the content of the rights contained in these articles, and in particular where there exists the right to work, it is important to determine whether they are even applicable in the first place. Here, s 11 of the HKBORO and the two Reservations earlier referred to must be considered.

(3) These provisions aside, even if they are inapplicable, is there nonetheless a right to work at common law?

(4) Finally, how is the DOI's discretion to be exercised when there exists IDT?

15. I will deal with the following issues in turn:-

(1) Article 14 of the BOR.

(2) Article 6 of the ICESCR.

(3) Article 33 of the Basic Law.

(4) The right to work at common law.

(5) Proportionality.

(6) The DOI's discretion and IDT.

16. There are two matters that ought to be mentioned before dealing with these issues:-

(1) MA, who was an Applicant before the Court of First Instance and the Court of Appeal, no longer wishes to pursue his appeal before this Court.[28]

(2) As mentioned earlier, since the decision of the Court of Appeal, three of the Applicants have been granted permission to work by the DOI. The other, JA, is serving a term of imprisonment; we are told that the earliest date of discharge is July 2016.

It can therefore be said that the present appeals are academic in that, even if the appeals succeed, three of the Applicants do not need any relief entitling them to be able to work and one Applicant would not in any event be in a position to work. However, none of the parties has suggested that the Court should not hear the appeals and, for my part, I am of the view that important issues are raised and should be dealt with in the public interest.[29]

D ARTICLE 14 OF THE BOR

17. The following matters fall to be determined under this issue:-

(1) Applicability of Article 14: s 11 of the HKBORO and the UK Reservation.

(2) Article 14 and the right to work.

(3) IDT.

D.1 Applicability of Article 14: Section 11 of the HKBORO and the UK Reservation

18. Article 14 is in the following terms:

> **"Protection of privacy, family, home, correspondence, honour and reputation**
>
> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

19. It is necessary to determine whether the Applicants can rely on this Article in the first place, whatever be its ambit and effect. If the Applicants are unable to enjoy the right contained in Article 14 of the BOR, it is unnecessary to go into the content of the right in that article, in particular whether the protection from arbitrary or unlawful interference with a person's privacy includes the right to work. The Respondent says that the Article 14 right, whatever its ambit, is inapplicable in the present case and relies on s 11 of the HKBORO.

20. Section 11 states as follows:-

> **"Immigration legislation**
>
> As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

21. If this section bites as contended by the Respondent, the effect is that Article 14 of the BOR cannot be relied on by the Applicants. As we shall see presently, the focus of the arguments before the Court was on the meaning of the words "stay in".

22. In *Ubamaka v Secretary for Security*[30], this Court considered in some detail[31] s 11 of the HKBORO. In that case, a deportation order had been made against the applicant under s 20(1)(a) of the Immigration Ordinance Cap 115 ("the IO").[32] It was argued on behalf of the applicant that he could rely on Articles 3 and 11(6) of the BOR to resist removal to Nigeria. The DOI referred to s 11 to contend that these Articles were of no application to the power to deport under s 20(1)(a) of the IO. The applicant argued that s 11 was unconstitutional on the basis either that it was contrary to Article 39(1) of the Basic Law[33] or that it was incompatible with international law (in particular when reference is made to Article 19(c) of the Vienna Convention on the Law of Treaties 1969).[34] The Court upheld the constitutional validity of s 11.[35]

23. The proper approach to cases involving the question whether s 11 will have the effect of precluding reliance on rights protected by the BOR was set out in *Ubamaka* and it bears repeating:-

> "46. Whether in any particular case s.11 has the effect of precluding someone's reliance on a right protected by the BOR may raise questions of law and construction, as well as questions of fact.
>
> > (a) Insofar as the Government [the Respondent in the present case] asserts that s.11 has such effect, it bears the burden of satisfying the Court that factually and as a matter of law the person who seeks to rely on a relevant right is a person who does not have the right to enter and remain in Hong Kong. This is important because s.11 does not apply to Hong Kong permanent residents with a right of abode nor to Hong Kong residents and others who are lawfully entitled to be in Hong Kong.
> >
> > (b) The Government will also have to satisfy the Court that it is seeking, as against that person, lawfully to enforce duties or to exercise powers arising under immigration legislation whichgovern entry into, stay in and departure from Hong Kong and that such duties or powers are properly applicable on the facts. This is so since s.11 is inapplicable where other powers or duties are being exercised or enforced.
> >
> > (c) The person claiming protection [such as the Applicants in the present case] will have to identify the BOR rights invoked and adduce evidence supporting his claim that such rights would be infringed if the Government were toproceed with its enforcement of the relevant duties or exercise of the relevant powers. If a s.11 power is exercised without engaging a protected right, obviously no issue as to constitutional protection arises.
> >
> > (d) If the Court is satisfied that in the case at hand, operation of the relevant provisions of the immigration legislation concerned does engage those rights, it next has to considerwhether the rights potentially infringed, in the present case rights under BOR art.3, are capable of being displaced by s.11.
> >
> > (e) This last question was raised by the Court in the light of s.5 of HKBORO examined below.Prior to the present hearing, the argument had proceeded on the basis that s.11 must beconstrued as either having the narrow meaning contended for by the appellant or as overriding *all* the rights contained in the BOR, as the respondents contend. The question whether s.11 should instead be construed as overriding some, but not all, of the BOR rights assumed major importance at the hearing. In particular, the question arose as to whether s.11 is capable of displacing the constitutional protection provided by BOR art.3. That is a topic to which I return in Section G."

24. I shall discuss in greater detail[36] when dealing with IDT the relevance of and the references to Article 3 of the BOR contained in paras 46(d) and (e) of this extract and I therefore leave this aspect aside for the time being. As for the other elements, there is no dispute that the Applicants do not have the right to enter or remain in Hong Kong. The Applicants of course place reliance on the privacy right contained in Article 14 of the BOR.

25. The Respondent contends that in exercising his discretion not to give permission to work, he is exercising powers under the IO which govern the "stay in … Hong Kong" of the Applicants. The Applicants submit otherwise. The relevant provisions in the IO enabling the DOI to exercise this discretion are said to include ss 11[37] and 37ZX[38].

26. It is said by Mr Fordham QC (correctly) that for the purposes of s 11, it must be shown that the relevant immigration legislation relied on must govern "entry into, stay in and departure from Hong Kong". However, in the present case, the discretion vested in the DOI under the IO to grant (or refuse) permission to work does not, he submits, come within these words. Lord Pannick QC argues that quite clearly the relevant immigration legislation governs the "stay in" Hong Kong. This was the conclusion reached by A Cheung J and the Court of Appeal.

27. The determination of the different stances adopted by the parties depends on the true construction of s 11 of the HKBORO, of the phrase "any immigration legislation governing entry into, stay in and departure from Hong Kong" and in particular the words "stay in".

28. As with all exercises in statutory construction, the starting point is to have regard to the context and purpose of the relevant provision to be construed. In *Vallejos and Domingo v Commissioner of Registration*,[39] this Court emphasised this approach to statutory (and constitutional) interpretation.[40]

29. The following points, in my view, provide a reasonably clear picture of the context and purpose of s 11:-

> (1) It is clear from the provision itself that it is dealing with immigration control on entry into, stay in and departure from Hong Kong, as reflected inArticle 154(2) of the Basic Law:-
>
> > "The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions."
>
> Section 11 is in the same terms in adopting the words "entry into, stay in and departure from Hong Kong".
>
> (2) The intention of s 11 is to except the applicability of the BOR to the aforesaid aspects of immigration control.[41] Here, it is also useful to make reference to the Reservation that was entered by the United Kingdom Government on the ratification of the ICCPR on 20 May 1976.[42] The Reservation was in the following terms:-
>
> > "The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories."

As a matter of international law,[43] the Reservation evidenced the terms that the United Kingdom Government were prepared to enter into the ICCPR: the Covenant only applied subject to the Reservation. When in 1976, the United Kingdom Government acceded to the terms of the ICCPR, it also did so for its then dependent territories, including Hong Kong. Thus, as far as Hong Kong was concerned, the ICCPR could only ever apply subject to the Reservation. Further, whatever might have been the reason for the United Kingdom itself to enter the Reservation[44], as far as Hong Kong was concerned, the significance of the Reservation was to enable the Hong Kong Government to deal with immigration matters, specifically to have in place legislation "which the Government may deem necessary to enact to govern entry into, stay in and departure by persons who do not have the right to enter and remain in Hong Kong".[45] It was against this background that the HKBORO was enacted.[46] After the resumption of the exercise of sovereignty on 1 July 1997, when the Basic Law came into effect, Article 39(1)[47] made it clear that the ICCPR was effective only "as applied" to Hong Kong. The ICCPR therefore only applies in Hong Kong subject to the Reservation. Section 11 reflects this proviso. Indeed, the wording of s 11 tracks the Reservation; the relevant phrase in both is "entry into, stay in and departure from Hong Kong". For a full discussion of s 11 and the Reservation, one need really go no further than the decision in *Ubamaka*.[48]

(3) The intention of Article 154(2) of the Basic Lawand the Reservation, both of which are couched in general terms, must have been, one would have thought, for the purpose for enabling effective immigration control to be exercised. This is hardly a novel or surprising view to take, and is one that is reflected in jurisdictions other than our own. In *Ubamaka*[49], reference was made to a passage in the Judgment of the European Court of Human Rights in *Chahal v United Kingdom*[50] in which it was said that Contracting States (to the European Convention on Human Rights) had the right "as a matter of well-established international law and subject to their treaty obligations including the Convention, to control *the entry, residence and expulsion* of aliens" (emphasis added). The highlighted words emphasize the broad nature of the immigration control: it governs each stage of a person's stay in any particular place, from entry through his or her stay to departure.

30. Given this context and purpose, one then looks at the words used in s 11 to ascertain the ambit of the immigration legislation which is intended to be excepted from the BOR by this provision. It is clear in my view that, subject to s 5 of the same Ordinance[51], the provision is intended to except immigration legislation that deals with each stage of a person's stay in Hong Kong, as stated earlier, from entry through his or her stay in Hong Kong, to departure. This includes of course whether permission should be given to be in Hong Kong in the first place, the purpose for which that permission is to be granted to enter Hong Kong and the duration of the stay. It must also, from an immigration control point of view, generally cover the activities which a person in Hong Kong may be permitted to carry out and in my view must cover the aspect of whether a person should be permitted to work. Whether a person who, not having the right to enter and remain in Hong Kong, is permitted to work during his or her stay is, one would clearly have thought, eminently a matter of immigration control. Particularly in a place like Hong Kong, which has considerable economic attractions to many people, the need to control immigration and to control the number or type of people who may wish to work here, can easily be seen. It has not really been suggested otherwise by the Applicants.

31. In my judgment, nothing that has been advanced by the Applicants detracts from the views articulated above. The main point raised by the Applicants amounted to saying that, as a matter of statutory construction, s 11 only related to immigration legislation dealing with entry into Hong Kong ("entry into"), the right to remain in Hong Kong (this was the construction put on the words "stay in") and departure from Hong Kong ("departure from"). In other words, the word "governing" in s 11 is given a qualification and is said by the Applicants, to mean only "determining who has the right to" or "addressing the right to." Thus, s 11 was not apt to cover legislation that related to the activities or rights of persons while they were in Hong Kong. In the context to the present case, s 11 did not therefore cover any legislation that gave the DOI a discretion to decide whether or not to grant permission to work to persons like the Applicants once they were already here in Hong Kong. Mr Fordham QC accepted that if, as a condition of entry into Hong Kong, there was a prohibition against employment, such prohibition would be caught by s 11 since it would relate to the right of "entry into" Hong Kong in the first place. However, he contrasted this situation with the present case where the DOI was not exercising his power to determine whether the Applicants or any of them should be allowed to enter Hong Kong and if so, on what terms. The Applicants were already here and the DOI was merely exercising his discretion whether or not to allow the Applicants to work. Accordingly, the prohibition did not relate to the Applicants' entry into Hong Kong, nor to their right (if any) to remain in Hong Kong, nor (obviously) to any question of their departure from Hong Kong; the DOI's decision simply did not relate to these facets. Mr Fordham QC referred in this context to s 37ZX of the IO[52]: although the DOI could permit a screened-in torture claimant to take up employment, nevertheless such permission did not amount to a limit of stay or other condition of stay (under s 11 of the IO) nor could it amount to any authority to remain in Hong Kong (under s 13). Put simply, the permission to work bore no relation to the question whether a person was or was not permitted to enter or remain in Hong Kong.

32. As further support for this construction of s 11, Mr Fordham QC deployed two additional arguments:-

> (1) He relied on s 14 of the IO[53] as being relevant to the construction of s 11. The argument ran along these lines: it could not have been intended that s 11 excepted immigration legislation from the applicability of the BOR, because this was precisely what s 14 did (and deliberately did so for only one year). Were it otherwise, so the argument proceeded, there would be a duplication if both s 11 and s 14 in excepting provisions of the IO from the application of the BOR; this could not have been the intention of these statutory provisions.

(2) It could in any event not have been the intention to deprive all persons who did not have the right to enter and remain in Hong Kong(persons like the Applicants) of all rights set out in the BOR. Apart from IDT (Article 3 of the BOR)[54], examples were provided of where it would appear unconscionable and unjust were rights protected under the BOR to be unavailable to persons like the Applicants. In the Applicants' written Case, it was said that if s 11 had the effect the Respondent said it had, then it would be possible for a criminalizing provision such as s 38AA of the IO[55] to be made retrospective in application (cf Article 12 of the BOR). Before us, Mr Fordham QC gave some further examples: what if, he asked rhetorically, a condition of entry was imposed upon a person entering Hong Kong to the effect that he could only live in one part of Hong Kong apart from the rest of his family; or a condition of entry was imposed on a person prohibiting marriage? Given these situations, it could simply not have been the intention of s 11 to deny what may be fundamental and basic human rights to persons, albeit not having the right to enter and remain in Hong Kong, while they were here in Hong Kong. This was another way of submitting that s 11 should be given a 'human rights friendly' construction, rather than one that denied human rights.

33. The construction of the relevant words in s 11 contended by the Applicants applied equally to the words “entry into, stay in and departure from” contained in the United Kingdom Reservation. He submitted that the Reservation was only ever intended, as far as the United Kingdom was concerned, to deal with the problem of persons wishing to enter and remain in the United Kingdom, rather than to affect the availability or application of human rights of persons when actually there. In support of this proposition, reference was made to two authorities. On 1 November 2006, the Human Rights Committee of the United Nations considered a report made by the United Kingdom Government relating to human rights under the ICCPR in the context of legislation in the United Kingdom dealing with the detention of suspected terrorists.[56] In 2008, the Human Rights Council of the General Assembly of the United Nations published opinions adopted by its Working Group on Arbitrary Detention.[57] Included was a consideration of what was said to be the arbitrary detention of an asylum seeker from Somalia by the United Kingdom authorities. It was said by Mr Fordham QC that in neither case did the United Kingdom Government pray in aid of the Reservation to justify any alleged infringement of human rights under the relevant legislation. According to Mr Fordham QC, the approach of the United Kingdom in not denying rights to persons in situations similar to the Applicants could also be seen by the Reservation entered into by the United Kingdom Government to the Refugee Convention: as stated earlier[58], Article 17 of the Refugee Convention provides that refugees should be permitted to work but that Article also provides that parties to the Convention can impose a temporal limitation of up to three years’ residence before a refugee can take up employment so as to protect national labour markets; the United Kingdom Government’s Reservation here was to extend the temporal limit to four years. This indicated, so the Applicants argue, the United Kingdom’s approach to reservations in general, that it specifically distinguished between the right to be in the United Kingdom and the rights of persons when actually in the United Kingdom.

34. The main fallacy in the Applicants' approach to construing s 11 lies in the failure to accord sufficient weight to the context and purpose of the provision. I have already gone into what clearly appears to be the relevant context and purpose, and how this is supported by the background and origin of that provision. When the context involves matters of immigration control, it appears artificial in the extreme merely to restrict this to the right of entry, (as the Applicants put it) the right to stay in a place and departure. Immigration control must also extend, quite obviously, to the activities of persons who have entered Hong Kong and who, for whatever reason, remain here. I therefore cannot agree with the proposition that the word "governing" in s 11 means only, as the Applicants submit, "determining who has the right to" or "addressing the right to". Quite simply, if this was the intention of s 11, the provision would have said so. I agree with the view of the Court of Appeal[59] that s 11 would have been drafted in clearer and simpler terms if the Applicants' arguments were right.

35. I accept there may be possible arguments as to the precise limits of what is meant by "immigration legislation governing entry into, stay in and departure from Hong Kong" and the limits should really only be ascertained on a case by case basis. However, in the present case, it is obvious that a discretion vested in the DOI to determine whether or not persons in the position of the Applicants should be permitted to work, comes within the rubric of immigration control. To put it more precisely, the immigration legislation which gives the DOI this discretion does govern the stay in Hong Kong of persons like the Applicants. The somewhat fine distinction made by Mr Fordham QC between a prohibition on employment as a condition of entry into Hong Kong and the prohibition being imposed when a person was already here (in the form, for instance, of a decision not to permit employment) was a distinction without a difference in substance. Both come within the umbrella of immigration control over entry into, stay in and departure from Hong Kong.

36. Nor is the reference to s 37ZX to the point. While any permission to work given to a screened-in torture claimant does not, I accept, under that provision give any rights to remain in Hong Kong, this does not by itself advance the Applicants' basic submission at all. If anything, it can be said that it supports the contrary position, namely, that the power given to the DOI by this provision is another example of immigration legislation governing a person's stay in Hong Kong.

37. Nor is there much assistance to be derived from a comparison with s 14 of the HKBORO. Admittedly, there is some overlap between this provision and s 11, in that certain provisions of the IO will be excepted from the application of the rest of the Ordinance, but there are differences:-

(1) While s 14 excepts the IO and all acts or omissions under that Ordinance from the application of the rest of the Ordinance, s 11 is much more limited in application. Section 11 only applies where there is "immigration legislation governing entry into, stay in and departure from Hong Kong".

(2) As the Court of Appeal pointed out[60], there are provisions in the IO which would not come within s 11 at all such as the criminal offences covered by ss 2AG and 37C, the provisions relating to the forfeiture of a ship (s 37E) or appeals against removal orders made by the DOI (s 53A).

(3) The duration of s 14, which covers a number of Ordinances and not just the IO, is a finite one whereas there is no temporal limitation in s 11.

38. I should also add that even if the words "immigration legislation governing entry into, stay in and departure from Hong Kong" are given the narrow meaning for which the Applicants contend, the same point as regards duplication with s 14 will arise.

39. Next, I turn to the argument that it could not have been intended that persons like the Applicants who are allowed to be in Hong Kong, should be deprived of human rights. It will be recalled that a number of examples were provided by Mr Fordham QC.[61] The use of examples may sometimes assist in advancing an argument but, with respect, the use of somewhat extreme and hypothetical examples which are not related to the factual circumstances in the present case, is in my view of little assistance. The basic inquiry in the present case is really to pose the following question: does the relevant act or omission complained of originate from immigration legislation governing entry into, stay in and departure from Hong Kong? As I have said earlier, the precise ambit of this phrase should be determined on a case by case basis. In the present case, for the reasons given, the legislation giving the DOI the discretion whether or not to allow the Applicants to work in Hong Kong clearly comes within these words.

40. As regards the applicants' submissions on the United Kingdom's Reservation[62], the consideration and opinion of the Human Rights Committee and the Human Rights Council of the United Nations again provide little assistance for present purposes. There may be a number of reasons why the United Kingdom Government did not pray in aid the Reservation and these documents do not provide any indication that the particular argument, with which we are concerned, was discussed at all. As far as the Human Rights Committee consideration is concerned, the Court of Appeal explained the absence of reliance on the reservation by reference to the Human Rights Act in the United Kingdom.[63] Just as limited in terms of utility is the consideration of the United Kingdom's Reservation under the Refugee Convention.[64]

41. Whatever the position of the United Kingdom, it is the context and purpose of s 11 that must be considered in order to construe that provision. Here, it is important to look at the position in Hong Kong,[65] for it is the context and circumstances here that are relevant, not the position elsewhere, whatever may have been the historical origins. Again, I would refer to the decision in *Ubamaka*.

D.2 Article 14 and the right to work

42. For the reasons set out in Section D.1, by reason of s 11 of the HKBORO, the Applicants are unable to rely on Article 14 of the BOR. It is inapplicable, and it is therefore unnecessary and undesirable to go into the meaning and ambit of this provision.

D.3 IDT

43. It does not follow from the conclusion I have reached on s 11 in the present case that the DOI has an unrestricted discretion and this was not the position of the Respondent. I have already briefly alluded to this.[66] Further, in the light of *Ubamaka*[67], s 11 is to be read subject to s 5(2)(c) of HKBORO[68], in that there can be no derogation from Article 3 of the BOR. Article 3 is in the following terms:-

> "**Article 3**
>
> **No torture or inhuman treatment andno experimentation without consent**
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"

44. The nature of the Article 3 right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, is an absolute one. As Ribeiro PJ said in *Ubamaka*[69]:-

> "114. In my judgment, the clear words of s.5 establish the non-derogable character of the right not to be subjected to torture or CIDTP protected by BOR art.3. It is also clear from the highly persuasive jurisprudence of the Strasbourg Court and the House of Lords in relation to the closely analogous provisions of the ECHR that BOR art.3 rights are not only non-derogable but also absolute. Such jurisprudence shows that the absolute character of the protection against torture and CIDTP is an internationally accepted standard or, as Lord Steyn puts it "a universal minimum standard"."

45. In the context of the present case, I agree with the Applicants' submission that where, as a consequence of the prohibition against working, IDT (for we are not concerned with torture, cruelty or any form of punishment) can be shown to exist or where the individuals concerned can be shown to be facing a substantial and imminent risk of IDT, the discretion on the part of the DOI must be exercised in favour of the Applicants or persons like them. Put simply: where IDT or a substantial and imminent risk of IDT can be shown, the DOI must exercise his discretion to give permission to work. It is put in this imperative way because the Article 3 right is an absolute one.

46. But then the following questions need to be addressed: in any given case, what is IDT, who has the burden of demonstrating this and to what degree of likelihood must it be demonstrated?

47. As to what constitutes IDT, again the decision of this Court in *Ubamaka* provides much guidance.[70] The facts of that case involved the decision of the DOI to issue a deportation order against the Applicant. The assertion made by the Applicant was that if he were returned to Nigeria, he risked being prosecuted and punished for a similar offence to the offence of which he was convicted in Hong Kong. This, he said, amounted to cruel, inhuman or degrading treatment or punishment. We are of course concerned only with IDT but in my view the same approach can be adopted.

48. As was emphasised in *Ubamaka*, a "minimum level of severity" must be shown. Reference was made to the decision of the House of Lords in *R (Limbuela) v Secretary of State for the Home Department*.[71] The following passage in the Judgment of Ribeiro PJ[72], although dealing with CIDTP, provides a basic working definition of IDT, as well:-

> "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 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 art.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 art.3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by art.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 [been] 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 art.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."

49. It is, I think, important to note the following aspects of IDT when one is considering what it means in the present case:-

(1) The references in the passage just quoted to bodily injury and physical pain are perhaps more apt in describing torture or punishment, rather than IDT.

(2) However, a minimum level of severity must still be reached before treatment can be said to amount to IDT. In *Limbuela*[73], Lord Bingham of Cornhill said this, "Treatment is inhuman or degrading if, to a seriously detrimental effect, it denies the most basic needs of any human being".

(3) I agree with this statement but of course, like most statements of principle of a general nature, it will be the relevant individual facts and circumstances that one must inevitably examine in order to arrive at a conclusion in any given case. In the context of IDT, one will have to look at those facts and circumstances individual to the applicant in question. In *Limbuela*, reference was made to factors such as age, gender, mental and physical health and condition, any facilities or sources of support.[74]

(4) Put in this way, an inquiry into the relevant facts and circumstances will mean that there is no precise formula as to whether, in any given case, the minimum level of severity has been reached. One can really only point to relevant factors that may have to be taken into account, although I accept in many cases there will be common factors. Context, however, is important. In *Limbuela*, the relevant context was the position of asylum seekers who claimed to be destitute and who had no means of real support, not even any guarantee of overnight accommodation on a daily basis. The context of the present case – persons who have been in Hong Kong for prolonged periods since becoming protected persons – is different.

(5) Mr Fordham QC urged upon us to state that persons in the position of the Applicants in the present case, who showed the following characteristics – being mandated refugees or screened-in torture claimants, living on Government handouts, maintained at subsistence level, with nowhere to go and no expectation that they would be leaving Hong Kong in the foreseeable future – must be automatically deemed to have satisfied the test of IDT if they were not to be permitted to work. The trouble with this submission is that it does not recognise the difficulty, if not impossibility, of formulating a precise factual formula to establish IDT in every case. I reiterate that the correct approach is to examine the relevant facts and circumstances and context of any particular case and any particular person.

(6) This approach accords with principle. In *Limbuela*, there are a number of passages precisely making the point that it is impossible to formulate a simple factual test applicable to all cases.[75] In most cases, an exercise in judgment will be required and each case will have to be judged on its own facts.[76]

50. The burden of demonstrating IDT lies on the party who alleges this. In the context of the present case, the burden would rest with the Applicants. I have already touched on what would constitute IDT and the need to show a minimum level of severity.

51. But what degree of likelihood of IDT must be shown? In *Ubamaka*, this was put at a "genuine and substantial risk".[77] This means evidence must be adduced by an Applicant to show that there is a real risk of being subjected to IDT.[78] In *Limbuela*, all members of the House of Lords referred to an imminence test, that is, an applicant would face an imminent prospect of IDT.[79]

52. Translated to the present case, as indicated above[80]the burden on the Applicants can be stated in the following way: can it be shown that there is a substantial and imminentrisk of IDT if the DOI were not to grant them permission to work?

53. We have been invited by both parties to determine on the facts before us the issue whether or not IDT can be said to exist. For my part, I am not inclined to make such a determination for the following reasons:-

(1) Although, as stated earlier[81], both A Cheung J and the Court of Appeal alluded to the possibility that on the facts, the Applicants may be able to demonstrate IDT, no firm findings either way were made. This was because both courts below were of the view that by reason of s 11 of HKBORO, Article 3 of the BOR was in any event of no application.[82] Without such findings, this Court should be extremely slow to embark on a fact finding exercise itself.

(2) This is particularly so when there is a real possibility of a dispute on the facts. For example, the Applicants have filed evidence to describe their mental condition and why their inability to work has contributed significantly to this. This is not accepted by the Respondent.

(3) If it had been necessary, I would have been inclined to remit the determination of this issue (the existence of IDT) to another tribunal. However, in view of the current position of the Applicants[83], this would be an academic exercise, as both sides accepted at the hearing.

54. That said and accepting that a high threshold has to be surmounted[84], I am inclined to agree with the views of both A Cheung J and the Court of Appeal that the position of the Applicants could conceivably constitute IDT if they were not given permission to work. All have been in Hong Kong for a long time since they became protected persons (ranging from six to 12 years), longer if one took into account the time before they attained this status. As stated earlier, evidence has been adduced by the Applicants dealing with their mental condition, referring to their loss of dignity, and feelings of hopelessness and desperation. However, it is not necessary to resolve these issues for the reasons I have already set out.

E ARTICLE 6 OF THE ICESCR

E.1 Relevant provisions of the Covenant

55. For present purposes, the following provisions of the Covenant are relevant:-

> "**Article 2**
>
> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.
>
> ....
>
> **Article 4**
>
> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.
>
> ....
>
> **Article 6**
>
> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> ...."

E.2 The sub-issues to be determined

56. Before any consideration of the content of the right to work in Article 6 can be made, as a preliminary issue, it is again important to determine whether or not this article can be relied on by the Applicants in the first place. For the reasons that follow, I am of the view that the Applicants are unable to do so and, just as in the case of Article 14 of the BOR, it is therefore unnecessary and undesirable in the circumstances of the present appeals to discuss the content of the right contained in it. I will deal with the following sub-issues:-

(1) Is Article 6 of the ICESCR incorporated into Hong Kong municipal law?

(2) The effect of the Reservation of the United Kingdom Government dated 20 May 1976 in relation to Article 6 of the ICESCR.

E.3 Is Article 6 of the ICESCR incorporated into Hong Kong municipal law?

57. Article 39 of the Basic Law states as follows:-

> "**Article 39**
>
> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

58. The provisions of the international covenants and conventions referred to in Article 39(1) of the Basic Law are not directly enforceable in Hong Kong by any individual unless implemented by domestic or municipal law. As Ribeiro PJ summarised in *Ubamaka*[85], "It has long been established under Hong Kong law (which follows English law in this respect), that international treaties are not self-executing and that, unless and until made part of our domestic law by legislation, they do not confer or impose any rights or obligations on individual citizens". This is sometimes called the common law dualist principle and the wording of Article 39(1) of the Basic Law, both in English and in Chinese, is declaratory of this. One clear example is the incorporation into domestic law of the ICCPR. It is well recognised that the HKBORO is the domestic embodiment of the ICCPR as applied to Hong Kong.[86] One of the consequences of the principle is where an international obligation has not been made part of domestic law, then, whatever the international position may be, an individual cannot rely on the content of that international obligation. In addition, in the case of the ICESCR, at the 19th session in November-December 1998 dealing with the Substantive Issues Arising in the Implementation of the ICESCR relating to the Domestic Application of the Covenant, the Committee on Economic, Social and Cultural Rights of the Economic and Social Council of the United Nations confirmed this[87]:-

"5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded by any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant."

59. The Applicants do not dispute the application of the dualist principle, but submit instead that Article 6 of the ICESCR (insofar as this incorporates a general, unrestricted right to work for persons like the Applicants) has been incorporated into domestic legislation:-

(1) Reference is made to three provisions in the IO: ss 17G(2), 38AA and 37ZX:-

(a) Section 17G(2) states:-

"(2) Without prejudice to any provision of this Ordinance relating to conditions of stay which may be imposed on any person, a person is lawfully employable for the purposes of this Part only if-

(a) he is the holder of an identity card and he has not breached any condition of stay (if any) imposed on him under this Ordinance;

(b) he is the holder of an official passport; or

(c) he is not required to be registered under the Registration of Persons Ordinance (Cap 177) and-

(i) is the holder of a valid travel document and, having landed in Hong Kong lawfully, is not prohibited from taking employment, whether paid or unpaid, under any condition of stay, and in respect of whom no removal order or deportation order is in force;

(ii) *(Repealed 31 of 1984 s. 4)*

(iii) is the holder of a Vietnamese refugee card which does not prohibit him from taking employment;

(iv) is the holder of a certificate of exemption; or

(v) is the holder of any other document of a type approved by the Governor by order published in the Gazette. "

(b) Section 38AA is set out in para 32(2) footnote 55 above.

(c) Section 37ZX states:-

"37ZX **Claimant of substantiated claim may apply for permission to take employment etc**.

(1) The Director may, on an application of a claimant who has a substantiated claim, permit the claimant to take employment or establish or join in a business.

(2) A permission must not be given under subsection (1) unless the Director is satisfied that exceptional circumstances exist that justify such a permission being given to the claimant.

(3) A permission given under this section –

(a) may be given subject to a time limit and any other condition the Director thinks fit to impose; and

(b) must be given in writing.

(4) A permission given under this section expires immediately on-

(a) the expiry of the time limit (if any); or

(b) the breach of any other condition, subject to which the permission is given.

(5) The Director may, before a permission expires under subsection (4), vary any time limit or any other condition imposed under subsection (3).

(6) To avoid doubt, a permission given under this section is not and must not be taken as-

> (a) a limit of stay or other condition of stay imposed or varied under section 11; or
>
> (b) the Director's authority under section 13 for the claimant to remain in Hong Kong."

(2) To reinforce the argument, Mr Fordham QC made reference also to a paper dealing with the Initial Reports submitted by States Parties under Articles 16 and 17 of the ICESCR.[88] The paper contained the report of the People's Republic of China in implementing the provisions of the Covenant. Part 2 of the paper deals specifically with the position of Hong Kong. He draws our attention particularly to para 349, in which it was stated that provisions of the ICESCR were incorporated into Hong Kong's domestic law through various provisions in the Basic Law and provisions in over 50 Ordinances. Annex 2A of the paper states that Article 6 of the ICESCR has been incorporated into Hong Kong legislation under six Ordinances, including the IO. Accordingly, it was submitted by Mr Fordham QC, Article 6 has been incorporated into domestic legislation and therefore can be relied on by the Applicants.

60. There is some superficial attraction in the argument raised by the Applicants but in my judgment it does not bear analysis:-

(1) I accept that the fact there is no comprehensive incorporation of the ICESCR into a single piece of domestic legislation (as in the case of the ICCPR) is of course no bar. There can be incorporation of individual provisions of the Covenant by different statutes. This is particularly so where a Convention deals with different topics. The ICESCR, as its name suggests, deals with economic, social and cultural rights.

(2) However, where it is said that a particular Convention or a provision of that Convention has been incorporated into domestic legislation, it is important to analyse that piece of domestic legislation to see whether it has actually done soand to what extent. This becomes then largely a matter of statutory construction.

(3) None of the three provisions relied on by the Applicants in my view incorporates the general, unrestricted right to work of persons in the position of the Applicants (this being, it is said, the effect of Article 6 of the ICESCR):-

> (a) Section 17G(2) of the IO does not give a general right to work at all. The classes of persons who are "lawfully employable" are restricted. The provision is also subject to other parts of the IO relating to conditions of stay.
>
> (b) Section 38AA of the IO, if anything, is quite the opposite of allowing a general, unrestricted right to work. It actually prohibits the taking up of employment.
>
> (c) Section 37ZX of the IO is also restricted in allowing persons to work. This provision merely enables the DOI to give permission to work to a screened-in torture claimant.

(4) Nor is there much assistance to be derived from the paper setting out the views of the PRC (including Hong Kong) regarding the implementation of the ICESCR:-

> (a) First, the extracts (relied on by the Applicants) need to be seen in context. The relevant context, as identified by the Court of Appeal in its Judgment[89], includes looking at paras 403 and 404 of the same paper:-
>
> "**Reservations on article 6**
>
> 403. In paragraph 29 of its concluding observations of 2001, the Committee recommended that "HKSAR withdraw its reservation on article 6 and the interpretative declaration replacing its former reservation on article 8".
>
> 404. The declaration reserves the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on taking of employment in HKSAR for the purpose of safeguarding the employment opportunities of workers in HKSAR. We have carefully considered the Committee's recommendation. However, we have concluded that the declaration remains necessary because it affords flexibility in the formulation of measures to protect the interests and employment opportunities of local workers. We therefore respectfully advise that we propose to retain it."

In my view, these paras made it quite clear that there was no general, unrestricted right to work, particular for persons like the Applicants. I shall say more about the Reservation in the next section.

(b) Secondly, and perhaps more important, whatever the status of this paper which after all provides only a somewhat generalised and unanalysed view of the question, it is to matters of substance that one must pay particular attention. As a matter of substance, it is important to examine the relevant statutory provisions to see whether, following the dualist approach, treaty obligations have indeed been incorporated into domestic legislation and, if so, to what extent. As seen above, Article 6 (in the sense advanced by the Applicants) has not been incorporated into any of the provisions in the IO identified by the Applicants. The most that can be said is that there is some allowance made for persons like the Applicants to be permitted to work, but this is far from the general, unrestricted right which is said to exist.

61. Accordingly, whatever the effect or ambit of Article 6 of the ICESCR, even if it provides for the general and unrestricted right to work which the Applicants advance as its effect, this Article does notenure to their benefit. It has not been incorporated into Hong Kong domestic legislation.

62. At the hearing, Mr Fordham QC made submissions based on a Convention or treaty-compliant interpretation of relevant provisions of the IO which give the DOI a discretion to determine whether permission to work may be given to the Applicants. The basic submission was that where a discretion was given to the DOI by statute, the relevant provisions should be given an interpretation that accorded with international obligations; and relevant in this context was Article 6 of the ICESCR. Reliance was placed on a number of principles: that where a provision was ambiguous and capable of bearing different meanings which may comply or conflict with treaty obligations, then the Court will adopt the construction that is treaty-compliant[90]; the principle of legality meaning that where a statutory provision is in general terms, then this will be insufficient to override fundamental rights unless it clearly or expressly does so[91]; that where necessary, the Court will effect a remedial construction of the relevant statutory provisions.[92]

63. It is unnecessary to go into the submissions based on these principles. It was accepted that before they can apply, there must exist a constitutional or fundamental right in the first place. The Applicants are unable to get over this hurdle. Under the dualist principle, Article 6 of the ICESCR (as the Applicants have construed it) has not been incorporated into domestic legislation.

64. This conclusion is supported all the more when one looks at the Reservation entered into by the United Kingdom Government on 20 May 1976 in relation to the ICESCR.

E.4 The effect of the Reservation of the United Kingdom Government dated 20 May 1976 in relation to Article 6 of the ICESCR

65. The Reservation was in these terms:

> "The Government of the United Kingdom reserve the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory."

66. From a simple reading of this Reservation, it seems clear that, whatever the effect of Article 6 and even assuming that it would otherwise give a general and unrestricted right to work to persons like the Applicants, the intention was to reserve the right to impose restrictions on the application of that Article. Just as in the case of the Reservation entered by the United Kingdom Government to the ICCPR, Article 39(1) of the Basic Law has the effect in any event of enabling the ICESCR to remain in force only "as applied to Hong Kong", in other words, that Convention applies in Hong Kong subject to the Reservation. [93]

67. The Applicants made two points:-

> (1) First, on its true construction, while the Reservation might enable possible restrictions based on birth and residence to be imposed, whether or not as a matter of law such restrictions were valid, however, could only be determined – and determined ultimately only by the courts – by an application of an appropriate constitutional test.[94]
>
> (2) Secondly, the so-called Reservation was not a Reservation at all in international law; it was merely an interpretative declaration. According to the definition section of the Vienna Convention on the Law of Treaties, a reservation has the following meaning[95]:-
>
> > "(d) ""reservation"" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect off certain provisions of the treaty in their application to that State;"

Sometimes, States enter what is known as an interpretative declaration by which it seeks merely to advance a preliminary interpretation dealing with a subject but which does not purport to be binding; in other words, it does not seek to modify a State's obligations in entering into an international obligation and such interpretation is subject to a different interpretation placed in it by the courts.[96]

68. In my view, these points, not really advanced with much enthusiasm, can be shortly dealt with:-

(1) It would be surprising if the intention of the Reservation was as narrow as the Applicants submit. The language of it does not bear such a meaning. Nor can such a construction of it follow from the context and purpose of the Reservation, which can be taken to be the safeguarding of the employment opportunities of residents in the relevant region or territory. The construction advanced by the Applicants would also be somewhat pointless. As Fok JA reasoned in his Judgment in the Court of Appeal,[97] if all that the Reservation did was to identify restrictions which may be imposed on the Article 6 right but subject ultimately to a justification test, this was already inherent in Article 4 of the same Convention.[98]

(2) The Reservation is clearly a reservation for the purposes of excluding or modifying the obligation obtained in Article 6 of the ICESCR. It actually uses the term "reserve", and the intention of the Reservation is clear, as indicated above, from its context and purpose. It is important to look at its "substantive content"[99] in order to determine this question. It is also of note that textbooks writers regard the Reservation as a reservation: see, for example, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* by Matthew Craven.[100]

F. ARTICLE 33 OF THE BASIC LAW

69. I now come to the third of the provisions said by the Applicants to provide the basis for saying that a constitutional right to work exists. Article 33 of the Basic Law states:-

> "Hong Kong residents shall have freedom of choice of occupation."

70. As I understand Mr Fordham QC's submission, the relevance of Article 33 of the Basic Law lies in the assumption within it that there is a right to work in general. Thus regarded, this provision provided another means by which, following the dualist principle, Article 6 of the ICESCR was incorporated into Hong Kong domestic law. The paper setting out the views of the PRC regarding the implementation of the ICESCR[101] made reference to Article 33 of the Basic Law as being the constitutional guarantee of Article 6.[102]

71. Article 33 does not refer to the right to work in general. It is much narrower than that, dealing only with the freedom of choice of occupation. If it was intended that a wider right was to exist, the article would simply have said so or it would have been made much clearer, rather than to adopt a somewhat elliptical technique.

72. Fok JA in his Judgment in the Court of Appeal said this[103]:-

> "139. BL33 has its origins in article 3(5) (§17) of the Joint Declaration and Annex I Section XIII to the Joint Declaration (§151) both of which refer to various rights and freedoms including that "of choice of occupation". No wider right to work is expressly referred to. At the time of the Joint Declaration, the significance of a freedom of choice of occupation was the practice in the PRC's planned economy of assigning students joining universities to specific fields of studies and occupations after graduation: see Chan and Lim (General Editors): Law of the Hong Kong Constitution (Sweet & Maxwell, 2011) at §24.004.
>
> 140. In my opinion, a right to choose one's occupation is narrower than a right to work in general. As the CESCR General Comment No. 18 states, at §6, the right to work is not to be understood as an absolute and unconditional right to obtain employment but includes the right to decide freely to accept or choose work. This demonstrates that the freedom of choice of occupation is therefore only part of the wider right to work in ICESCR6. If BL33 was intended to confer more than a freedom of choice, one would have expected its wording to be different.
>
> 141. Furthermore, the relevant context of BL33 would include the fact that by reason of BL39, the ICCPR and ICESCR as applied to Hong Kong include both the immigration reservation, reflected in HKBORO s. 11, and the UK's reservation to ICESCR6. I have addressed the construction of those reservations above and, in the light of my conclusions as to their proper interpretation, it would not be right to conclude that BL33, properly construed in its context, is co-extensive with ICESCR6 since this would be to ignore the UK reservation to that article.
>
> 142. I would add that this conclusion as to the proper construction of BL33 is consistent with previous cases dealing with BL33 which have held that its effect is not to guarantee a right to be employed either generally or in any particular field, but instead, is to protect against conscription to particular fields of occupation: see *Cheng Chun-ngai Daniel v Hospital Authority*, unrep., HCAL 202/2002 (12 November 2004) at §55; *Financial Services and Systems Limited v Secretary for Justice*, unrep., HCAL 101/2006 (6 July 2007) at §§49-53; *Ng King Tat Philip v Post-Release Supervision Board*, unrep., HCAL 47/2010 (23 August 2010) at §§116-117. See also, Hong Kong's New Constitutional Order (2nd Ed.) by Professor Yash Ghai at pp. 435-436.
>
> 143. In my view, therefore, the right conferred by BL33 is a passive or negative right of freedom to choose an occupation, but does not imply a right to take up available employment in the first place. Nor does it confer an unqualified right to obtain employment, which is necessarily subject to market forces and also subject to legal constraints, such as visa and qualification requirements."

73. With respect, I agree with this passage.

74. Lord Pannick QC also relies, in this context, on Article 41 of the Basic Law[104] to contend that in any event Article 33 has no application to non-Hong Kong residents like the Applicants. However, it is not necessary to arrive at a view on Article 41 in this context.

G THE COMMON LAW RIGHT TO WORK

75. As a back stop submission, the Applicants finally advance the argument that a common law right to work exists. It is not necessary to deal at length with this submission. None of the authorities cited by the Applicants bears this out and, as Lord Pannick QC points out, the context of those cases are quite far removed from the present.[105] More important, it is difficult to conceive of the existence of a right to work under the common law in the circumstances of the present case, particularly in the light of the discussion above relating to s 11 of the HKBORO, Article 39 of the Basic Law and the two Reservations made regarding the ICCPR and the ICESCR.

H PROPORTIONALITY

76. From the above, it is clear that no constitutional right to work exists in favour of the Applicants in the present case. No questions of proportionality therefore arise for consideration.

I THE DIRECTOR'S DISCRETION AND IDT

77. As mentioned above, it does not follow that the absence of a constitutional right to work means that the DOI, in the exercise of his discretion whether or not to permit persons like the Applicants to work, can do as he pleases without any limitation. It has never been the Respondent's case that this would be the consequence. Nor can it be.[106] The precise limits of the DOI's discretion in this context will of course have to be worked out in future cases. For the time being, one factor which affects the discretion – and it is an important one – is the IDT factor. This has already been discussed earlier.[107]

J CONCLUSION

78. For the above reasons, I would dismiss the appeals. I would, however, make an order *nisi* that there be no order as to costs. The Applicants can be said to have been partially successful in their submissions regarding IDT.[108] The Applicants' own costs shall be taxed in accordance with the Legal Aid Regulations (Cap 91A). If any party wishes to have a different order for costs, written submissions should be served on the other party or parties and lodged with the Court within 14 days of the handing down of this judgement, with liberty on the other party or parties to serve and lodge written submissions within 14 days thereafter. In the absence of such submissions, the order *nisi* will stand absolute at the expiry of the time limited for these submissions.

Mr Justice Ribeiro PJ:

79. I agree with the judgment of the Chief Justice.

Mr Justice Tang PJ:

80. I agree with the judgment of the Chief Justice and the observations of Mr Justice Chan NPJ.

Mr Justice Chan NPJ:

81. I entirely agree with the judgment of the Chief Justice. I would only make one observation on art 39(1) of the Basic Law.

82. Insofar as it is argued that there is an obligation under art 39(1) to enact new laws to implement the ICCPR and ICESCR and that there is a right to apply to court to mandate governmental compliance with this obligation, that is not the effect of art 39(1). Upon the true construction of this provision, having regard to its purpose and context (including the history of Section XIII of the Joint Declaration which was the origin of art 39(1)), art 39(1) imposes no such obligation. This is not only clear from the language in the English version. This is also borne out by the language used in the Chinese version: it contains no mandatory words, but uses words which state clearly that only those relevant provisions which are applicable to Hong Kong (適用於香港的有關規定) continue in force (繼續有效); it also makes no mention of any need for future legislation, but states, equally clearly, that those applicable provisions are implemented through the laws of the HKSAR (通過香港特別行政區的法律予以實施). This construction is consistent with the mutual understanding of the parties to the Joint Declaration and what was explained in the White Paper issued by the British Government and reproduced in Hog Kong in 1984 (paras 43 to 47) before the signing of the Joint Declaration.

83. As the Chief Justice said in para 58 above, art 39(1) is declaratory of the position in Hong Kong as understood by the parties to the Joint Declaration at that time and reflects the dualist principle that international treaties do not confer or impose any rights or obligations unless they are made part of the domestic law by legislation. See paragraphs 43 and 44 in *Ubamaka v Secretary for Security & another*.

Lord Clarke of Stone-cum-Ebony NPJ:

84. I also agree with the judgment of the Chief Justice.

Chief Justice Ma:

85. For the above reasons, the appeals are unanimously dismissed. The Court also makes an order *nisi* as to costs as set out in para 78 above.

(Geoffrey Ma)	(RAV Ribeiro)	(Robert Tang)
Chief Justice	Permanent Judge	Permanent Judge

(Patrick Chan)	(Lord Clarke of Stone-cum-Ebony)
Non-Permanent Judge	Non-Permanent Judge

Mr Michael Fordham QC, Mr Earl Deng and Mr Timothy Parker, instructed by Barnes & Daly, assigned by DLA, for the Appellants

Lord David Pannick QC, Mr Paul Shieh SC and Ms Grace Chow, instructed by the Department of Justice, for the Respondent

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[1] This is the common abbreviation for the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention. Incidentally, that Convention contains an express provision (Article 17) allowing refugees the right to work.

[2] The relevant person within the Government responsible for immigration matters is the Director of Immigration, the Respondent in the present appeals ("the DOI").

[3] The DOI may be required, if necessary, at this stage also to consider whether or not the person is a refugee: see *C and Others v Director of Immigration* [2013] 4 HKC 563. On 7 February 2014, the Government announced details of a unified screening mechanism to determine claims for non-refoulment protection.

[4] GA was recognized as a mandated refugee in July 2004 (having arrived in Hong Kong in June 2004); FI in December 2006 (he arrived in Hong Kong in September 2005), JA in October 2002 (he arrived in Hong Kong that month as well).

[5] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (usually referred to as the Convention Against Torture, and abbreviated to CAT).

[6] Article 3(1).

[7] This was the effect of the decision of this Court in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187.

[8] At the time of the hearing before the Court of First Instance in the present case, he is recorded by the Judge (Andrew Cheung J as he then was) as being the first successful screened-in torture claimant in Hong Kong.

[9] Judgment of Andrew Cheung J dated 6 January 2011 at paras 5 to 11; Judgment of Fok JA (as he then was) dated 27 November 2012 at paras 7 to 9.

[10] In para 7 of the Judgment.

[11] The Applicants were represented in these appeals by Mr Michael Fordham QC, Mr Earl Deng and Mr Timothy Parker.

[12] The familiar three questions of -

(1) Can the interference be justified by reference to a legitimate aim?;

(2) Is the interference rationally connected to that legitimate aim; and

(3) Is the interference no more than necessary to achieve the legitimate aim?

[13] Contained in the Hong Kong Bill of Rights Ordinance Cap 383. Article 14 states that there should be no interference with a person's privacy. The Article is set out in full in para 18 below.

[14] Para 55 below.

[15] See para 69 below.

[16] The DOI was represented in these appeals by Lord Pannick QC, Mr Paul Shieh SC and Ms Grace Chow.

[17] Set out in para 20 below. This section states that in relation to persons not having the right to enter and remain in Hong Kong, the BOR does not affect any immigration legislation governing (among other things) a person's stay in Hong Kong.

[18] This is relevant in relation to Article 14 of the BOR. The Reservation is set out in para 29(2) below.

[19] I have referred to this as a Reservation at this stage but it is contended by the Applicants that it is not a reservation as such but only an interpretative declaration. This Reservation is set out in para 65 below.

[20] Set out in para 74 footnote 104 below.

[21] See Section D.3 below.

[22] Dated 6 January 2011.

[23] For example, procedural fairness, Wednesbury unreasonableness etc. See also Section I below.

[24] In para 121 of the Judgment.

[25] Stock VP, Kwan and Fok JJA.

[26] The Judgment of Fok JA with which the other Judges concurred.

[27] Referred to in para 7(5) above.

[28] As stated in para 19 of the Judgment of the Court of Appeal, MA has, since the judicial review proceedings commenced, married a Hong Kong Permanent Resident and has obtained a dependency visa. He is therefore able to work in Hong Kong.

[29] Cf *Secretary for Security v Sakthevel Prabakar* (2003) 6 HKCFAR 397, at para 4; (2004) 7 HKCFAR 187, at para 42. *Chit Fai Motors Company Limited v Commissioner for Transport* [2004] 1 HKC 465.

[30] (2012) 15 HKCFAR 743.

[31] The analysis is contained in the Judgment of Ribeiro PJ with which the other Judges concurred.

[32] This is the power to deport an immigrant (a non-Hong Kong Permanent Resident) if that person is found guilty of an offence punishable with not less than two years imprisonment.

[33] See paras 55 to 78 of the Judgment of Ribeiro PJ.

[34] Paras 79 to 95 of the Judgment.

[35] Paras 96 and 102 of the Judgment.

[36] In Section D.3 below.

[37] The power vested in the DOI and other immigration officers to impose conditions of stay.

[38] The power vested in the DOI to grant permission to work to a screened-in torture claimant (such as PA).

[39] [2013] 2 HKLRD 533, at paras 76 to 77. There, the Court was concerned with the proper construction of the words "ordinarily resided" in Article 24(2)(4) of the Basic Law.

[40] Reference was made to the Judgment of Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574. This approach has been reiterated on a number of occasions and recently by this Court in *Fully Profit (Asia) Limited v Secretary for Justice* [2013] 6 HKC 374 at para 15.

[41] Section 11 is contained in Part III of the HKBORO, which is headed "Exceptions and Savings".

[42] The BOR incorporates into Hong Kong municipal law the provisions of the ICCPR.

[43] Article 19 of the Vienna Convention on the Law of Treaties.

[44] The main reason was said to the prevention of an influx of immigrants entering the United Kingdom.

[45] See *Ubamaka* at para 67.

[46] *Ubamaka* at para 69.

[47] See para 57 below.

[48] At paras 48 to 96.

[49] At para 103.

[50] (1996) 23 EHRR 143 at para 73.

[51] I shall come to this in Section D.3 below.

[52] Set out in para 59(1)(c) below.

[53] Section 14 states:-

> **"Temporary savings**
>
> (1) For a period of 1 year beginning on the commencement date, this Ordinance is subject to the Ordinances listed in the Schedule.
>
> (2) This Ordinance does not affect-
>
>> (a) any act done (including any act done in the exercise of a discretion); or
>>
>> (b) any omission authorized or required, or occurring in the exercise of a discretion,

before the first anniversary of the commencement date, under or by any Ordinance listed in the Schedule."

The Schedule to the HKBORO lists the IO among others.

[54] Discussed in Section D.3 below.

[55] Section 38AA states:-

"**Prohibition of taking employment and establishing business, etc.**

(1) A person-

(a) who, having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director under section 13; or

(b) in respect of whom a removal order or a deportation order is in force,
must not take any employment, whether paid or unpaid, or establish or join in any business.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a

fine at level 5 and to imprisonment for 3 years."

[56] This consideration by the Human Rights Committee is published in the Sixth Periodic Report of the Committee in its Consideration of Reports submitted by States Parties under Article 40 of the ICCPR (dated 18 May 2007, CCPR/C/GBR/6). This Report related to the United Kingdom. The relevant legislation relating to detention was the Anti-terrorism, Crime and Security Act 2001.

[57] Dated 16 January 2008 (A/HRC/7/4/Add.1).

[58] In para 3 footnote 1 above.

[59] At para 41 of the Judgment of Fok JA.

[60] In paras 34 and 47 of its Judgment.

[61] See para 32(2) above.

[62] See para 33 above.

[63] See para 49 of the Judgment of Fok JA.

[64] See para 33 above.

[65] See paras 28 to 30 above.

[66] Para 10 above. See also Section I below.

[67] At paras 106 to 116, 133.

[68] Section 5 states:-

> "**5. Public emergencies**
>
> (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.
>
> (2) No measure shall be taken under subsection (1) that-
>
> > (a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);
> >
> > (b) involves discrimination solely on the ground of race, colour, sex, language, religion or
> >
> > social origin; or
> >
> > (c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15."

[69] At para 114.

[70] At Section J.2; paras 172 to 176.

[71] [2006] 1AC 396.

[72] Para 173.

[73] At para 7.

[74] At para 8. *Limbuela* was a case involving IDT. There, a challenge was made against a decision refusing to provide welfare support to asylum seekers. Under the relevant legislation in the United Kingdom, support was generally available to an asylum seeker only if he or she made a claim for asylum as soon as practicable after arrival in the United Kingdom, but this legislation was subject to compliance with rights under the European Convention of Human Rights. The applicants in the case claimed that the refusal amounted to IDT, a Convention right (under Article 3).

[75] *Limbuela* at para 9 (Lord Bingham of Cornhill) and para 59 (Lord Hope of Craighead).

[76] *Limbuela* at para 59 (Lord Hope of Craighead) and para 72 (Lord Scott of Foscote); *Soering v United Kingdom* (1989) 11 EHRR 439, at para 89.

[77] At para 172.

[78] At paras 174, 175.

[79] See *Limbuela* at paras 8, 62, 72, 78 and 102.

[80] Para 45.

[81] Paras 9 and 13 above.

[82] The Judgments of the lower courts preceded the decision of this Court in *Ubamaka*.

[83] See paras 6(3) and 16(2) above.

[84] See *Ubamaka* at para 172.

[85] At para 43.

[86] See *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, at para 53.

[87] At para 5 of the paper dated 23 December 1998 (E/C.12/1998/24).

[88] Paper dated 4 March 2004 (E/1990/5/Add.59).

[89] At paras 130, 131.

[90] See *Ubamaka* at para 43 referring to *R v Secretary for the Home Department ex parte Brind* [1991] 1 AC 696, at 747-8.

[91] See *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362, at paras 67 to 69 referring to *R v Secretary of State for the Home Department ex parte Simms* [2002] 2 AC 115 and *Coco v The Queen* (1993) 179 CLR 427.

[92] See *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, at paras 62 to 79.

[93] See para 29(2) above; *Ubamaka* at para 53.

[94] Such as the proportionality test.

[95] See Article 1(d).

[96] See *Belilos v Switzerland* (1988) 10 EHRR 466, at para 40.

[97] At para 112 of the Judgment of the Court of Appeal.

[98] Set out in para 55 above.

[99] *Belilos* at para 49.

[100] Clarendon Press, 1995.

[101] Earlier referred to in para 59(2) above.

[102] At Annex 2A.

[103] At paras 139 to 143.

[104] Article 41 of the Basic Law states:-

> "Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

[105] They deal largely with issues of restraint of trade or analogous concepts.

[106] For a useful discussion of the limits, see *C and Others v Director of Immigration* [2013] 4 HKC 563, at paras 18-22 (Tang PJ) and 71-86 (Sir Anthony Mason NPJ).

[107] At Section D.3 above.

[108] In the courts below, it had been held that IDT could not be of any relevance by reason of s 11 of the HKBORO. The decisions preceded the decision of this Court in *Ubamaka*.