CACV 44/2011, CACV 45/2011, CACV 46/2011, CACV 47/2011
AND CACV 48/2011

CACV 44/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 44 OF 2011

(ON APPEAL FROM HCAL NO. 10 OF 2010)

BETWEEN

MA	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

CACV 45/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 45 OF 2011

(ON APPEAL FROM HCAL NO. 73 OF 2010)

BETWEEN

GA	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

CACV 46/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 46 OF 2011

(ON APPEAL FROM HCAL NO. 75 OF 2010)

BETWEEN

PA	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

CACV 47/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 47 OF 2011

(ON APPEAL FROM HCAL NO. 81 OF 2010)

BETWEEN

FI	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

CACV 48/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 48 OF 2011

(ON APPEAL FROM HCAL NO. 83 OF 2010)

BETWEEN

JA	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

(Heard Together)

Before: Hon Stock VP, Kwan and Fok JJA in Court

Dates of Hearing: 4-7 September 2012

Date of Handing Down Judgment: 27 November 2012

J U D G M E N T

Hon Stock VP:

1. I agree with the judgment of Fok JA.

Hon Kwan JA:

2. I agree with the judgment of Fok JA.

Hon Fok JA:

A. Introduction

3. These are appeals from a judgment of A. Cheung J (now Cheung CJHC) dated 6 January 2011 by which, save to the limited extent described below, he dismissed five applications for judicial review against the Director of Immigration.

4. It is common ground that the main issue in these appeals, as it was below, "concerns the circumstances, if any, under which a mandated refugee or a screened-in torture claimant, 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)" (Judgment §1).

5. That issue arises because, as a result of the need, it is said, in view of Hong Kong's circumstances, to maintain effective immigration control, as well as the fact that the United Nations Convention relating to the Status of Refugees 1951 has never been applied to Hong Kong, the Government has consistently denied any legal obligation as regards refugees, including any obligation to admit refugees and permit them to take up available employment here. Similarly, in respect of torture claimants, although the CAT[1] applies in Hong Kong, the Government denies any legal obligation to allow screened-in torture claimants to work in Hong Kong. Nevertheless, the Director acknowledges having a discretion, to be exercised on an exceptional basis, to permit mandated refugees or screened-in torture claimants to work.

6. In these appeals, the appellants maintain their challenge to the lawfulness of the Government's denial of any legal obligation to permit them to work whilst they are here in Hong Kong.

B. The appellants

7. Of the appellants in this Court, applicants below, four of them are mandated refugees and one is a screened-in torture claimant. The Judge described their individual circumstances in §§2 to 11 of the Judgment below. It is not necessary to repeat those circumstances at length in this judgment but instead it is sufficient to say that it is clear from them that the appellants have all been effectively stranded here in Hong Kong for a prolonged period of time: each of them has been here between 7 and 12 years and they each respectively obtained official recognition of their status between 4 and 10 years ago.

8. As a matter of context, it was stressed on behalf of the appellants that they are not asylum seekers but instead they are persons who have had their status officially recognised as mandated refugees and a screened-in torture claimant respectively. As such, they are not economic migrants. They are individuals who necessarily cannot return to their homes because they cannot be expected to return to face a well-founded fear of persecutory treatment or torture. They are stranded in Hong Kong in the sense that if they could go elsewhere they would but they cannot. In addition, they are unable to engage in any economic activity either here or anywhere else.

9. It is also correct, as a matter of context, that the appellants form part of what is at the moment a small group: certainly a very small group relative to the total number of asylum seekers in Hong Kong. The evidence shows that in the years 2005 to 2008 a total of 5,838 new claims for asylum were made, 5,396 claims were concluded (i.e. recognised, rejected or withdrawn) and 228 asylum seekers recognised as mandated refugees.[2] The evidence also shows that, of the total of 82 mandated refugees in Hong Kong as at 31 January 2010, there are only 15 such mandated refugees who have remained in Hong Kong for more than 5 years post-recognition of their status.[3] JA, the screened-in torture claimant, is the only such torture claimant at this time.

C. The Judgment below

10. In the court below, the appellants challenged the Government's position and asserted that it infringed various human rights provisions, namely the right to privacy (BOR14[4]/ICCPR17[5]), the right not to be subjected to cruel, inhuman or degrading treatment (BOR3/ICCPR7), and the right to work (ICESCR6[6]). They also relied on rights under the Basic Law, including in particular the right to freedom of choice of occupation in BL33[7].

11. The Judge held (Judgment §42), following the judgment of this Court in *Ubamaka Edward Wilson v The Secretary for Security* [2011] 1 HKLRD 359, that the appellants' reliance on the rights guaranteed under the HKBOR and the ICCPR must be rejected because of HKBORO[8] s. 11.

12. So far as the appellants' reliance on ICESCR6 was concerned, the Judge held (Judgment §47) that the restrictions placed by the Director on mandated refugees and screened-in torture claimants in relation to their ability to work whilst remaining in Hong Kong could not be successfully challenged under that provision by reason of the reservation made by the UK Government when the ICESCR was applied to Hong Kong.

13. In relation to BL33, the Judge held that, on a generous and purposive construction, this does not guarantee the right to be employed or to be employed in any particular field of occupation (Judgment §65) and that, when BL33 was read together with BL39(1) and BL41, the asserted right to take up available employment was not intended by the drafters of the Basic Law to extend to mandated refugees and screened-in torture claimants, such a right having been specifically removed by the UK Government's reservation to ICESCR6 (Judgment §71).

14. The Judge therefore held that the appellants' judicial review challenges, insofar as they were based on rights guaranteed under the various instruments in question as directly enforceable rights in their favour, must fail (Judgment §76).

15. However, the Judge accepted that in principle, in the case of a mandated refugee or screened-in torture claimant, a prolonged period of prohibition against taking up available employment, when there was 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 (Judgment §79) but this would turn on the circumstances of an individual case (Judgment §80) and one could not say that the Director's policy amounted to inhuman or degrading treatment of mandated refugees and screened-in torture claimants, even in a prolonged situation (Judgment §82).

16. Applying the heightened anxious scrutiny approach, the Judge did not consider that the Director's policy was irrational or unreasonable (Judgment §104) but he did conclude that, in refusing their requests, the Director had not properly considered the requests by two of the appellants (MA and GA) to grant them permission to take up available employment (Judgment §128) and quashed those two decisions (Judgment §131).

17. Finally, the Judge rejected the appellants' challenges to their being required to enter into recognizances (Judgment §140) and to the appellant JA's challenge to the deportation order made against him (Judgment §144).

D. The issues on appeal

18. On appeal, the appellants maintained their contention that the Government's denial of a legal duty to permit them to work contravened the same human rights provisions, namely the right to privacy (BOR14/ICCPR17), the right not to be subjected to cruel, inhuman or degrading treatment (BOR3/ICCPR7), and the right to work (ICESCR6).

19. They advanced, as a core proposition, that "The Director cannot justify the application of a provision or policy denying permission to work to an individual, pending his resettlement or departure, who is: (a) a mandated refugee or screened-in torture claimant, and (b) who has already been present in Hong Kong for more than 4 years." On the basis of the various human rights provisions relied upon, the appellants sought suitable declaratory relief. Such relief was sought also on behalf of the appellant MA, notwithstanding the fact he has now married a Hong Kong permanent resident and obtained a dependency visa and Hong Kong identity card so that he is able to work here. Since that particular status is not immutable, the fact of MA's present ability to work does not, in my view, stand as a bar to his obtaining such relief to which he, together with the other appellants, might be legally entitled.

20. So far as HKBORO s. 11 is concerned, the appellants contended, also as a core proposition, that "The exclusionary rule in HKBORO s. 11 does not extend beyond immigration legislation provisions which (or whose application) address the right to enter, remain or resist removal. It does not therefore extend to all provisions of immigration legislation and their application."

21. That core proposition relating to HKBORO s. 11 is a critical part of the appellants' case on appeal and the first main issue on these appeals is whether this distinction is a valid one, with the result that the immigration reservation reflected in s. 11 is not applicable to the appellants so that they can directly enforce rights under the HKBOR and/or ICCPR. If they can, subsidiary issues arise as to whether those rights are engaged.

22. The second main issue on these appeals concerns the extent to which the appellants are able to assert rights under the ICESCR. That issue raises the fundamental question of whether there is any relevant reservation concerning the right to work in ICESCR6.

23. Third, it falls to consider whether the appellants' rights under BL33 have been infringed since there is no question of that right not being available to the appellants.

24. If the appellants are able to rely on any of the human rights provisions or BL33 to assert a right to work, the question of the correctness of the appellants' core proposition set out in paragraph 19 above arises, as does the question of whether the Government can justify a denial of permission to work in those circumstances.

25. Next, an issue is raised in the Director's respondent's notices in the appeals as to whether the Judge was right to apply a higher standard of review of decisions taken by the Director pursuant to the relevant policy.

26. Finally, it is necessary to consider the issues of whether the decisions to place the appellants on recognizance and to maintain a deportation order against JA are unlawful.

27. The Court has been much assisted by, and is grateful for, the very thorough and able submissions made on behalf of the appellants, represented by Mr Michael Fordham QC leading Mr Earl Deng, and also on behalf of the respondent, represented by Mr Paul Shieh SC leading Ms Grace Chow.

E. BOR/ICCPR

E1. The construction of HKBORO s. 11

28. Mr Fordham made it clear that he was not contending, in this Court, that HKBORO s. 11 was unconstitutional or that the reservation to the ICCPR was invalid and could be disapplied. Arguments to that effect were addressed to the Court of Appeal in *Ubamaka* and rejected (see Sections F3.2 and F3.3 of the judgment in that case).

29. Instead, the appellants advanced the core proposition identified above, namely: "The exclusionary rule in HKBORO s. 11 does not extend beyond immigration legislation provisions which (or whose application) address the right to enter, remain or resist removal. It does not therefore extend to all provisions of immigration legislation and their application."

30. Mr Fordham submitted that HKBORO s. 11 does not cover every facet of a person's stay in Hong Kong and contended that the Judge was wrong in his conclusion that the present case did not concern the appellants' stay in Hong Kong on the basis that "their ability or inability to work is just one facet of their 'stay' in Hong Kong" (Judgment §38). Instead, Mr Fordham submitted that HKBORO s. 11 only precludes the invocation of ICCPR rights where an individual is asserting a right to be permitted to be here or a right not to be removed.

31. It was accepted by the appellants that it was a question of drawing a line. The appellants sought to draw that line at the simple question: Can the individual be permitted to enter or be removed? This, they contended, is the heart of sovereign immigration control and, whilst it was accepted that HKBORO s. 11 properly excluded the application of the BOR to that question, that was the limit to which it could be invoked. It was accepted that this is the ratio of *Ubamaka* at §135 (which, for the purposes of these appeals, was accepted to be binding on this Court), namely:

> "… there is a long line of cases decided in Hong Kong in which it has been confirmed that the effect of section 11 of the HKBORO and the immigration reservation to the ICCPR is that the provisions of the BOR and ICCPR respectively cannot be invoked to enable those not having the right to enter and remain in Hong Kong to resist removal or deportation".

32. Thus, Mr Fordham sought to draw a distinction between rights to be here and not to be removed, on the one hand, and rights while here, on the other hand. He further submitted that the imposition of a restriction on the right to work was not a decision concerning the right to be here or not to be removed and so a decision to impose such a restriction was one in respect of which the provisions of the BOR could be invoked.

33. The analysis of the correctness of the appellants' core proposition must focus on the proper construction of HKBORO s. 11 which provides:

> "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."

A key question of construction concerns the meaning of the word "governing" in the phrase "governing entry into, stay in and departure from Hong Kong". The appellants say this only relates to a person "not having the right to enter and remain in Hong Kong" and so this gives a clue to how the rest of s. 11 is to be construed.

34. Mr Fordham developed his core proposition in the following way. First, the context of HKBORO s. 11 is the UK reservation to the ICCPR and not a Hong Kong-specific context. Next, one can distinguish between provisions of the IO[9] which address whether a person is entitled to enter or is liable to be removed, on the one hand, and other provisions, on the other hand. Further, since IO ss. 2A and 7 talk of a "right to land" this limits the extent to which one can read across from the IO to HKBORO s. 11 because the latter provision does not use the expression "right to land", using instead the broader expression "right to enter and remain". Finally, whilst it was accepted that "stay in" encompassed the right to remain in Hong Kong and therefore a condition of stay imposed by an immigration officer concerning the duration of such stay (per IO s. 11(2)(a)), Mr Fordham drew a line at that point as regards the conditions of stay which were the subject of HKBORO s. 11. That is to say, those other conditions which might be imposed by an immigration officer upon entry (per IO s. 11(2)(b)) were beyond that line and not subject to the s. 11 exclusion. Similarly, other provisions in the IO were plainly not the subject of that exclusion: e.g. IO s. 37E (concerning the forfeiture of a ship), ss. 2AG and 37C (concerning certain criminal offences) and s. 53A (concerning appeal provisions).

35. In support of the distinction between rights to be here and rights while here, Mr Fordham relied on:

(1) CCPR General Comment No. 15 reflecting, at §5, the position as the HRC[10] saw it as regards ICCPR rights and their application to aliens, namely that the core of immigration sovereignty was the State's decision whether or not to admit an alien to enter or reside in its territory, and, at §6, making the general observation that "once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant."

(2) The fact that the context of the UK reservation to the ICCPR was the influx into the UK of East African Asians, who had asserted rights under the ECHR[11] to enter the UK. Under the ECHR, there was no equivalent right to that in ICCPR12(4) because the UK had not ratified Article 3(2) to the 4th Protocol to the ECHR. It was held in *East African Asians v United Kingdom* [1973] 3 EHRR 76 that they could rely on other rights, namely the protection of dignity of treatment and right to family life in order to assert a right to enter the UK. The aftermath of this decision was the context of the UK reservation to ICCPR, namely to stop persons claiming covenant rights to gain entry and not the broader proposition that aliens within a State's territory have rights they can invoke.

(3) The fact that the language of the reservation was expressed not in technical language to reflect any statutory scheme but in broad and general terms about stay and removal, so that the phrase "governing entry into [etc.]" was directed to the question of whether a person could come in and remain or resist being removed. Any link to immigration legislation was limited to those persons not having the right to enter and remain.

(4) The fact that the limitation of the reservation to entry and exit is reinforced by the need for a separate Hong Kong-specific reservation for ICCPR13. This, Mr Fordham contended, only made sense if a narrow meaning were given to the preceding reservation and was not necessary if a broad meaning were given to it.

(5) A narrow meaning to s. 11 also being supported by HKBORO s. 14, providing for temporary savings and excluding from the operation of the HKBORO a number of scheduled ordinances, including the IO, for a period of one year from its commencement date. Thus, it was submitted, the legislative draftsman recognised that the effect of s. 11 was far from excluding all aspects of immigration control from the operation of the HKBORO, hence the enactment of s. 14(2) and the inclusion of the IO in the Schedule to the HKBORO.

(6) The comments of the HRC in CCPR/CO/73/UK (Concluding Observations on the fifth periodic report submitted by the UK) at §§6 and 16 which, it was submitted, made no sense if the UK had entered a reservation including an exclusion of the operation of the ICCPR to immigration detention. Similarly, the UK response (CCPR/CO/73/Add.2) did not suggest, at §§11 and 12, that ICCPR9 (the right to liberty and security of person) did not apply in respect of detention because of the immigration reservation.

(7) The fact that the implications of a rejection of the suggested distinction would be surprising: for example, it would permit the denial of state benefits for asylum seekers; or would permit a reporting requirement under a recognizance that fell on the same day of the week as a person's day of religious observance.

(8) The following cases, which it was submitted also supported the distinction the appellants sought to draw, namely: *Wong King Lung & Others v Director of Immigration* [1994] 1 HKLR 312 per Jones J at pp. 325 and 327; *Hai Ho Tak v AG* [1994] 2 HKLR 202 per Mortimer JA at p. 208; *Chieng A Lac & Others v Director of Immigration & Others* [1997] HKLRD 271 per Keith J at p. 291; and *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 per Tang VP at §41.

36. I do not accept the appellants' submissions in this regard. As Nazareth JA held in *Hai Ho Tak* at pp. 208-209:

> "Suffice it to say that unless s.11 is ambiguous or obscure or leads to absurdity, it is to be given its ordinary or literal meaning. In the absence of ambiguity or obscurity, it is neither necessary nor permissible to refer to matters extraneous to the Ordinance, like the terms of the Covenant or the Siracusa Principles as has been attempted in the submissions and material presented to us."

37. In my judgment, HKBORO s. 11 is neither unclear nor ambiguous. Its language is not obscure, nor does reading it as referring to conditions of stay concerning the purpose for which entry has been granted lead to absurdity.

38. I would accept that the subject matter to which the immigration reservation is directed concerns immigration control. However, as a matter of principle, immigration control is not just about whether a person can enter a place and for how long before he can be removed. It also deals with the purpose for which he is allowed into that place: thus, a condition of stay as to that purpose must form a core ingredient of the relevant immigration decision whether to admit the person. There seems to me to be no reason or necessity to limit the sovereign ability of immigration control to a decision as to whether someone can enter or must leave. Instead, it may also include what the person can do on his being allowed to enter since the purpose for which a person is allowed to enter clearly impinges on the question of whether he should be allowed to enter at all. That purpose is inextricably linked up with the latter decision (as to whether to permit him to enter) and is therefore part of the immigration decision itself. To take a simple example, a student from, say, France enrolled for a degree course at a tertiary institution in Hong Kong may be granted permission to land subject to a condition of stay that he may remain in Hong Kong only for so long as he is in full-time education at that institution. The decision to impose that condition of stay on the student is part and parcel of the very decision whether to allow him to enter: but for his enrolment in his degree course, he would not have been allowed to enter otherwise than as a visitor only and for a much shorter period than he would require.

39. Thus, in my opinion, the meaning of the word "stay" in HKBORO s. 11 is clear and includes conditions of entry relating both to duration and purpose of entry. I consider that this conclusion is all the more supported when one reads across to IO s. 11, which is headed "Permission to land and conditions of stay" and which refers to a "limit of stay" in s. 11(2)(a) (defined in IO s. 2 as "a condition of stay limiting the period during which a person may remain in Hong Kong") and "other conditions of stay" in s. 11(2)(b). The references to "stay" in IO s. 11 relate both to duration and purpose and there is no good reason, in my view, to draw a distinction between the concept of "stay" in these two senses: duration and purpose are both clearly conditions of stay as a matter of statutory language and also conceptually. The language of the IO having been in place when the HKBORO was enacted, reading across in this manner is not only permissible but enables the Court to arrive at a proper purposive and contextual construction of HKBORO s. 11. I would therefore conclude that the appellants' distinction between IO s. 11(2)(a) and s. 11(2)(b) is artificial: there is no reason, in my view, why a condition of stay as to the limit of the duration of permission to enter is different from any another condition of stay.

40. It also falls to the Court to give the word "governing" in the phrase "governing entry into, stay in and departure from Hong Kong" its ordinary meaning, i.e. regulating, so that the immigration reservation means that the HKBORO does not affect immigration legislation regulating the decision whether to allow an alien to enter and, if so, for how long and for what purpose, or requiring him to leave.

41. It is, in my view, a powerful factor against the appellants' core proposition and proposed distinction between rights to be here and rights while here that, if that had been the intention of the legislation, its drafting could have been different and much simpler. Thus, HKBORO s. 11 could simply have read: "Nothing in this Ordinance shall, as regards persons with no right to enter or remain, confer any right on them to do so". Alternatively, the words "stay in" could simply have been omitted from the phrase in question.

42. In any event, the appellants' proposed distinction between rights to be here and rights while here is, with respect, too crude a distinction. It does not follow from my conclusion above that every decision or exercise of discretion by the Director is one in respect of which reliance on ICCPR rights is excluded. Nor do I understand such an extreme position to have been contended for by the Director, who accepts that a line must be drawn on one side of which are decisions which are caught by HKBORO s. 11 and on the other side of which are decisions which are not (such as, for example, a decision to forfeit a ship under s. 37E). Thus, the Director accepts that not all provisions under the IO are covered by HKBORO s. 11, which applies only to legislation insofar as it governs entry into, stay in and departure from Hong Kong of those not having the right to enter and remain here: to like effect, see *Hai Ho Tak* per Mortimer JA at p. 208 (lines 14-15).

43. It is, therefore, important to emphasise that it is not the case that HKBORO s. 11 means that an alien has no rights under the BOR while here and, as will be seen, there is authority suggesting that such rights can be invoked in respect of detention, i.e. something that has happened to the alien while he is here. Although it is not necessary for the purposes of these appeals to decide whether detention is outside the ambit of the phrase "governing entry into, stay in and departure from Hong Kong", it is sufficient to state that there is a clear difference between a decision to permit a person to land and to impose a condition of stay as to the purpose of his visit (e.g. to attend full-time education) and a decision to detain a person for some breach of an immigration condition. The former decision is bound up with the decision whether to let that person enter, whereas the latter decision is the consequence of whatever decision has been taken on the question of whether to admit and, if so, for how long and for what purpose. It is certainly arguable that the latter decision to detain may not be covered by the phrase "governing entry into, stay in and departure from Hong Kong" but, as I have said, it is not necessary to so decide in this case.

44. General Comment 15 at §§5 and 6 states the default position for aliens in the absence of any reservation. However, so far as Hong Kong is concerned, the obligations under the ICCPR are qualified by the immigration reservation and so the commentary is of limited assistance. In any event, even accepting that the commentary identifies the core immigration decision as being whether to admit an alien or not, that decision is, for the reasons I have addressed above, inextricably linked to the purpose of that alien's entry.

45. The *East African Asians* case does not, in my opinion, assist. It shows the immediate context before the UK made its reservation to the ICCPR in 1976. That reservation was extended to Hong Kong and was not confined to those considerations that triggered the making of the reservation in the first place. I do not consider that the case requires the Court to read the reservation otherwise than as its plain language requires.

46. As to the UK reservation to ICCPR13, this is reflected in the terms of HKBORO s. 12, which provides:

> "Article 9 [ICCPR13] does not confer a right of review in respect of a decision to deport a person not having the right of abode in Hong Kong or a right to be represented for this purpose before the competent authority."

I do not accept that this demonstrates that the intention of the immigration reservation reflected in HKBORO s. 11 must be to reserve something narrower, otherwise the reservation in respect of ICCPR13 was not necessary. The s. 11 reservation is a general reservation, not directed to any particular provision. By contrast, the s. 12 reservation is more specific: it deals with the deportation of a person not having the right of abode in Hong Kong and therefore covers a different class of persons, namely those with the right to enter but no right of abode.[12] Hence, a specific reservation was entered to exclude the operation of ICPR13 (equivalent to BOR9) to such persons.

47. Nor do I accept that the temporary savings in HKBORO s. 14 would have been unnecessary if HKBORO s. 11 is construed in the way contended for by the Director and as I have concluded it should be. I have already indicated that there are decisions of the Director which will not be caught by s. 11 and in respect of which ICCPR rights can be invoked. It is with regard to those decisions that s. 14, the effect of which is now spent, was directed.

48. The exchanges between the UK and the HRC relied upon by the appellants are, in my view, of little assistance. Generally, as a matter of statutory construction, when the words in a provision are clear there is no basis for resorting to extrinsic materials. Here, the meaning of HKBORO s. 11 is clear: this was also the view of Nazareth JA in *Hai Ho Tak* at p. 209 (line 5). In any event, the statements in these exchanges between the UK and the HRC, which took place in 2001, are not contemporaneous with the UK's ratification of the ICCPR in 1976. Furthermore, as a matter of context, those exchanges took place after the coming into effect of the Human Rights Act 1998 (in October 2000) so that, as a matter of UK domestic law, regardless of any reservation to the ICCPR, UK laws had to be compatible with the ECHR and a decision-maker would therefore have to justify any restriction on rights conferred by the ECHR. Since there was no reservation to the ECHR, the UK sought to justify restrictions on the relevant rights (see e.g. CCPR/CO/73/Add.2 at §§14 and 18). Taken in context, I do not think that one can extrapolate from the exchanges support for the contention that the UK did not consider the ICCPR reservation to be effective in respect of ICCPR rights.

49. Mr Fordham also referred to a report, CCPR/C/GBR/Q/6, from the HRC's 91st Session in 2007 concerning issues to be taken up with the UK on its 6th Periodic Report. In its reply to the list of issues raised by the HRC, the UK stated that it had no intention of withdrawing the reservation to ICCPR12(1) and 12(4) and referred to controlling immigration into the UK in terms of the right to enter and reside in the UK rather than to control of the purpose of entry (see p. 8, §10). However, it seems to me that this is a broad statement of the then current UK thinking rather than a statement in the context of immigration control in Hong Kong. Furthermore, I have already referred to the fact that, by the date of this report in 2007, the rights under the ECHR were protected in UK domestic law by the Human Rights Act with the consequence that many of the ICCPR rights are now duplicated and domestically enforceable without reservation (see p. 7, §3). This would perhaps explain why the UK did not raise any reference to any reservation in respect of treaty rights concerning its detention policy with regard to asylum seekers (p. 15, §21). I do not therefore consider that the appellants can derive assistance from this report in support of the core proposition advanced.

50. The alleged surprising results of the Director's position would not appear to arise given the Director's acceptance that there are some decisions under the IO which do not govern the entry into, stay in and departure from Hong Kong. Whilst it is not necessary, in order to illustrate this point, to address each of the examples given in the appellants' skeleton submissions as to rights that might be asserted by an alien while here, it is difficult to see how the imposition of medical or scientific experimentation could be said to form part of any relevant immigration decision that would be caught by HKBORO s. 11. Similarly, an unfair trial on prosecution for an immigration offence would plainly not, it seems to me, be within the contemplation of s. 11.

51. Finally, I come to the cases relied upon by the appellants, some of which I have already referred to above.

52. I do not accept that the appellants' case is supported by *Wong King Lung*. Counsel's submission in that case, recorded at p. 325 (lines 24-29), upon which Mr Fordham placed much reliance, was that:

> "… it is clearly not the legislative intention [of the HKBORO] to exclude all decisions which the Director of Immigration can make in relation to persons who do not have the right of abode. The Director has the power to maintain in custody persons who are suspected to be illegal immigrants but in that respect those persons would be able to bring a claim under the BORO if it is alleged that there has been a breach of their rights during custody."

That submission was apparently accepted by Jones J at p. 327 (lines 16-18) when, after having upheld the application of HKBORO s. 11 to the case before him, he said:

> "Nonetheless, I am satisfied that if any of the applicants' rights are infringed whilst they are in Hong Kong, as for instance, under Article 3, which is concerned with torture, inhuman or degrading treatment, those rights are protected under the BORO."

53. Neither the submission in *Wong King Lung* nor the Judge's acceptance of it supports the distinction the appellants seek to make between rights to be here and rights while here. As I have already indicated, it was accepted by the Director that there may be circumstances in which a person subject to a decision of the Director would be able to invoke rights under the BOR because the decision is not one governing his entry into, stay in and departure from Hong Kong. Not everything that happens to an alien in Hong Kong arises out of the decision which HKBORO s. 11 catches and, in respect of those other matters outside that particular decision, the alien can invoke rights under the BOR. In any event, as Jones J observed at p. 326 (lines 37-45), it is not the case that if the HKBORO does not apply the Court's jurisdiction is ousted entirely: there are still rights at common law and other rights under the IO unaffected by the immigration reservation.

54. Mortimer JA's observation in *Hai Ho Tak* (being the name under which *Wong King Lung* proceeded on appeal) at p. 208 (lines 14-15) that HKBORO s. 11 "applies to only part of the immigration legislation and its application; that is to legislation governing entry, stay or deportation of persons with no right to enter or remain" similarly does not assist the appellants. That observation states the position accurately: not every decision of the Director falls within s. 11.

55. In *Chieng A Lac*, Keith J (as he then was) held that HKBORO s. 11 did not exclude the application of the BOR to detention under IO s. 13D(1) since such detention did not amount to the application of immigration legislation governing stay in Hong Kong (see p. 291B-E). The argument that was advanced, and was accepted by Keith J, was that s. 11 only applied to lawful stay under a condition of stay and not to unlawful stay. On appeal in *Vo Thi Do & Ors v The Director of Immigration & Anor* [1998] 1 HKLRD 729, being the name under which *Chieng A Lac* went on appeal, Litton VP, giving the judgment of the Court of Appeal, rejected that argument and instead (at p. 748F-H) agreed with the Director's submission which was:

> "… that the words 'entry into, stay in and departure from Hong Kong' in s.11 should be given their ordinary meaning. 'Stay in Hong Kong' means what it says, and includes stay in a detention centre on order of the Director made under s.13D(1) of the Immigration Ordinance (Cap.115). Since the Vietnamese migrants are undoubtedly 'persons not having the right to enter and remain in Hong Kong' in terms of s.11, it follows that the [BOR] does not affect the power of detention under s.13D(1)."

Litton VP went on to say that s. 11 should not be given an artificial interpretation and that Keith J was not referred to *Hai Ho Tak* where the Court of Appeal appeared to have taken a broad view of s. 11 "as well". Although Litton VP noted that the construction of s. 11 did not affect the result of the case, I am satisfied that this part of his judgment construing s. 11 constitutes a separate, independent reason for the Court's decision and is therefore not merely an *obiter dictum*. I do not therefore consider that the appellants derive any assistance from the decision in *Chieng A Lac*.

56. Finally, the case of *A (Torture Claimant)* concerns the treatment of detainees in detention. The Court of Appeal held that because the power of detention under IO s. 32 had not been exercised under a sufficiently clear and certain policy, it violated the detainees' rights under BOR5(1). I have already indicated that it is not necessary for the purposes of these appeals to decide if detention is an immigration decision governing a person's entry into, stay in or departure from Hong Kong within HKBORO s. 11. However, it is right to note that the decision in *A (Torture Claimant)* may be difficult to reconcile with *Vo Thi Do*. *Vo Thi Do* was not cited in the judgment of the Court of Appeal in *A (Torture Claimant)*, nor was reliance placed on s. 11 to preclude reliance on rights under the BOR.[13] I do not therefore consider that *A (Torture Claimant)* assists the appellants in the present case as regards the construction of s. 11.

57. In conclusion on this issue, I would reject the appellants' core proposition and would therefore hold that HKBORO s. 11 does apply in the present case so that the appellants are not entitled to invoke rights under the BOR to challenge the lawfulness of the condition of stay imposed on them that they may not take up employment while in Hong Kong.

E2. Right to privacy (BOR14/ICCPR17)

58. In the light of my conclusion on the construction of HKBORO s. 11, it follows that the appellants are unable to rely on rights under the BOR.[14] For that reason, it is unnecessary to resolve the subsidiary issues that would have arisen if my conclusion on the construction of s. 11 had been otherwise. However, in deference to the importance of the question and the quality of the opposing arguments advanced to us, I propose to summarise the parties' respective contentions.

59. BOR14, which is in the same terms as ICCPR17, provides:

> "(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."

60. ECHR8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

61. Mr Fordham sought to draw a parallel between BOR14 and ECHR8 and the relevance of European case law on the ambit of the privacy right in BOR14, supported by authorities such as *Leung v Secretary for Justice* [2005] 3 HKLRD 657 at §120, *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 at §§54-60 and *Li Nim Han v Director of Immigration* [2012] 2 HKC 299 at §25.[15] Hence, Mr Fordham relied on *Niemietz v Germany* [1992] 16 EHRR 97 at §27 to support the proposition that protected family life, being fundamental to human dignity, includes the ability to work and earn a living as a practical economic facet of the founding, establishing and developing of relationships with other human beings. He also relied on *Sidabras v Lithuania* (2006) 42 EHRR 6 at §§49-50 to support the proposition that a policy preventing a class of persons from undertaking a class of work fell within the ambit of the right to respect for private life. In *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, the House of Lords recognised that cases such as *Sidabras* showed that a far-reaching ban on taking up employment did affect private life (§14) and Lord Bingham further observed (at §15(4)) that, being "[e]ffectively deprived of the ability to work, the applicants' ability to function as social beings was blighted."

62. In particular, Mr Fordham relied on *Tekle v Secretary of State for the Home Department* [2009] 2 All ER 193 holding that a lengthy delay in reaching a decision in respect of a claim for asylum could interfere with the claimant's right to respect for private and family life under ECHR8. He relied on §§5, 15 and 36 of the judgment as recognising that the right to work includes a right to be allowed to develop relationships with others. At §35, Blake J accepted the submission that the ability to take employment is an aspect of private life and, at §36, he held:

> "In my judgment, the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimant's ability to form relations either in the work place and outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom and it is maintained against someone who has been physically resident in the United Kingdom since the fresh claim was made four-and-a-half years ago this restriction can thus be said to be an interference with right to respect for private life. … The ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other beings is thus an aspect of private life."

63. For his part, Mr Shieh accepted that the refusal of permission to work for a long time could be an invasion of private life. He did not take issue with the proposition that the ability to work affected the ability to function as a social being and thus affected private life. However, he contended that the privacy right in the ICCPR is not to be equated with that in the ECHR. Mr Shieh submitted that the difference between the two human rights instruments was that ECHR8 uses the positive phrase "respect for" private life whereas BOR14 imposes a negative prohibition on interference with privacy. He submitted that the ECHR8 duty was wider and included not just a negative duty to refrain from unjustified interference but also a positive duty to show respect: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 per Lord Bingham at §18. Thus, Mr Shieh took issue with the notion that the non-interference duty in BOR14 equated with a duty to allow a person to work, insofar as that was necessary in order to comply with the positive duty to show respect for his private life.

64. Mr Shieh submitted that the ECHR8 right to respect for private life was wider than the right guaranteed in Hong Kong by BOR14, since the positive element of the duty was missing from the wording of the Hong Kong privacy provision. It was, he contended, one thing not to interfere in privacy but another thing to say that not allowing a person to work was a cause of interference with private life by, for example, not allowing him to develop relationships in the workplace. He did not dispute that the concepts of "privacy" and "private life" are similar but he contended that the different wording in the two human rights instruments supported a difference as to the content of the duty: in his submission, a prohibition means not taking away something one has already developed but "respect for" means taking steps to facilitate its development (which is absent in the prohibition context).

65. Mr Shieh relied on the decision of the Asylum and Immigration Tribunal in *MM (Zimbabwe) v Secretary of State for the Home Department* [2009] UKAIT 00037 holding that whilst respect for "private life" in ECHR8 does not include a right to work or study *per se*, social ties and relationships (depending on their duration and richness) formed during periods of study or work are capable of constituting "private life" for the purposes of ECHR8. He particularly relied on the reasoned analysis in §§22 to 41 of the decision to support his submission that a denial of a right to work did not *per se* constitute a breach of ECHR8 and submitted that this analysis was preferable to that in *Tekle* at first instance.

66. As to *Tekle*, Mr Shieh pointed to the fact that, on appeal (in *Secretary of State for the Home Department v DT (Eritrea)* [2009] EWCA Civ 442), the Court of Appeal reached a conclusion on that case by reference to the claimant's entitlement to rely on ECHR11 and hence decided it would be an unnecessary and disproportionate use of the Court's time to hear argument about ECHR8. However, at §29 Hooper LJ (with whom Laws and Keene LJJ agreed) made it clear that the Secretary of State's appeal was clearly arguable and expressed no view one way or another on the correctness of Blake J's conclusion that a refusal of permission to work was a breach of ECHR8.

67. As I have already noted, it is not necessary to decide the issue of whether the appellants are able to rely on the privacy right in BOR14 to challenge the lawfulness of the Director's refusal to grant them permission to work as a condition of their stay in Hong Kong because I have concluded HKBORO s. 11 prevents reliance on that right. The issue raises an important question and, as such, it should be answered when it is necessary to the determination of a case before the Court (see the approach in *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278 at pp. 282J and 287D-E).

E3. Protection against cruel, inhuman or degrading treatment (BOR3/ICCPR7)

68. It is similarly neither necessary nor appropriate to resolve the question of whether the denial of permission to work in the present cases amounts to subjecting the appellants to cruel, inhuman or degrading treatment but, again, I shall summarise the opposing arguments.

69. Mr Fordham submitted that, if HKBORO s. 11 did not preclude reliance on the BOR, the appellants must be able to rely on the protection of BOR3. BOR3, which is in the same terms as ICCPR7, provides:

> "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."

70. The definition of cruel, inhuman and degrading treatment was addressed in *Ubamaka* at §§71-75. To constitute inhuman or degrading treatment, the ill-treatment must attain a minimum level of severity and involve bodily injury or intense physical and mental suffering.

71. It was submitted that the prohibition against working imposed on the appellants in their present circumstances was the equivalent of the position prevailing in *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396, where Lord Bingham held (at §7) that:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being."

72. Mr Fordham submitted that there is a link with the concept of human dignity and that the ability to take up opportunities to engage in productive work is an important part of human dignity: see *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 per Nugent JA at §27. This is supported by the comment in UN High Commissioner for Refugees, General Conclusion on International Protection, 10 October 1988, No. 50 (XXXIX) at §(j), where the Executive Committee recognised:

> "… that the enhancement of basic economic and social rights, including gainful employment, [is] essential to the achievement of self-sufficiency and family security for refugees and is vital to the process of re-establishing the dignity of the human person and of realizing durable solutions to refugee problems".

See also, The Michigan Guidelines on the Right to Work, Michigan Journal of International Law (Winter 2010) Vol. 31 p. 293 at §§15-18 and 21.

73. Against this, Mr Shieh submitted that *Limbuela* was not a case defining the content of the BOR3 duty but was instead a decision in the framework of the UK legislation. Under the relevant legislation, asylum seekers were prohibited from working for 12 months after making a claim for refugee status and there were provisions governing support for them in the meantime to save them from being destitute, as statutorily defined, but only if they made a claim for refugee status as soon as reasonably practicable after their arrival in the United Kingdom. Thus, if there was no such claim, there was no duty to provide support. However, notwithstanding this, the House of Lords held (§§6-7, 37-38) that there came a point in time when the Secretary of State came under a duty to provide for asylum seekers to avoid a breach of their rights under the ECHR. Mr Shieh submitted that the duty to act to prevent a breach of ECHR rights was to be found in the domestic legislation itself, namely s. 55(5)(a) of the Nationality, Immigration and Asylum Act 2002, so whether or not there was a duty to take pre-emptive steps was to be decided on the particular wording of that domestic legislative provision.

74. Mr Shieh also submitted that the Court did not have to address the question of whether the denial of permission to work could constitute cruel, inhuman or degrading treatment in general but rather the specific question of fact of whether in any particular case that stage had been reached. He contended that it could clearly not be said that the denial of permission to work would inevitably lead in every case to mental breakdown. The Judge below did not make any findings on the evidence before him as to whether any appellant's case had reached the stage of constituting cruel, inhuman or degrading treatment (Judgment §84) and hence it could not be said that there was a breach of BOR3 yet.

75. In this regard, Mr Shieh submitted that the state of the evidence was insufficient to make such a finding and that the expert medical evidence of Dr Susan Mistler, a clinical psychologist, was unsatisfactory because she had only interviewed three of the five appellants.

76. Against this it must be recognised that Recitals 1 and 2 to the ICCPR[16] 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.

77. Mr Fordham submitted that the comments of the South African Constitutional Court in *Watchenuka* and the Michigan Guidelines supported the proposition that it was not necessary to interpose some other threshold, such as destitution, in order to arrive at a conclusion that particular treatment was cruel, inhuman or degrading treatment. In *Limbuela*, the particular statutory scheme made risk of destitution the relevant threshold for state action by reference to ECHR3 (equivalent to ICCPR7 and BOR3) but it is clear that the House of Lords did not consider it appropriate to wait until there was a breach of a Convention right before requiring the Secretary of State to act (see per Lord Hope at §61).

78. Nevertheless, as I have already said, it is neither necessary nor appropriate to decide this question in these appeals.

F. ICESCR

F1. The ICESCR "as applied to Hong Kong" (BL39)

79. It will be remembered that the appellants rely on the right to work under ICESCR6. That article provides:

"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.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

80. BL39(1) provides that the provisions of the ICESCR "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region". It was common ground that the phrase "as applied to Hong Kong" in relation to the ICESCR meant the same as it did in relation to the ICCPR. In this regard, therefore, it was accepted that the analysis in respect of the ICCPR in *Ubamaka* (see §§4-9 and 134-135) applies equally.

81. Hence, it follows that the ICESCR as applied to Hong Kong means the ICESCR subject to the UK's notification in respect of ICESCR6 (the terms of the notification are set out below).

82. Mr Fordham submitted that the better description of this notification is a declaration rather than a reservation but he confirmed he did not take a stand on its categorisation (by which I understood him to mean that its effect, and whether it was a reservation in respect of the obligation under ICESCR6, was a matter of construction) or on temporal gaps on the international stage (this having been an argument raised in the appellants' skeleton argument based on an apparent delay on the part of the PRC Government notifying the Secretary General of the UN of its position in respect of the application of ICESCR6 to Hong Kong).

83. The proper interpretation of the UK's notification in respect of ICESCR6 is an issue addressed below. However, a prior issue was addressed by the parties in argument, namely the construction of BL39 and the manner in which the ICESCR is intended to be implemented in Hong Kong law.

F2. The construction of BL39 and the implementation of the ICESCR

84. Because of the conclusion I have reached on the meaning and effect of the UK's notification in respect of ICESCR6 (see issue F3 below), it is not necessary to reach any conclusion on the question of whether BL39 gives domestic effect to the ICESCR and, if so, how. Nevertheless, this issue was argued at some length before us, it would appear, for the first time since the coming into effect of the Basic Law on 1 July 1997. Given the importance of the issue, it is perhaps surprising that it has not previously arisen for determination in the fifteen years since the Basic Law came into effect. For the same reason, I think it is appropriate to summarise the competing arguments advanced to us on this issue.

85. In *Ubamaka*, in the context of the ICCPR, the Court focused on the meaning of "as applied to Hong Kong" in BL39(1) and held that this phrase means that the implementation of the ICCPR is subject to the reservation entered by the UK Government when ratifying the ICCPR. The question of the domestic implementation of the ICCPR has not, however, been in issue because it is well-established that the provisions of the ICCPR as applied to Hong Kong were implemented through the HKBORO containing the BOR. The HKBORO effects the incorporation of the ICCPR as applied to Hong Kong into our laws: see *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 per Sir Anthony Mason NPJ at §53; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 per Li CJ at §21. Thus, the HKBORO is plainly the applicable piece of Hong Kong legislation giving direct and comprehensive effect[17] domestically to the international treaty obligations of first the UK and now the PRC in respect of the ICCPR as regards Hong Kong.

86. However, it does not appear that courts have previously had to grapple with the broader question of construction of BL39 by reference to the ICESCR. In *Kong Yun Ming v The Director of Social Welfare* [2012] 4 HKC 255, Stock VP noted:

> "77. It was not suggested in argument that article 9 [of the ICESCR] is part of domestic law and it is not necessary for the purposes of this case to determine whether article 39 of the Basic Law in its reference to the ICESCR gives direct effect to the Covenant or envisages implementation by diverse legislative measures."

87. In a helpful distillation of his submissions in respect of the ICESCR, Mr Fordham submitted (Distillation §1) that: "Art 39 BL does not adopt the approach of 'without more giving domestic effect' to the provisions of the ICESCR applicable to Hong Kong ('the Applicable Provisions')."

88. However, Mr Fordham developed his argument as follows in his Distillation (at §§2 to 5) in these terms:

"2. Art 39(1) BL does without more constitutionally guarantee [or, require (being another term Mr Fordham contended was appropriate here)] the effective implementation of the Applicable Provisions through the laws of the Region ('the Guarantee').

3. Further, Art 39(2) BL does without more constitutionally protect individual rights and freedoms from restriction save where prescribed by law and compatible with the Guarantee ('the Protection').

4. Art 39 BL envisages laws to deliver the Guarantee, and which must not infringe the Protection. A law would include a BOR-type instrument and sector-specific legislation. Provisions of the BL itself (see Art 33 BL) are also relevant.

5. Art 39 thus secures results, through the application of laws."

89. Mr Fordham contended (Distillation §6) that this was a recognised mode of securing compatibility with ICESCR2(1) as recognised by General Comment No. 9 of the CESCR[18] at §5. ICESCR2(1) provides:

> "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."

And §5 of General Comment No. 9 notes that:

> "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."

90. Whilst it was common ground that there has been no implementation of the ICESCR in Hong Kong domestic law through an equivalent of the HKBORO, it remains an open question whether the ICESCR is generally given effect in the existing laws of Hong Kong and the appellants referred to a report of the PRC to the CESCR in 2004 (E/1990/5/Add.59) and relied on sector-specific legislation, viz. IO ss. 38AA and 17G(2) and also BL33, to which it will be necessary to return in due course, as achieving the implementation of the ICESCR provisions into Hong Kong domestic law (Distillation §§7 and 8).

91. For his part, Mr Shieh submitted that the appellants' Distillation §2 does not enable an individual to complain that the state has not done enough to implement the ICESCR in Hong Kong law. He disputed the proposition that there is a domestically enforceable right to enforce the guarantee or requirement that applicable provisions would be implemented through the laws of Hong Kong.

92. Mr Shieh submitted that the language of BL39 cannot bear the effect of requiring a HKBORO-like instrument to implement the ICESCR and he noted that Mr Fordham disowned that submission. Instead, Mr Shieh submitted that BL39 might contemplate HKBORO-type legislation but this was not required. Properly understood, he said, BL39 is simply declaratory of the existing dualist theory regarding the application of international treaties to Hong Kong. In this context, it is right also to record that Mr Shieh noted that, in case of variance between the two official texts of the Basic Law the Chinese text shall prevail,[19] and addressed submissions in respect of the Chinese phrase "通過香港特別行政區的法律予以實施" in BL39(1) which is translated in the English version of the Basic Law as "shall be implemented through the laws of the [HKSAR]" to the effect that the Chinese phrase is not mandatory and does not suggest any duty to enact laws.

93. Mr Shieh contended that, on the international plane, BL39 secures that the international obligations of the UK and now the PRC in respect of Hong Kong should continue to be in force for Hong Kong. Thus, this is a matter for which the PRC would remain internationally accountable but he contended, domestically, BL39 indicates that the manner of implementation is by domestic legislation as it was prior to 1 July 1997 when the Basic Law came into effect. As I understood it, his submission was that it was never contemplated, at the time of the making of the Joint Declaration in 1984 or the promulgation of the Basic Law in 1990, that the two international covenants would give rise to an enforceable duty to enact legislation or to an entitlement on the part of an individual to rely on the covenant rights directly.

94. In support of his submission that the phrase "shall be implemented through the laws of the region" in BL39(1) is descriptive rather than mandatory, Mr Shieh also pointed out that it contrasts with other provisions of the Basic Law by which a duty is imposed on the Hong Kong Government to do something. By way of example, Mr Shieh referred to BL136 which provides that the "Government of the [HKSAR] shall, on its own, formulate policies on the development and improvement of education". To like effect, in respect of sports and the social welfare system, see BL143 and BL145 respectively. The wording of BL23 ("shall enact laws") is in similar vein.

95. A major plank in Mr Shieh's argument was also that his construction of BL39 was consistent with the theme of continuity inherent in the Basic Law, as contemplated in Article 3(3) of the Joint Declaration[20] and as discussed in cases such as *HKSAR v Ma Wai Kwan David* [1997] HKLRD 761 at 772I-J, 774E, 790D and 800J and *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304 at §35. Thus, since it had not been a requirement before the coming into effect of the Basic Law, the manner in which the international covenants were to be applied to Hong Kong was not required to be by way of HKBORO-type legislation.

96. Another main plank in Mr Shieh's argument was that the Basic Law drafting material and relevant extrinsic materials show that BL39(1) was declaratory of the conventional dualist theory regarding the application of international treaties in domestic law: see e.g. *Hai Ho Tak* per Nazareth JA at p. 208 lines 26-27 describing this as "trite law" and Hong Kong's New Constitutional Order (2nd Ed.) by Professor Yash Ghai at p. 478 stating "a treaty has no direct legal effect internally unless it is incorporated under local law". It has not been suggested that the HKBORO was enacted because it was thought BL39(1) required this. The principal extrinsic and drafting materials relied on were:

(1) Joint Declaration Article 3(5) (§17), the PRC Elaboration in Annex I (at §156), and the UK Explanatory Notes on Annex I (at §§43-47);

(2) The note on then draft article 16 (which eventually became BL39) in the Work Report of the Basic Law Drafting Committee Sub-Group on Fundamental Rights and Duties of HK Residents, Third Plenary Session (November 1986); and

(3) The Report of the Work of the Legal Sub-Group, 8th Plenary Session (31.1.97) pp. 43-44.

97. Such materials were, Mr Shieh contended, consistent with the UK position (also declaratory of the dualist theory) as reflected in:

(1) The UK's Initial Report to the HRC in respect of the ICCPR (18.8.77) at §1;

(2) The UK's Second Annual Report to the HRC in 1978 at §§186 and 213, which reflected the position at the time of the drafting of the Joint Declaration and the Basic Law respectively; and

(3) The UK's Report to the HRC, 44th Session (1989) at §149.

98. Mr Shieh developed his submission by contending that, insofar as a particular right under either covenant has received the blessing of enactment in domestic law, this means it has been implemented through BL39(1). That right, so incorporated into domestic law, cannot thereafter be restricted beyond the covenant because of BL39(2), which provides:

> "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."

99. By reference to the structure of Basic Law, Mr Shieh invited the Court to resist the notion that without the ICCPR and ICESCR being domestically legislated there are no rights. In addition to the basket of rights in Chapters III and VI of the Basic Law, he also referred to the existence of common law rights and disparate statutory rights in subject-specific legislation. It was therefore not the case, he submitted, that there was a constitutional vacuum without domestically enforceable rights.

100. Hence, Mr Shieh contended, the understanding in BL39 was clearly that the existing mode of recognising the rights in the Covenants did not involve domestic legislation. There was no intention that BL39 would involve a sea change in respect of the enforcement of Covenant rights so that the Government could be compelled to enact compliant legislation or those rights could otherwise be directly enforced domestically.

101. Mr Fordham suggested that the effect of Mr Shieh's submission was difficult to reconcile with Li CJ's observation in *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at p. 14G-H as to BL39 being "an important provision for the constitutional protection of individual rights" and was wrong. Instead, the correct position was reflected in his §§2 to 5 of his Distillation. I have set down these conflicting submissions in deference to the learning behind them and the time devoted to them in argument but in the event it is not necessary to choose between them because I have come to the conclusion (addressed in the next section of this judgment) that the effect of the UK notification is a reservation precluding reliance by the appellants on ICESCR6.

F3. The UK notification in respect of ICESCR6

102. When the UK ratified the ICESCR on 20 May 1976 and extended it to various dependent territories including Hong Kong, it did so subject to a number of reservations and declarations. The material part of the notification reads as follows:

> "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."

As I have indicated above, that notification is part of the ICESCR "as applied to Hong Kong".[21]

103. The issue here is whether that notification amounts to a modification of the obligation assumed by the UK in respect of Hong Kong (and therefore the obligation in the ICESCR as applied to Hong Kong) or merely a statement that restrictions *could* be imposed on the ICESCR6 obligation.

104. Mr Fordham submitted that, as a matter of construction, the notification served to identify the nature of the rights under ICESCR6 for the purposes of Hong Kong. That was necessary, he submitted, because of the terms of ICESCR4, which provide:

> "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."

105. By the notification, the UK was, he suggested, declaring that restrictions might be imposed on the right to work under ICESCR6 based on place of birth or residence qualifications so that, for the purposes of ICESCR4, such restrictions were "compatible with the nature of" the ICESCR6 right. It would then remain to be determined if the restriction could objectively be justified by reference to the need to promote the general welfare in a democratic society.

106. Mr Fordham submitted that this approach was consistent with the approach of Hartmann J (as he then was) in *Raza & Ors v Chief Executive-in-Council & Ors* [2005] 3 HKLRD 561 at §121 where he noted that the courts had accepted there are objective justifications for policies which restrict aliens from taking up local employment. It was his submission that this reflected and illustrated the ability to locate these considerations in their proper place. The question in relation to any particular restriction was whether the case had crossed the line so that the Government latitude provided by the notification could be held to have gone too far.

107. Thus, on the appellants' submission, the notification concerns what is permissible by way of restriction, subject to justification, and not what is excluded from the ICESCR6 obligation altogether. In particular, the notification was not intended to exclude from judicial scrutiny any particular restriction on the right to work. That, said Mr Fordham, was consistent with the Court of Final Appeal's observations as to the importance of BL39 in *Ng Ka Ling* at p. 14G-H.

108. In support of his construction of the UK notification in respect of ICESCR6, Mr Fordham relied on various communications and other commentaries concerning the ICESCR, namely:

(1) The CESCR's General Comment No. 3 (in E/1991/23) on the nature of states parties' obligations (ICESCR2(1)) stating at §10 that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party" and that if the ICESCR were not so read "it would be largely deprived of its raison d'être";

(2) The CESCR's General Comment No. 18 (E/C.12/GC/18) on the nature of the right to work (see §6), which included a comment (at §18) that the right should apply in relation to employment opportunities for migrant workers and stating what the core obligations under ICESCR6 included (see §31);

(3) The Limburg Principles on the implementation of the ICESCR (E/C.12/2000/13) describing (at §§49-51) what "determined by law" in ICESCR4 means and the Maastricht Guidelines on violations of economic, social and cultural rights (in the same paper) stating (at §9) that violations of the ICESCR occurred when a State failed to satisfy the minimum core obligation identified in General Comment No. 3;

(4) The Michigan Guidelines at p. 294, stating that "the core of the right to work is freedom to gain a living by work freely chosen or accepted" and that the freedom to work is "a right that is fundamental to the protection of refugees and others seeking protection"; and

(5) The comments of the CESCR in its consideration of reports submitted by the UK (E/C.12/GBR/CO/5) at p. 7 (§27) which would, he said, be difficult to understand if the UK had precluded the need to justify the restriction of rights under the ICESCR and p. 10 (§40) referring to the CESCR's recommendation that the UK withdraw its reservations to various articles including ICESCR6, as having "become obsolete".

109. It was submitted that the appellants' construction of the UK's ICESCR6 notification was consistent with its construction of HKBORO s. 11 only affecting an alien's rights to enter and remain in Hong Kong rather than his rights while here. Thus, Mr Fordham submitted, the ICESCR6 notification works alongside HKBORO s. 11 to give the right to work to those persons who are here. Restrictions may be imposed, as the ICESCR6 notification states, but they must be justified by the Government.

110. I do not consider that the appellants' construction of the UK's notification in respect of ICSECR6 is correct.

111. As a starting point, the language of the UK's notification in respect of ICESCR6 is expressed in terms of a reservation. At the same time the instrument of ratification was deposited, the Government of the UK also made the following notification:

> "Firstly the Government of the United Kingdom maintain their declaration in respect of article 1 made at the time of signature of the Covenant."

That declaration was in the following terms:

> "First, the Government of the United Kingdom declare their understanding that, by virtue of article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under article 1 of the Covenant and their obligations under the Charter (in particular, under articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail."

So the distinction between a reservation and a declaration was therefore clearly within the contemplation of the UK Government at the time of its notification in respect of ICESCR6 and it deliberately chose to use language expressing its notification in respect of that article as a "reservation".

112. More importantly, a major difficulty with the appellants' construction of the UK notification in respect of the ICESCR6 is that it would serve little or no purpose in the light of the express power in ICESCR4 to subject the rights under the ICESCR to justifiable limitations. On Mr Fordham's construction, the notification in respect of ICESCR6 merely identifies the first stage of the justification test, namely a legitimate objective connected to the restriction (rationality) but leaves the second stage question (of proportionality) to the state to establish. But this would, in my view, be a pointless reservation because it is self-evident that a state should be allowed to apply immigration controls to safeguard the employment opportunities of its own nationals and these would therefore already fall within the ambit of ICESCR4 as potentially justifiable limitations. Thus, ICESCR6 subject to the UK notification as the appellants construe it would add nothing to what is already contained in ICESCR4.

113. In order to give it a purpose, the UK notification would, it seems to me, have to go beyond reserving the right to do what is obvious in any event under ICESCR4. Such a purpose would be given by reading the UK notification as a modification of the right under ICESCR6 so that it does not apply to persons outside the particular region or territory in respect of which the UK was ratifying the ICESCR.

114. In his commentary on the ICESCR, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Clarendon Press, 1995), Matthew Craven explains the background to the UK notification to the ICESCR6 as being the argument that, ICESCR6 read together with ICESCR2(2) and (3), might preclude restrictions being imposed upon equality of access to employment in respect of non-nationals in developed countries (see p. 213). For this reason, he notes: "A reservation on this specific point was entered by the UK on ratification". He states (at p. 214) that the effect of the UK reservation, which is not incompatible with the object or purpose of the ICESCR, and which has not been the subject of any State objection, is "to modify the obligations" of the UK under the ICESCR in relation to other States parties.

115. This interpretation of the UK notification in respect of ICESCR6 appears to be shared by the CESCR which, in its Concluding Observations on the PRC's report in respect of Hong Kong (E/C.12/1/Add.58), recommended (at §29) "that HKSAR withdraw its reservation on article 6" (emphasis added) and contrasted it with the "interpretative declaration" in respect of ICESCR8.

116. The appellants' point that their construction of the UK notification in respect of ICESCR6 is consistent with their construction of HKBORO s. 11 is not one which assists them. On the contrary, since I have concluded that the proper construction of HKBORO s. 11 is that a condition of stay restricting employment cannot be challenged under the BOR, it follows that a consistent construction of the ICESCR6 notification would support the conclusion that it is a reservation modifying the obligation to recognise the right to work.

117. I would therefore conclude that the UK notification in respect of ICESCR6 is a reservation and modifies the obligation assumed thereunder so that the right to work in ICESCR6 is not one which applies to non-permanent residents of Hong Kong (i.e. to persons who may be subject to a condition of stay), which would at least include a person not having the right to enter and remain here. That the UK would have wished to make this reservation in respect of Hong Kong is clearly explicable by reference to the considerations referred to by the Judge below in the context of his discussion of the conventional public law review of the challenged decisions, namely:

> "97. … As the courts, including this Court, have noted on various occasions, in the light of Hong Kong's small geographical size, huge population, substantial daily intake of immigrants from the Mainland, and relatively high per capita income and living standards, and given Hong Kong's local living and job market conditions, almost inevitably Hong Kong has to adopt very restrictive and tough immigration policies and practices. The courts recognise that the legislature has chosen to entrust the high responsibility for and wide discretions on immigration matters to the Director. It is an important responsibility, given Hong Kong's unique circumstances, and the discretions conferred are indeed wide. …"

118. I do not consider that the materials relied upon by Mr Fordham support the contrary conclusion.

119. CESCR's General Comment No. 3 regarding the nature of the core obligation cannot, in my view, constitute a bar on a State party properly entering a reservation on any of the obligations under the ICESCR. Nor do I regard anything in the Limburg Principles, as supplemented by the Maastricht Guidelines, or the Michigan Guidelines as precluding the entering of a reservation as I consider the UK notification is to be construed. As for CESCR's General Comment No. 18, this would appear to state the obligation under ICESCR6 as regards the rights of migrant workers absent the modification of the obligation under ICESCR6 by reason of the reservation in the UK notification. But I would observe, in any event, that there is some scope for debate as to the nature of the obligation in ICESCR6 even without taking into account the UK notification.

120. It is quite correct that the idea that the obligations in the ICESCR are only promotional or aspirational in nature has been criticised (see the references in the Judgment at §45). However, as the Court of Appeal noted in *Kong Yun Ming* (at §§79 and 81), some of the obligations in the ICESCR are not capable of immediate fulfilment by reason of their resource-sensitive nature. This is recognised in the distinction between ICESCR2(1), which talks of States parties undertaking "to take steps" towards the full realisation of the rights under the ICESCR, and ICESCR2(2), which refers to States parties undertaking "to guarantee" that the rights will be exercised without discrimination.

121. The concept of progressive realisation of rights is acknowledged in General Comment No. 3 at §9. General Comment No. 9 notes (at §10) the CESCR's view that many of the provisions in the ICESCR are capable of immediate implementation but ICESCR6 is not amongst the examples given. In International Human Rights in Context by Steiner, Alston and Goodman (3rd Ed., 2007), the editors refer in a note to a commentary on the ICESCR expressing the view that what is laid down in, amongst other articles, ICESCR6, "are not rights of individuals, but broadly formulated programmes for governmental policies in the economic, social and cultural fields".

122. Craven comments (at p. 203) that the use of the word "recognize" in ICESCR6 is contrary to the idea that States parties are required to guarantee the right to work and (at p. 204) that the CESCR views the obligation as being one within ICESCR2(1) to look towards the implementation of "policies and measures aimed at ensuring there is 'work for all who are available for and seeking work'". The UK notification in respect of ICESCR6 clearly affects the scope of who is available for work in Hong Kong.

123. As to the CESCR's comments in (E/C.12/GBR/CO/5), it is to be noted that the comment at p. 7 (§27) is on ICESCR11 and ICESCR12 rather than the right to work provision in ICESCR6. Furthermore, the CESCR's comment at p. 10 (§40) confirms the CESCR's view of the relevant notification as a reservation.

124. For all these reasons, I would hold that the UK notification in respect of ICESCR6 is a reservation in respect of that article and has the effect of precluding reliance on it by a non-permanent resident of Hong Kong (i.e. a person who may be subject to a condition of stay). It follows that the appellants cannot invoke rights under ICESCR6.

F4. Sector-specific legislation

125. Before moving from the ICESCR to consider the appellants' reliance on rights under the Basic Law, it is relevant to consider their argument that the IO is the relevant sector-specific legislation giving effect to the right to work in ICESCR6.

126. The appellants rely on the IO and, in particular, IO ss. 38AA and 17G(2)[22] "including an avowed power to give permission to work", as being the relevant sector-specific legislation by which BL39 secures compatibility with ICESCR2(1) (Distillation §§6 and 7). As noted above, the appellants also rely on the 2004 PRC Report (E/1990/5/Add.59) to the CESCR at §§348-349 and Annex 2A (Distillation §8).

127. The 2004 PRC Report to the CESCR states (at §§348-349):

"348. In paragraph 15(a) of its concluding observations, the Committee reiterated its particular concern that the Covenant's status in the HKSAR domestic legal order continues to be different from that of the ICCPR, the provisions of which have been incorporated into domestic legislation.

349. It is true that there is no single law corresponding to the [HKBORO] in relation to ICCPR that incorporates ICESCR into Hong Kong's domestic legal order. However, ICESCR provisions are incorporated into our domestic law through several articles of the Basic Law (for example, articles 27, 36, 37, 137, 144 and 149), and through provisions in over 50 ordinances. Those laws were listed in annex 3 to the initial report, and are updated at annex 2A of the present report. We consider that specific measures of this kind more effectively protect Covenant rights than would the mere reiteration in domestic law of the Covenant provisions themselves."

128. Annex 2A is headed "Constitutional guarantee and legislative measures implementing the Covenant in the HKSAR" and under ICESCR2 and ICESCR6 the following is listed:

"ARTICLE 2

Constitutional guarantee	-Article 39 of the Basic Law
Legislative measures	-…

…

ARTICLE 6

Constitutional guarantee	-Articles 33 and 147 of the Basic Law
Legislative measures	-Employment of Children Regulations (Cap 57 subleg B) under the Employment Ordinance
	-Immigration Ordinance (Cap 115)
	-Sex Discrimination Ordinance (Cap 480)
	-Disability Discrimination Ordinance (Cap 487)

-Family Status Discrimination Ordinance (Cap 527)

-Employees' Retraining Ordinance (Cap 423)

…"

129. Although at first blush the annex appears to be supportive of the appellants' arguments, it is important not to overlook the fact that it is part of a report dated in 2004 and therefore a long time after the UK's ratification (in 1976) of the ICESCR in respect of Hong Kong. The annex reflects the PRC's understanding of the position and, whilst it confirms that it was understood that the ICESCR contained certain rights that had to be implemented by some domestic legislation or by Basic Law rights, it would, in my view, be reading too much into the annex to suggest that it was thought that BL39 recognised that all provisions of the ICESCR were to be implemented immediately and I refer to my observations above on the progressive nature of some of the provisions.

130. An explanation as to why the PRC took the stance that the IO implemented ICESCR6 is shown in §397 of the Report which refers to action taken against illegal workers to protect the employment opportunities of local workers. Reference is there made to joint operations between the Labour Department, the Immigration Department and the Police. Importantly, §§403-404 of the Report provides an explanation of why the reservation in respect of ICESCR6 has been retained, in these terms:

> "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 the 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 respectfully advise that we propose to retain it."

131. In view of that statement, I do not think the reference in the annex to BL39 and the IO can be interpreted as suggesting that the ICESCR6 right is conferred on a non-permanent resident of Hong Kong (i.e. a person who may be subject to a condition of stay). On the contrary, the Report would appear to confirm the continued relevance and application of the reservation to ICESCR6.

132. So far as IO ss. 38AA ("Prohibition of taking employment establishing business, etc.") and 17G(2) (dealing with matters of interpretation in respect of Part IVB of the IO "Prohibition of employment of illegal immigrants and others") are concerned, I would note that, although the appellants' case was argued on the basis that it was implicit that there was a discretion on the part of the Director to give permission to work under IO s. 38AA, it is plain from the terms of that section that it does not expressly make that qualification. The section provides that:

> "(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 …".

133. In any event, regardless of the Director's position that he has a discretion to give permission to work to a person who would otherwise be prohibited by IO s. 38AA from doing so, I do not see how the existence of such discretion can be regarded as conferring a right to work on a person not having the right to enter or remain in Hong Kong. It is therefore not possible, in my view, to regard the IO, or ss. 38AA or 17G(2) thereof, as conferring the right to work under ICESCR6.

134. Moreover, since the right to work in ICESCR6 is modified by the reservation contained in the UK notification, the constitutionality of any sector-specific legislation giving effect to the ICESCR6 would fall to be determined in the light of, and subject to, the reservation in question. Thus, the failure to exercise a discretion to permit a person not having the right to enter or remain in Hong Kong could not successfully be challenged as being in breach of ICESCR6.

G. BL33

135. If the appellants cannot rely on ICESCR6, they seek to rely instead on BL33 which provides:

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

136. In this context, the appellants also rely on BL41 which provides:

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

137. Mr Fordham submitted that the proper construction of BL33 was no narrower than ICESCR6 because its language was capturing the essence of the core right not to be forced into a particular occupation (conscription) and not to be denied work (access-deprivation). He submitted this was supported by reference to the 2004 PRC Report (E/1990/5/Add.59) to the CESCR, to which I have referred above, indicating that the ICESCR6 right was conferred domestically by BL33 and BL39. He also referred to the CESCR's General Comment No. 18 (E/C.12/GC/18) stating (at §4) that the right to work in ICESCR6 includes the right not to be deprived of work unfairly which, the CESCR comments, underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work and emphasises the importance of work for personal development and social and economic inclusion.

138. I would reject the wide construction of BL33 advanced by the appellants.

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. [23] 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[24] 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.

144. The appellants argue that BL41 limits the restrictions that can be imposed on non-residents' rights since these can only be such as are "in accordance with law". As to this, the conclusions I have reached as to the proper construction of HKBORO s. 11 and the UK reservation to ICESCR6 mean that the ICCPR and ICESCR rights as applied to Hong Kong are restricted as regards non-residents. The Court of Final Appeal has recognised that there is a difference as regards the fundamental rights and freedoms enjoyed by residents on the one hand and non-residents on the other and also whether such rights can be restricted by law: see *Gurung Kesh Bahadur* (*supra*) at §§28, 29 and 42.

145. Furthermore, the phrase "in accordance with law" in BL41 means law including the IO so that the provisions of that ordinance would be relevant in considering the extent of the right under BL33 for a non-resident: see *Re Pasa Danaville Dizon*, unrep., HCAL 97/2009 (11 September 2009) at §8, *Gurung Ganga Devi v Director of Immigration*, unrep., HCAL 131/2008 (23 September 2009) at §27 and *Comilang v Director of Immigration*, unrep., HCAL 28/2011 (15 June 2012) at §91.

146. That there is a difference in the quality of the rights enjoyed by residents on the one hand and non-residents on the other is also reflected in the observations of Stock VP in *Fok Chun Wa v Hospital Authority*, unrep., CACV 30/2009, namely:

> "70. The range of rights within Chapter III is broad and the degree to which rights of non-residents in Hong Kong at any given time may lawfully be circumscribed so as to differ from those enjoyed by residents must depend upon the context. So, for example, it is not possible to envisage circumstances in which it would be lawful to deprive a non-resident of the freedom from arbitrary detention or imprisonment. On the other hand, it would be a non-purposive construction that supposed that art.41 intended that non-residents be accorded all the same privileges and benefits as residents, unqualified by considerations of residence status, or other connection with Hong Kong, and regardless of the impact of according such privileges and benefits on Hong Kong residents, benefits such as the freedom of occupation (art.33) or the right to social welfare (art.36). …".

147. I therefore conclude that BL33, on its proper construction, does not support the appellants' asserted claim to a right to work.

H. Justification

148. As noted above, the appellants advanced the following core proposition based on the alleged breaches of the various human rights provisions relied upon:

> "The Director cannot justify the application of a provision or policy denying permission to work to an individual, pending his resettlement or departure, who is: (a) a mandated refugee or screened-in torture claimant, and (b) who has already been present in Hong Kong for more than 4 years."

But since I have concluded there is no breach of any relevant human rights provision, the issue of justification does not arise for decision in these appeals.

149. Because that is not a relevant exercise, I do not propose to address whether the evidence that a total ban on this limited class of persons from having permission to work is justified in order to protect local workforce and avoid creating a "pulling effect" (i.e. encouragement to others, who might simply be economic migrants, to come to Hong Kong to try their luck) would satisfy the applicable proportionality test: see *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229 at §§33-36.

150. Had it been necessary to do so, however, I was attracted to Mr Fordham's submission that it was for the Government to justify any restriction on any such right by reference to the objective evidence filed now and not on some later judicial review by one of the individual appellants on a reconsideration by the Director of his request for permission to work (that being the contention advanced on behalf of the Director).

I. Standard of Review

151. This was the subject of the respondent's notices in each of the respective appeals. As already noted, the Judge held the Court should apply the higher anxious scrutiny approach when reviewing the exercise of Director's discretion to decide to refuse permission to work to the appellants MA and GA.

152. However, since the quashing of those two decisions is not the subject of any cross-appeal by the Director, it is clear that the question raised in the respondent's notices is in fact academic at present because the Director is currently in the process of reconsidering the appellants' requests for permission to work and will reach decisions on those requests in due course. In the event permission to work is refused and there is then a further judicial review of that refusal, it will be a matter for the Court hearing that judicial review to consider appropriate standard of review. It is therefore not appropriate to address that question in these appeals.

J. The recognizances

153. The appellants contended that the recognizances which they have been required to enter into are unsustainable on the ground that, as a matter of objective current achievability, there is no real prospect of their being removed from Hong Kong.

154. Under s. 36(1)(b) of the IO, an immigration officer is empowered to require a person who is liable to be detained under IO ss. 27, 32 or 34. There is no express time limit to the recognizance that may be required to be entered into and the absence of any such time limit, as a matter of implication, is supported by the decision in *V v Director of Immigration*, unrep., CACV 9/2006 (19 May 2006) at §§16, 19, 24 and 25.

155. On the facts, there is evidence that the efforts of the UNHCR HK[25] to seek resettlement for mandated refugees are genuine and serious. As the Judge noted (Judgment §138), the evidence shows that the positions of all mandated refugees in terms of their resettlement are under the Director's regular monitoring and that the Director remains intent on removing the refugees for resettlement once a third country willing to accept them is found. So far as PA, the screened-in torture claimant is concerned, the evidence shows that the Director is monitoring the situation in Sri Lanka in order continually to assess whether a removal order can be made and eventually executed. It appears it is still the Director's intention to issue a removal order against him and, should conditions in Sri Lanka improve to the point that there are no longer substantial grounds for believing he will be in danger of being tortured on his return there, to remove him to that country, or alternatively, if a safe alternative country is identified, to remove him to that place.

156. In the circumstances, each of the appellants is a person liable to be detained and, as such, the recognizances they have been required to enter into are lawful.

K. The deportation order against JA

157. The basis of the challenge to the deportation order against JA appears to be premised on the deportation order being one which requires his deportation to Pakistan, his home country from which he fled. It is also said that, because of criminal convictions to which JA has been subject, he is not viable for resettlement and so the deportation order should be rescinded on humanitarian grounds.

158. The premise of the argument is flawed in that the deportation order does not require that JA be removed to his home country but rather requires that he "leave Hong Kong".

159. The evidence is that the Director intends to remove JA from Hong Kong when he can be resettled in a resettlement country arranged by the UNHCR. The Judge did not find that the fact there is "little prospect of resettlement in the immediately foreseeable future" meant that the only reasonable decision, in the public law sense, was to rescind the deportation order (Judgment §143) and I agree.

L. Disposition and costs

160. For the reasons set out above, I would dismiss the appeals and also the respondent's notices in each appeal.

161. I would make an order *nisi* that the appellants pay the respondent's costs of the appeals, save for the costs of the respondent's notices, to be taxed if not agreed, and that the appellants' own costs be taxed in accordance with the Legal Aid Regulations (Cap. 91A, Sub.Leg.).

Hon Stock VP:

162. Accordingly, the appeals are dismissed as are the respondent's notices. An order *nisi* is made in the terms proposed in paragraph 161 above.

(Frank Stock)	(Susan Kwan)	(Joseph Fok)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Michael Fordham QC & Mr Earl Deng, instructed by Barnes & Daly, assigned by DLA, for all Applicants

Mr Paul Shieh SC & Ms Grace Chow, instructed by the Department of Justice, for the Respondent

[1] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

[2] Affirmation of Mr Tam Kwok Ching dated 15 April 2010, §8.

[3] *Ibid*. at §13.

[4] References in this Judgment to the BOR are to the Hong Kong Bill of Rights, followed where applicable by the relevant article number.

[5] References in this Judgment to the ICCPR are to the International Covenant on Civil and Political Rights, followed where applicable by the relevant article number.

[6] References in this Judgment to the ICESCR are to the International Covenant on Economic, Social and Cultural Rights, followed where applicable by the relevant article number.

[7] References in this Judgment to the BL followed by an Arabic numeral are to the correspondingly numbered article in the Basic Law of the Hong Kong Special Administrative Region.

[8] The Hong Kong Bill of Rights Ordinance (Cap. 383).

[9] Immigration Ordinance (Cap. 115).

[10] The United Nations Human Rights Committee.

[11] References in this Judgment to the ECHR are to the European Convention for the Protection of Human Rights and Fundamental Freedoms, followed where applicable by the relevant article number.

[12] As an example of a case involving the immigration rights of such a person, see *Gurung Kesh Bahadur v Director of Immigration* (2002) HKCFAR 480.

[13] It is also to be noted that, in *Ghulam Rbani v Secretary for Justice*, unrep., DCCJ 531/2010 (13.10.11), Leung DJ declined to follow *A (Torture Claimant)* but instead held that he was bound by *Ubamaka* to hold that the effect of HKBORO s. 11 was to except IO s. 32 from the application of the BOR. Whether Leung DJ's decision as to the application of the BOR to detention is correct or not is not one with which this judgment is concerned.

[14] Nor, given the immigration reservation to the ICCPR, which I would construe in a consistent manner with s. 11 of the HKBORO, can they rely on rights under the ICCPR.

[15] Further, in his CCPR Commentary (2nd Ed.) at p. 385, Professor Manfred Novak notes that: "Despite the discrepancy in the two authentic English texts, it may be assumed that 'private life' under Art. 8 of the ECHR and 'privacy' under Art. 17 of the Covenant basically mean the same thing, such that resort may also be had in the alternative to the holdings of the Strasbourg organs."

[16] Recital 1 reads, "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"; Recital 2 reads, "Recognizing that these rights derive from the inherent dignity of the human person".

[17] Giving it "direct and comprehensive" effect as opposed to giving it effect domestically through the application of common law principles and by subject-specific legislation.

[18] UN Committee on Economic, Social and Cultural Rights.

[19] Decision of the NPCSC dated 28 June 1990.

[20] "The laws currently in force in Hong Kong will remain basically unchanged."

[21] By a letter of notification of treaties applicable to Hong Kong after 1 July 1997, dated 20 June 1997, the PRC notified the Secretary-General of the United Nations that the ICCPR and ICESCR as applied to Hong Kong "shall remain in force beginning from 1 July 1997". The PRC ratified the ICESCR on 27 May 2001 but subject to the PRC's communication dated 20 April 2001 which included the following:

> "Article 6 of the Covenant does not preclude the formulation of regulations by the HKSAR for employment restrictions, based on the place of birth or residence qualifications, for the purpose of safeguarding the employment opportunities of local workers in the HKSAR."

[22] See §132 below.

[23] See, as to the relevance other provisions of the Basic Law and also of the ICCPR as applied to Hong Kong as part of the relevant context when construing provisions in the Basic Law, *Ng Ka Ling* (*supra*.) at p. 29B-C.

[24] The right being "passive or negative" in the sense of prohibiting any interference with the freedom of choice as opposed to imposing an active or positive duty on the part of the Government to provide an employment.

[25] United Nations High Commissioner for Refugees, Hong Kong Sub-office.