

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**MISCELLANEOUS PROCEEDINGS NO. 34 OF 2011 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL
FROM CACV NO. 59 OF 2010)**

Between:

CH

Applicant

And

DIRECTOR OF IMMIGRATION

Respondent

Appeal Committee: Chief Justice Ma, Mr Justice Chan PJ and
Mr Justice Ribeiro PJ

Date of Hearing: 5 December 2011

Date of Determination: 5 December 2011

D E T E R M I N A T I O N

Mr Justice Ribeiro PJ:

1. The applicant seeks leave to appeal from the judgment of the Court of Appeal¹ dismissing his appeal from the judgment of Andrew Cheung J (as Cheung CJHC then was) refusing his application for judicial review.²

¹ [2011] 3 HKLRD 101.

² HCAL 24/2009 (5 January 2010).

2. The applicant came to Hong Kong on 12 July 2008 travelling on a passport issued by the United Republic of Cameroon. He obtained admission and permission to stay as a visitor until 26 July 2008 on his representation that he had come to purchase electronic appliances.

3. On 25 July 2008, just before expiry of his limit of stay, he stated that he was making a claim under the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment 1984 (“the Convention”) and sought an extension of stay from the Director of Immigration. An extension was refused.

4. Although Mr Timothy Parker, appearing for the applicant, has sought to raise certain other matters, the sole decision challenged by the applicant, and in respect of which leave to apply for judicial review was granted and evidence filed, is the decision of the Director to refuse an extension of stay. We shall deal with this application on that basis. The substantive torture claim has yet to be determined and no challenge relating to that claim was before the courts below.

5. The applicant’s essential complaint is that the Director’s policy of refusing an extension of stay pending determination of Convention claims made in Hong Kong results in the claimants becoming overstayers who are in breach of immigration laws, liable to detention and prosecution. It is also suggested that the policy admits of no exceptions and so involves the Director in fettering his discretion.

6. This complaint has been comprehensively dealt with in the courts below. The policy applicable in Hong Kong involves recognition of the negative duty under the Convention against refoulement of successful claimants to the State where they would face a substantial risk of torture. Pending determination of such

a claim, the claimant is not removed from Hong Kong. It is accepted policy, in accordance with this Court's decision in *Secretary for Security v Sakthevel Prabakar*,³ that investigation of the claim must be carried out taking into account all relevant considerations and observing high standards of fairness. It was also accepted in the courts below that the policy of the Secretary for Justice is not to prosecute Convention claimants as overstayers while their claim is pending. Whether there should be a prosecution if the claim fails depends on discretionary considerations.

7. The courts below found that no basis was shown for contending that the Director's policy of refusing an extension of stay pending determination of torture claims is absolute and a fetter on his discretion. Nor was any basis shown for saying that the policy is unlawful or unreasonable. Nothing in the Convention requires a State Party to confer any particular immigration status on a claimant. Nor has it been shown, either in relation to this applicant or generally, that the policy is in breach of the duty to observe high standard of fairness in processing claims.

8. The effect of the applicant's argument is that an extension of stay should be granted whenever a Convention claim is made, pending its determination, however unmeritorious the claim might be. That would undoubtedly encourage bogus claims and the Director cannot be criticised for not adopting such a policy. We see no substance in the proposed appeal and accordingly refuse leave with costs.

³ (2004) 7 HKCFAR 187 at §43-45.

(Geoffrey Ma)
Chief Justice

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

Mr Timothy Parker (instructed by Messrs Barnes & Daly) for the Applicant

Mr Anderson Chow SC (instructed by the Department of Justice) for the Respondent