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CACV 132-137/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEALS NO. 132-137 OF 2008
(ON APPEAL FROM HCAL NO. 132 OF 2006 and
HCAL NO. 1, 43, 44, 48 and 82 OF 2007)
(HEARD TOGETHER)

BETWEEN

C	Applicant in CACV132/2008
AK	Applicant in CACV133/2008
KMF	Applicant in CACV134/2008
VK	Applicant in CACV135/2008
BF	Applicant in CACV136/2008
YAM	Applicant in CACV137/2008

and

DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

Before: Hon Cheung CJHC, Yuen JA and Lam J in Court

Dates of hearing: 12-13 October 2009, 25-29 January 2010 and 1 February 2010

Date of Judgment: 21 July 2011

J U D G M E N T

Hon Cheung CJHC:

1. I agree with the judgment of Yuen JA and the order she proposes.

Hon Yuen JA:

Introduction

2. This is an appeal from a judgment of Hartmann J (now Hartmann JA) dismissing the six Appellants' proceedings for judicial review. The Appellants, from Africa and South Asia, are outside their countries of nationality and have entered Hong Kong at various times. They claim to be "refugees" as the term is defined in the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (collectively referred to as the "RC"), and they claim that as such refugees, they have certain substantive and procedural rights. I will set out later the definition of "refugee" in the RC.

3. Whilst the Appellants claim to be "refugees" as defined in the RC, they accept that Hong Kong is not a signatory to this Convention, and further that although the United Kingdom and the People's Republic of China are themselves signatories, those States have not extended the RC to Hong Kong. Accordingly, Hong Kong is not subject to any *Convention* obligations to them.

4. However the Appellants say that Hong Kong is under an obligation at *Common Law* to apply the concept of "non-refoulement" i.e.

not to return or remove them to a place where they are likely to face persecution.

5. The Appellants claim the obligation is founded on two separate grounds:

(1) Customary International Law, which they say has been incorporated into the Common Law of Hong Kong;

(2) the proper exercise of the discretion of the Director of Immigration ("the Director") under the Immigration Ordinance Cap. 115 ("the Ordinance").

6. The Appellants also say that on either ground, the Director, acting by his officers, is obliged to determine personally whether a claimant is a refugee, and that the existing practice of refugee status determination ("RSD") undertaken by the United Nations High Commissioner for Refugees ("UNHCR") is flawed, and in any event does not satisfy the obligations owed by the Director to refugee status claimants.

7. The Appellants issued judicial review proceedings in 2006 and 2007. In four cases, the sole respondent is the Director, and in the other two, both the Director and the Secretary for Security are respondents, but for present purposes, nothing turns on the identity of the individual Appellants or that of the Respondent(s).

8. For reasons set out in his judgment given on 18 February 2008, Hartmann J refused the relief sought and dismissed the proceedings.

9. On appeal, Mr Dykes SC, leading counsel for the appellants has reformulated the relief sought as follows:

"(1) a declaration that the Common Law incorporates a rule of customary international law [which has the status of a peremptory norm] that prohibits the Director of Immigration from expelling or returning (refoulement) a refugee and that the Director has an obligation to conduct an independent investigation of a person claiming refugee status and, if that person is found to be a refugee, not to refoule him; and

(2) a declaration that the practice and policy of the HKSAR Government to refoule asylum seekers who lodged unsuccessful claims with the United Nations High Commissioner for Refugees for the recognition of their refugee status, and not to refoule those asylum seekers whose refugee claims to the UNHCR are successful, is unlawful".

"Refugee Status Claimants"

10. Before discussing the issues, it may be helpful to set out the parameters of the group of persons with whom these appeals are concerned.

11. Generally the word "refugee" may denote a wide range of persons displaced from their homeland, whether by reason of war, natural disasters, or economic depravity etc. and who seek refuge in places outside their homeland, whether permanently or temporarily. These appeals are not concerned with the entirety of this wide range of persons.

12. Further it is important to note that the term "refugee" is not necessarily synonymous with the term "asylum seeker", as "asylum" may include a wide range of benefits such as issue of travel documents,

admission to residence and other form of lasting protection (*Godwin-Gill*, The Refugee in International Law, 2nd ed. p.174)

13. In each of these appeals, the Appellant claims to be a "refugee" as the term is defined in Article 1A(2) of the RC, i.e. a person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

14. The RC contains an exception (Art. 1F) disapplying the provisions to certain persons e.g. those who have committed crimes against humanity. Although logically these persons are still included in the *definition* of "refugee", it would appear that the Appellants have somehow incorporated the disapplying exception into the definition, as it seems that their approach is that these persons would not come within their definition of "refugees" at all.

15. Accordingly this judgment is concerned only with those persons who claim to fall within one or more of the 5 classes of persons in the Art 1A(2) definition and who do not fall within the exceptions contained in Art 1F of the RC (who I will refer to as "refugee status claimants").

16. In individual cases, a refugee status claimant may also claim to have rights under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which, unlike the RC, applies to Hong Kong. In other words, a refugee status claimant may also be a "torture claimant" and if that is verified, non-refoulement would also be achieved as Art. 3 of CAT provides that a person cannot be expelled or returned or extradited to a place if there are substantial grounds for believing that he would be in danger of being tortured there. Thus, when considering materials dealing with "non-refoulement", one must be careful to see if the concept is being applied in a "refugee" context and/or in a "torture" context.

17. Pausing here, it is important to note that the concept of non-refoulement in the "torture" context is reflected in the policy of the Secretary for Security not to deport persons who have been determined to be genuine torture claimants (*Secretary for Security v Prabakar* (2004) 7 HKCFAR 187).

18. Despite the possible overlap between refugee status claimants and torture claimants, we have been asked, for the purposes of these appeals, to assume that we are dealing with persons who are *only* refugee status claimants and who are not torture claimants.

The concept of non-refoulement

19. In *Regina (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2005] 2AC 1 (para. 11), Lord Bingham traced the history of the State's power to exclude aliens. He held that "the power to admit, exclude and expel aliens was amongst the

earliest and most widely recognised powers of the sovereign state". Although there was a history of humane practice to admit aliens seeking refuge from persecution, those refugees had no right to be admitted. Rather the right was that of the sovereign State to refuse to surrender them to their home States. "[T]hese rights were not matched by recognition in domestic law of any right in the alien to require admission to the receiving state or by any common law duty in the receiving state to give it" (para. 12).

20. Gradually however, there came into being arrangements between certain states, culminating, after the Second World War, in the RC.

21. The concept of non-refoulement is encapsulated in Article 33(1) of the RC. This provides:

> "No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

22. The RC gives a number of other rights to refugees, including the provision of housing, welfare and travel documents. Under Art. 42, signatory States can "make reservations" to some articles (but not the article providing for non-refoulement under Art. 33). Of course such reservations may be more theoretical than real, as a receiving State facing an influx of refugee status claimants would still have to cope with substantial problems such as having to provide accommodation, food, medical care and so on.

23. Notwithstanding the fact that reservations could have been made to some of the articles, it is notable that when the United Kingdom became a signatory to the RC in1954, it did not extend it to Hong Kong. Article 40 of the RC provides that a contracting State may choose at the point of accession to the Convention whether to extend the Convention to territories for whose international relations the contracting State is responsible. The contracting State has an obligation after accession to the convention to consider whether to extend the Convention to the territory, although the Convention recognizes that in certain constitutional situations, the contracting State may require the consent of the government of the territory first.

24. In a Parliamentary debate in 1985 when the United Kingdom Government was expressly asked about "application of the 1951 convention to Hong Kong", the Government spokesman in the House of Lords stated expressly that

> "it was decided not to extend the convention to Hong Kong because of the territory's small size and geographical vulnerability to mass, illegal immigration. ... The Hong Kong Government nevertheless co-operates fully with the UNHCR ..." (p.968)

25. As for the PRC, it became a signatory to the RC in 1982. It has also not extended the RC to Hong Kong, albeit by more complex technical means. It is not necessary for us to consider those means, as the Appellants do not suggest that the RC applies to Hong Kong.

26. So, although the definition of the term "refugees" (including its disapplying provisions) and the concept of non-refoulement are taken

from the RC, the Appellants cannot derive any rights from it. Their primary case is rather, that the concept of non-refoulement has become a norm of customary international law ("CIL") and that this has been incorporated into common law, which is part of the law of Hong Kong. Their alternative case is that even if there is no such law, the Director has as a matter of practice exercised his discretion to the same effect, such that de facto the law has been recognized and applied.

Refugee Status Determination

27. The Appellants say that either way, their claims for refugee status must be determined by the Government itself.

28. At the moment, what is happening on the ground, so to speak, is that if, after entry into Hong Kong, a person makes a claim to be a refugee, the Director would refer him to the UNHCR.

29. The UNHCR then determines whether that person is a genuine refugee, undertaking the determination in compliance with the practice established by the UNHCR, the procedures of which are laid down in the Handbook. If the UNHCR accepts a person's claim as genuine, the Government gives him temporary refuge in Hong Kong and provides him with an allowance until such time as he is accepted for resettlement overseas (if such an event occurs). The Director's position is that, although he has a legal right to remove such a person, he does not do so for humanitarian reasons.

30. If however the UNHCR rejects a person's claim, that person can appeal to a different officer at the UNHCR. If his claim is still

rejected, the Director is likely to deport him, although he may still of course apply to the Director to exercise his discretion in his favour.

31. The six Appellants were all rejected by the UNHCR after appeal, although one later succeeded in a CAT claim.

Summary of the parties' submissions

- *The Appellants' arguments*

32. In summary, the Appellants say:

(A) that the concept of non-refoulement is a principle of CIL, and indeed, has become a peremptory norm (or *jus cogens*). As the principle is part of CIL, it becomes part of the common law through the process of incorporation (*Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529). Therefore the Director is under a duty imposed by the Common Law to undertake RSD personally through his officers. I will deal later with the relevance of the argument of the peremptory norm;

(B) alternatively, that even if the concept of non-refoulement is not a principle of CIL, or has not become part of the law of Hong Kong, such that the Director is under no Common Law duty to undertake RSD, he still has the same duty to undertake RSD when exercising his discretion under the Ordinance, given his practice and policy of not removing persons accepted as genuine refugees.

33. The Appellants say that the Director cannot delegate his duty of RSD (however arising) to the UNHCR. They say there are defects in the UNHCR's practice and procedures.

34. The Director denies there are defects, and points to the UNHCR's mandate to protect refugees. Indeed it is the UNHCR (perhaps more readily than contracting States to the RC) which brings to light breaches of the RC by signatory States, although the English Court of Appeal has recognized that refugees also have what may be called "Convention rights" (*Saad and others v Secretary for State for the Home Department* [2001] EWCA Civ 2008 para. 9), eg to ensure that the State provides the apparatus for giving him access to those rights.

35. Coming back to the role of the UNHCR, the Director also emphasized the UNHCR's global knowledge and experience in verifying refugee status claims. In fact, the UNHCR undertakes RSD directly in some countries which are signatories to the RC, such as the PRC, and participates in RSD (eg in a supervisory role) in other signatory States.

36. The position of the UNHCR (which has not intervened in these proceedings, save to present a document to the Court) is that it undertakes RSD in compliance with standards laid down by the UNHCR Headquarters, and adopting best practice procedures for field offices. UNHCR provides the Director with the biographical data of claimants and informs him of the outcome of the claims and the determination of the claimants' status. The interview records are not provided for reasons of confidentiality but brief reasons are given.

- *The Director's arguments*

37. The Director denies that the concept of non-refoulement of refugees has developed into a CIL, and says that even if there is now such a CIL, it does not apply to Hong Kong because the Government had

contracted out as a "persistent objector" throughout the time when such a law was developing.

38. Further, even if there were such an international law of non-refoulement of refugees, it is contradicted by domestic legislation, as the Ordinance has given the Director the discretion whether to permit a person to land or remain in Hong Kong.

- *The Appellants' reply to the Director's arguments*

39. In respect of the "persistent objector" argument, the Appellants' primary reply is that non-refoulement has become a peremptory norm, a supreme law of CIL from which no State can derogate.

40. Further, and perhaps less noticeably during the hearing before Hartmann J, the Appellants' reply is that statements by officials of the Hong Kong Government whether before or after reunification are to no effect, because Hong Kong was and is not a sovereign state, and neither the UK nor the PRC had made objections, let alone persistent objections, during the period when non-refoulement was developing into a CIL. According to Mr Dykes, the concept of non-refoulement became a CIL "by the 1980's".

41. In respect of the domestic legislation argument, the Appellants accept that the CIL of non-refoulement would not become part of the law of Hong Kong if it is contradicted by legislation. However they say that the principle of legality requires legislation to be construed consistently with a territory's obligations, and adopting that method of construction, the Ordinance does not contain sufficiently clear language to permit refoulement of refugees.

Hartmann J's judgment

42. Hartmann J held that:

(1) the concept of non-refoulement of refugees has developed into a CIL but not into a peremptory norm;

(2) the Government of Hong Kong had challenged the concept of non-refoulement consistently while it was being developed into a CIL, and was a persistent objector to that law, with the result that Hong Kong is not subject to it;

(3) in any event, CIL is subject to inconsistent domestic legislation (the Ordinance); and

(4) it was not objectionable for the RSD to be undertaken by the UNHCR.

43. On appeal, the Appellants challenge all these findings save the one that the concept of non-refoulement has developed into CIL, but this finding is challenged by the Director.

Issues

44. The appeals can be broken down into the following issues:

(1) has the concept of non-refoulement of refugees developed into CIL? (if this concept has not developed into CIL, that is the end of the Appellants' primary argument, and they would have to resort to the discretion argument);

(2) if the concept of non-refoulement of refugees has indeed developed into CIL, is it part of the law of Hong Kong?

(2.1) on the public international law level, did the Government of Hong Kong have the capacity to "contract out" of the

developing law by being a persistent objector? Did it in fact do so?

(2.2) even if the Government of Hong Kong had the capacity to, and did, seek to "contract out", is non-refoulement of refugees a peremptory norm from which no state can derogate, hence the Director would still be bound to comply with that CIL?

(2.3) even if there had been no "contracting out" at the public international law level, has the CIL of non-refoulement of refugees been overridden by domestic legislation?

(3) even if the concept of non-refoulement of refugees is not part of the law of HK, has the Director as a matter of practice exercised his discretion such that it has de facto recognized that concept?

(4) if non-refoulement is part of the law of Hong Kong under either the CIL scenario or the discretion scenario, is the Director obliged to undertake his own RSD instead of the present arrangement with the UNHCR?

(1) Has the concept of non-refoulement of refugees developed into CIL?

45. This court has been presented with a wealth of materials on how a concept may develop into a CIL. In *Prague Airport* (para. 23), Lord Bingham commented that identification of the conditions to be satisfied before a rule may properly be recognised as one of CIL are "not in themselves problematical". He accepted the formulation that CIL results from a general and consistent practice of States followed by them from a sense of legal obligation (*opinio juris*).

46. From the materials, it seems clear that three elements must be present:

- the concept must be of such a character and its formulation of sufficient precision as to be capable of creating a general rule;
- it has been consistently practised by States generally, although not necessarily by all States; and
- the practice has been followed because of a legal obligation to do so.

47. In the present case, there is no dispute over the first element. The other two elements are more controversial. First, is there sufficient evidence of consistent practice of non-refoulement of refugees by States generally, or is it predominantly a regional practice of Western States only? And secondly, even if the practice is more widespread, has it been undertaken out of a sense of legal obligation? These questions are not easy to resolve. It has been recognized that the element of "practice" is generally the most controversial (*Coleman* p.46).

48. At this stage it is necessary to first consider the state of the evidence. I have harboured some concerns about the type of evidence which has been presented to this court. In *Michael Domingues v United States* Case 12.285, Report No.62/02, Inter-Am. C.H.R., Doc. 5 rev.1 at 913 (2002), the Commission held (para. 47):

> "47. These elements in turn suggest that when considering the establishment of such a customary norm, regard must be had to evidence of state practice. [36] While the value of potential sources of evidence vary depending on the circumstances, state practice is generally interpreted to mean official governmental conduct which would include state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international and regional governmental organizations such as the United Nations and the Organization of American States and their organs, domestic policy statements, press releases and official manuals on legal questions. [37] In summary, state practice generally comprises any

acts or statements by a state from which views about customary laws may be inferred. [38]"

49. Similarly in *Flores v Southern Peru Copper Co.* (2003) 62 343 F3d 140, the United States Court of Appeals, Second Circuit, held (para. 11):

"**2. Sources and Evidence of Customary International Law**

[11] In determining whether a particular rule is a part of customary international law -- *i.e.*, whether States universally abide by, or accede to, that rule out of a sense of legal obligation and mutual concern—courts must look to concrete evidence of the customs and practices of States. As we have recently stated, "we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States." *United States v. Yousef*, 327 F.3d 56. 103 (2d Cir.2003); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153. 160-61. 5 L.Ed. 57 (1820) (Story, *J.*) (identifying "the general usage and practice of nations [;] … judicial decisions recognising and enforcing that law[;]" and "the works of jurists, writing professedly on public laws" as the proper sources of customary international law); *see also Filartiga*, 630 F.2d at 880 (quoting *Smith*)."

50. Without meaning to be disrespectful, the evidence presented in these appeals is mostly "second-hand" because the Appellants' primary source of evidence is from academic writings.

51. However, given that there are some 190 nations recognized by the United Nations, it is understandable that "primary", "concrete" evidence of State practice would be logistically difficult to compile.

52. Moreover in *Prague Airport*, the House of Lords was addressed on the issue whether there was a CIL of non-refoulement of

refugees which rendered the questioning by British immigration officers at Prague Airport and refusal of entry of Romani persons unlawful. It would appear that the House of Lords considered a large amount of academic writings without comment on the secondary nature of those materials. (I note however that the House of Lords did not, in the event, pronounce directly on the issue whether a CIL of non-refoulement of refugees has been established because at para. 26, Lord Bingham referred to "that principle, *even if* one of CIL", not availing the appellants in that case).

53. It therefore seems to me that the state of the evidence presented by the Appellants (albeit secondary in nature) was acceptable, and would enable this court to consider the issue whether there is sufficient evidence of a practice of non-refoulement of refugees.

54. I shall come now to what the materials show. Of course a general, consistent practice of non-refoulement (without more) is not sufficient to establish the development of a CIL - one must consider at the same time whether the practice was by reason of the States' legal obligation, and I shall therefore consider these factors together.

55. We have been referred to many academic writings, some supporting the argument that non-refoulement of refugees has developed into a CIL, and some disputing that. Of course it is not just a contest of numbers. What matters is the quality of the publication and the eminence of the writer, and when a conclusion is a result of the meeting of many eminent minds from different regions, that to my mind compounds the significance and authority of the views expressed.

56. With this approach, it seems to me that the San Remo Declaration, and Lauterpacht and Bethlehem's publication, together with the views expressed at the meeting of international law experts at the Cambridge Lauterpacht Research Centre for International Law are of particular significance and authority. In my view they affirm the Appellants' argument that the concept of non-refoulement of refugees has developed into a CIL.

57. Further in *Prague Airport* Lord Bingham held (para. 26):

> "There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and who applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear".

However, as mentioned earlier, Lord Bingham did follow this statement by saying that "that principle, *even if* one of CIL", did not avail the appellants in that case as they were still in Prague so that in any event the CIL would not have applied.

58. Nevertheless, Lord Bingham's acknowledgment of the principle as being of "general acceptance" is further confirmation of the views of eminent academics such as Lauterpacht and Bethlehem that the concept of non-refoulement of refugees has developed into a CIL.

59. Before coming to the above view, I had considered the fact that even after 2001, Coleman remained of the view in his publication in 2003 as well as Hathaway in 2005 that the concept of non-refoulement of refugees was only a regional practice which does not include Asia.

However I note the particular caution expressed by Coleman in his approach (p.46).

60. As for Hathaway's views, I accept that the position in Asia is of particular relevance, not so much because Hong Kong is situate within it, but because Asia has seen large-scale movements of displaced people, and consequently there exists more evidence of the practice of States (whether of refoulement or non-refoulement) than in other places where the issue would be more theoretical than real.

61. I think that this is what was meant by Hartmann J when he referred to the practice of States "specially affected". The learned judge was, in my respectful view, correctly tracking the language of the International Court of Justice in the *North Sea Continental Shelf Cases* [1984] ICJ Rep. 3 where at paras. 73-4, it was held:

> "73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were *specially affected*….
>
> 74. …Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are *specially affected*, should have been both extensive and virtually uniform in the sense of the provision invoked: -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.". (Emphasis added).

62. Although Allain appears to have varied the meaning of these words "specially affected" by treating the term as meaning the State members of the UNHCR Executive Committee, who he says were specially affected as protectors safeguarding the interests of refugees (p.539), Coleman is of the view, correctly in my opinion, that in light of the *North Sea Continental Shelf Cases*, these words mean those States whose *own* interests were affected by the issue.

63. If those States which are the destinations (whether permanent or temporary) of mass influxes of refugees clearly practise non-refoulement, at obvious cost to their own economic and social development, that can be evidence that they do so only by reason of legal obligation. However one must also be cautious of making assumptions of acceptance of legal obligations from the practice of non-refoulement alone, as otherwise States would be forced to terminate all moral or humanitarian actions for fear of assuming onerous legal obligations (*Flores v Peru* para. 8). A kind neighbour who gives food to a hungry child should not be too easily regarded as having assumed a legal obligation to bring up the child.

64. The Director has pursued the line of argument that the concept of non-refoulement has not been practised in Asia, being a part of the world specially affected by the refugee problem. He derives assistance from the fact that of 193 States recognized by the United Nations, 48 States are not signatories of the RC, and of those 48 States, 25 are Asian.

65. However, as mentioned earlier, it is not necessary that a rule must be globally practised before it can develop into a CIL. And although there were references in publications to apparent refoulement

practices (such as stories of boatloads of displaced people being pushed back out to sea), it is difficult to ascertain to what extent these were merely anecdotal.

66. In my view what is important is that since the RC (which is now in its 50th year), no State has explicitly asserted that it is entitled, *solely as a matter of legal right in public international law*, to return genuine refugees to face a well-founded fear of persecution, and has openly done so. Clearly the RC has had an impact, even on non-signatory States, and has helped to create a CIL of non-refoulement of refugees.

67. In conclusion on this issue, I would agree with the learned judge that on balance, the Appellants are correct in asserting that the concept of non-refoulement of refugees has developed into a CIL.

(2.1) On the public international law level, did the Government of Hong Kong have the capacity to "contract out" of the developing law by being a persistent objector? Did it in fact do so?

68. The concept of "persistent objector" is a principle in public international law where "a State ... in the process of formation of a new customary rule of international law, disassociate[s] itself from that process, declare[s] itself not to be bound, and maintain[s] that attitude" (*Fitzmaurice* pp.99-100). Evidence of objection must be clear. See the *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116, at p.131 and *Domingues* paras. 40-42, 84-87.

69. It is clear from many statements made by the Hong Kong Government that it stands on its rights under the Ordinance to remove persons who may be refugees. And article 154(2) of the Basic Law provides that the HKSAR Government has the power to "apply immigration controls on entry into, stay in and departure from Hong Kong of persons from foreign states and regions".

70. But it is important to remember that only States can be persistent objectors, a point with which Mr Chow, leading counsel for the Director, agrees.

71. Mr Chow accepts that the Government of Hong Kong does not have the capacity *in its own right* to raise objections as a persistent objector, as the development of CIL is a matter of public international law between States. But he relies on the non-extension of the RC to Hong Kong by both the UK and the PRC, the reservations made to the ICCPR and the Convention for Rights of the Child in respect of immigration, and the implied authorization by Hong Kong's sovereign state of the statements made by officials of the Hong Kong Government.

72. However it seems to me that these could all be in the context of the non-applicability of the *RC* to Hong Kong. And as we have seen, even if the contents are similar, CIL is independent from Convention rights and obligations. I do not think we have been referred to any clear statements where there has been a disassociation from the process of the development of the concept of non-refoulement of refugees into a CIL. To this extent therefore I would decline, with respect, to agree with Hartmann J's view that Hong Kong has been a persistent objector. However it is not necessary to reach any final conclusions on this

interesting issue in light of my view on the effect of domestic legislation, which will be set out later in this judgment.

(2.2) Is non-refoulement of refugees a peremptory norm (jus cogens) from which no State can derogate, hence the Director would be bound to comply with that CIL?

73. The Appellants argue that the concept of non-refoulement of refugees is a "peremptory norm" from which no State can derogate, hence the Director would be bound to comply with that CIL. A "peremptory norm" is a concept embodied in the Vienna Convention on the Law of Treaties (art. 53) as being "a norm accepted and recognized by the international community of States *as a whole* as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". (Emphasis added).

74. There is an inherent difficulty in establishing that a rule has attained the status of a peremptory norm. Even Allain (who has supported the idea of non-refoulement of refugees as jus cogens) accepts that a double *opinio juris* is required (p.538) - first, the acceptance by States that a rule has developed into a CIL, and superimposed on that, the acceptance by States *as a whole* of its non-derogable and permanent nature.

75. A number of academic writers, Godwin-Gill, Lauterpacht and Bethlehem, Coleman and Ford chief among them, have concluded that the concept of non-refoulement of refugees has not attained the status of a peremptory norm.

76. If the prohibition on refoulement of refugees is not derogable, there would be real difficulties. It will call into question the validity of Art. 33(2) of the RC itself, which permits refoulement if the refugee poses a danger to the security of a receiving State.

77. In *Zaoui v Attorney General (No.2)* [2005] 1 NZLR 690, the Supreme Court of New Zealand had to consider the argument whether the prohibition on refoulement *to torture* had attained the status of a peremptory norm. The Court held after a comprehensive study that "while there is overwhelming support for the proposition that the prohibition on torture itself is jus cogens, there is no support in the state practice, judicial decisions or commentaries to which we were referred for the proposition that the prohibition on refoulement to torture has that status" (para. 51). That being the case for torture, *a fortiori* (in my view) where the prohibition is on refoulement to a lesser threat.

78. I would therefore conclude that the concept of non-refoulement of refugees has not attained the status of a peremptory norm (jus cogens).

(2.3) Has the CIL of non-refoulement of refugees been overridden by domestic legislation?

79. I have earlier said that it is not necessary for this court to decide if Hong Kong was a valid persistent objector during the development of the concept of non-refoulement of refugees. In my view, this is because of the clear effect of domestic legislation enacted in the Ordinance.

80. The concept of persistent objector is a matter of *public international law*. But whatever the position on the international stage, the Appellants would not be able to assert rights under a CIL if it is clearly overridden by *domestic* legislation to the contrary, and the Director says that the Ordinance is such a piece of legislation.

81. Indeed I understand it to be common ground between the Appellants and the Director that when there is clear domestic legislation to the contrary, a CIL would not be part of the law of Hong Kong, because legislation would override the Common Law into which CIL would otherwise be incorporated (*Trendtex*). Mr Dykes for the Appellants accepts that "the [Director] is right to say that the binding norm of CIL can be repudiated by legislation if there is no successful persistent objection".

82. Indeed in *Regina v Secretary of State for the Home Department, Ex parte Thakrar* [1974] 1 QB 684, the Court of Appeal, following Lord Atkin's judgment in *Chung Chi Cheung v The King* [1939] AC 160, held that the applicant could not invoke any right under the rule of international law which placed upon a state a duty to receive its own national, because that rule was inconsistent with the domestic law, viz. the Immigration Act 1971 under which that national would require leave to enter.

83. However Mr Dykes argues that the law now is that when one construes domestic legislation, one should apply the principle of legality, that is to say, that a power in general terms should not be taken to authorize the doing of an act adversely affecting the legal rights of citizens (*Her Majesty's Treasurer v Mohammed Jabar Ahmed and others* [2010] UKSC 2).

84. In *Ahmed*, the Supreme Court of England considered the effect of the Terrorism Order 2006, which was an Order in Council made *without Parliamentary scrutiny*. Under that Order, a person's assets may be frozen automatically upon his name being included in a list of terrorism suspects. The person had no right to challenge his inclusion in the list, and there was no time limit to the freezing order. The Supreme Court held that the Terrorism Order should be quashed. Mr Dykes argued that *Ahmed* has superceded *Thakrar*, and the courts in Hong Kong should construe the Ordinance in a manner that does not adversely affect the Appellants' "rights" of non-refoulement under CIL.

85. But with respect, it seems to me that this is a circuitous argument. The Appellants have *no constitutional right* to remain in Hong Kong. And in *Ahmed*, it was accepted that Parliament *can* legislate contrary to fundamental principles of human rights if the language is sufficiently clear. It is only where general or ambiguous words are used that fundamental rights could not be overridden, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process" (para. 111, quoting Lord Hoffmann in *Simms*).

86. In other words, Parliamentary sovereignty remains supreme, and the issue is one of interpretation of the legislature's intention. The same conclusion was reached in *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109, where domestic legislation was held effective to override provisions in the ICCPR. It would be noted that in *Prabakar* the Court of Final Appeal held that it was unnecessary to decide the issue whether as a matter of Hong Kong domestic law, the Secretary for Security

had a legal duty to follow the policy not to deport torture claimants. The Court of Final Appeal assumed, without deciding, that the Secretary was under such a duty, and expressly stated that it "must not be taken to be agreeing with the views ... that such a legal duty exists" (para. 4).

87. So it seems to me that it is a question of construction of the Ordinance to see if it was the legislature's clear intention that the Director has the power to remove persons such as the Appellants even if their claims to be refugees are verified.

88. Hartmann J held that the wide powers given to the Director under the Ordinance were sufficiently clear to have the effect of overriding the CIL of non-refoulement of refugees. And he held that in any event he was bound by the decision of this court (Sir Derek Cons V-P, Clough and Penlington JJA) in *Madam Lee Bun and another v Director of Immigration* [1990] 2 HKLR 466.

89. In *Lee Bun*, the applicants had entered Hong Kong from China claiming to be political refugees who would face persecution if returned. They sought judicial review against the Director's removal orders claiming rights under both the RC and CIL. Their applications were dismissed by the Court of Appeal.

90. The Court assumed, without deciding, that the concept of non-refoulement of refugees had developed into CIL, but held that the scheme of the Ordinance (amongst other things) showed the legislature's intention that, apart from Vietnamese refugees for whom there were specific provisions, refugees were not to be accorded any special rights and that the discretion given to the Director in the Ordinance remained

unaffected by rules of CIL (p.470F-H, 472 D-F). By operation of the *expressio unius exclusio alterius* maxim of interpretation, the specific provisions for Vietnamese refugees meant that all *other* refugees fell to be dealt with under the Director's powers of removal. With the later repeal of the specific provisions for Vietnamese refugees, the position reverted to is that the Director's discretion remains unfettered.

91. Mr Dykes has argued that this court is not bound by the judgment in *Lee Bun* because it was "plainly wrong". He argues that the Vietnamese refugees may have included economic migrants, and that the provisions for Vietnamese refugees gave them special treatment *on top of* CIL rights of non-refoulement.

92. With respect to Mr Dykes, I do not agree. Although the term "Vietnamese refugees" was not defined, the provisions were enacted under the Comprehensive Plan of Action agreed with the UNHCR, and it would have been inconsistent for the term "refugee" to have had a different meaning from that under which the UNHCR operated (and continues to operate). Vietnamese refugees were therefore just one particular class of the "refugees" with whom our appeals are concerned.

93. Further I do not agree with the argument that Vietnamese refugees were given rights *on top of* a CIL right of non-refoulement. On the contrary, there is a clear intention to retain flexibility to repatriate them (see s.13A (2) and (4) (c) and s.13E). Statements made in the Legislative Council also made it clear that repatriation was regarded as a possible alternative course of dealing with the refugees, at least in theory (Hong Kong Legislative Council - 30 June 1982, p.1022, 1024). This position is also consistent with the non-extension of the RC to Hong Kong and the

reasons for that decision expressly declared in Parliament, even though reservations could have been made to the more onerous articles, such as those providing for accommodation, education, etc.

94. Using all relevant interpretative factors, I take the view that there was a clear legislative intent to keep the Director's powers unfettered, thereby overriding the operation of the CIL of non-refoulement of refugees. When one bears in mind the specific provisions enacted to cater for Vietnamese refugees, it is clear that the legislation which gives the Director power to refoule refugees was not an "unnoticed and unmentioned" piece of legislation which would engender skepticism about any general or ambiguous words found.

95. As for the Appellants' argument based on the Fugitive Offenders Ordinance s.5 (1) (c), I do not see how it can help them. If the CIL of non-refoulement of refugees applies in Hong Kong, it would not have been necessary to enact legislation preventing the surrender of fugitive offenders who are refugees and who face persecution on return.

96. Accordingly, I agree with respect with the decision of Hartmann J that the Ordinance shows a clear legislative intent to give an unfettered discretion to the Director, sufficient to override the CIL of non-refoulement of refugees.

(3) Even if the concept of non-refoulement of refugees is not part of the law of HK, has the Director as a matter of practice exercised his discretion such that it has de facto recognized that concept?

97. I can deal with this part of the argument very briefly. It is well-established that it is for the Director to administer the immigration

regime (*Ho Ming Sai* p.30 following the Court of Final Appeal in *Lau Kong Yung).* The evidence is clear that in any case where the Director decides not to remove a genuine refugee, that decision is made on humanitarian grounds, and not as a de facto recognition of any legal obligation. It is settled law that there is no duty on the part of the Director to take into account humanitarian or compassionate factors (*Lau Kong Yung*). To decide otherwise would be to enable incorporation of the CIL through the back door (*R v Secretary of State for the Home Department, exp Brind* [1991] 1 AC 696 p.762).

(4) If non-refoulement is part of the law of Hong Kong under either the CIL scenario or the discretion scenario, is the Director obliged to undertake his own RSD instead of the present arrangement with the UNHCR?

98. As a matter of completeness, I would give my thoughts on this issue. If the CIL applies, there must be a system for RSD (*Saad* para. 16) but that is not to say that it must be an internal government system. It has not been suggested by the Appellants that the CIL imposes standards of RSD *higher* than those imposed by the RC. And yet the RC does not specify procedures for RSD, leaving the methods of RSD to be decided by the signatory States themselves (*Godwin-Gill* p.533).

99. As mentioned earlier, the PRC leaves RSD to the UNHCR. It can reasonably be expected that this agency, established under the aegis of the United Nations and operating under a mandate to protect refugees, would possess the integrity and ability, and the necessary networks and experience, to undertake a fair and efficient RSD. The UNHCR in fact has established Procedural Standards for the guidance of States, and these are the very standards being followed in the RSD in Hong Kong.

100. I do not read *Prabakar* as suggesting that the procedures adopted by the UNHCR were sub-standard. The finding against the Director in that case was because unexplained decisions rejecting a claimant's *refugee* status were being used to reject claims under *CAT* (paras. 46, 69).

101. As for the allegations and complaints made in individual cases, the ones most pressed upon the court were that no written reasons were given for rejection, and that appeals were undergone instantly with no time to prepare for them. However there is in fact evidence that the practice was to give brief written reasons, and that a claimant has time to prepare his case between the initial rejection and the appeal to a different officer within the UNHCR. A letter from the UNHCR dated 23 November 2007 states that the rationale for the brevity of reasons was to protect the claimants' confidentiality. No doubt that could be waived if an individual claimant wishes. And we have seen documents emanating from the Director quoting reasons given by the UNHCR for rejecting a claimant (Chiu III). In any event, as I understand the evidence, it remains open to claimants to ask the Director to consider humanitarian or other claims before execution of a removal order (Chiu III).

Order

102. For these reasons, I would dismiss the appeal with an order nisi that the Appellants bear the Director's costs (together with a certificate for two counsel) and that the Appellants' own costs be taxed in accordance with Legal Aid Regulations.

Hon Lam J:

103. I agree and have nothing to add.

(ANDREW CHEUNG)	(MARIA YUEN)	(M H LAM)
Chief Judge, High Court	Justice of Appeal	Judge of the Court of First Instance

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