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HCAL 51/2007
HCAL 105/2007
HCAL 106/2007
HCAL 107/2007
HCAL 125/2007
HCAL 126/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 51, 105, 106, 107, 125, 126 OF 2007
(Heard Together)

HCAL 51/2007

BETWEEN

FB	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

AND

HCAL 105/2007

BETWEEN

NS	Applicant
and	

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

AND

HCAL 106/2007

BETWEEN

M — Applicant

and

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

AND

HCAL 107/2007

BETWEEN

RO — 1st Applicant
MO — 2nd Applicant
YO (by his father and next friend RO) — 3rd Applicant
WO (by his father and next friend RO) — 4th Applicant

and

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

AND

HCAL 125/2007

BETWEEN

PVK	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

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AND

HCAL 126/2007

BETWEEN

ND	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

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Before: Hon Saunders J in Court

Dates of Hearing: 29-30 April, 9, 13-16, 19, 21 May, 11, 18 June, and 26 September 2008

Date of Judgment: 5 December 2008

J U D G M E N T

Introduction:

1. This application for judicial review concerns the procedure adopted by the Immigration Department (the Department), and the Secretary for Security (the Secretary), in dealing with people who come to Hong Kong and subsequently make a claim for protection under the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (the Convention).

2. It is the policy of the Secretary not to deport a person to a country where that person's claim that he would be subjected to torture in that country is considered to be well-found, (the policy). The policy reflects the safeguards contained in Article 3(1) of the Convention which applies in Hong Kong.

3. In June 2004, the Court of Final Appeal gave consideration to the application of the policy in Hong Kong by the Secretary in *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187. In the judgment certain significant findings were made. They include the following:

(i) a determination under the policy was plainly of momentous importance to the individual concerned. Life, limb and his fundamental right not to be subjected to torture was involved. Accordingly high standards of fairness must be demanded;

(ii) the court would, on judicial review, subject the determination to rigorous examination to ensure that such standards had been met;

(iii) the high standards of fairness should be approached as follows:

(a) the potential deportee, who had the burden of establishing his torture claim, should be given every reasonable opportunity to establish that claim;

(b) the claim must be properly assessed by the Secretary;

(c) where the claim was rejected, reasons should be given by the Secretary, which must be sufficient to enable the potential deportee to consider the possibilities of administrative and judicial review.

4. In addition, the court made certain observations to assist the Secretary in considering individual cases. They were:

(a) the difficulties of proof faced by persons in this situation should be appreciated;

(b) it would not be appropriate for the Secretary to adopt an attitude of sitting back and putting the person concerned to strict proof;

(c) an understanding of country conditions at the time of the alleged torture in the past as well as at the present time was usually relevant to the assessment of the claim.

5. Following that decision, the Secretary through his administrative arm, the Department, established a procedure for the consideration of claims under the Convention, that had been made at that time, or might be made in the future.

6. The six Applicants now before me challenge by way of judicial review the legality of the screening process of their claims for protection under Article 3 of the Convention. They say that the high standard of fairness demanded in the consideration of Convention claims has not been achieved by the process devised. Consequently, they say that the process is illegal, first on the grounds of procedural unfairness at common law, and second in breach of certain of the Applicants' constitutional rights and/or the constitutional obligations of the Respondents.

The relevant policy documents:

7. At a very late stage in the proceedings the Respondents produced to the Applicants solicitors three important formal policy documents relevant to the exercise of considering claims under the Convention. These documents were prepared following the decision in *Prabakar*, and constitute the policy by which the Secretary dealt with claims under the Convention. They are entitled, first, "*Assessment Mechanism for Claims Made Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention")*", second, "*Guidelines for Conducting Interviews and Making Assessments and Other Related Matters*", and third, "*Procedures for Handling Petitions Made by Unsuccessful Torture Claimants under Article 48(13) of the Basic Law*".

8. Quite how the Respondents could have embarked upon the hearing of these proceedings when they began on 29 April 2008, without having put these policy documents before the Court is simply beyond my understanding. It is abundantly clear, merely from the title of the documents, that they are highly relevant, if not quite crucial documents. They were produced only after orders were made by me requiring the Respondents to produce documentation said by Mr Mok to exist.

9. It is particularly difficult to understand why they were not contained within the original exhibits to the affidavits filed on the part of the Respondents when the first two documents contain the following statement:

> "Once it is decided to screen an individual in respect of Article 3 of the Convention, it is a clear requirement of Hong Kong domestic law that a high standard of procedural fairness be employed. This was decided in the leading case of The Secretary for Security and Sakthevel Prabakar [2004] HKCFA 39 where the Court of Final Appeal gave judgment on 8th June 2004. *Procedural requirements arising from the guidance of the court in the case are set out in the subsequent paragraphs."* (My emphasis)

The title of the third document is equally plainly self-explanatory and obviously relevant. It is clear beyond question that these are fundamental policy documents directed at precisely the issues before the Court in these proceedings. They should have been produced a very long time ago.

10. Mr Kat was quite justified in his criticism of the late production of this information, and the extent of it. He rightly described it in this way:

> "Ostensibly filed pursuant to leave granted to adduce further evidence of the training and guidance given to examiners and decision-makers in Convention claims (including on petitions to

> the CE in NS and FB), the documents and information now disclosed complete the evidence of the written policies and instructions of both the Director and Secretary to their officers and staff for the examination, assessment and termination of Convention claims."

11. It is not merely unfortunate, it is a matter of serious concern that those advising the Respondents, and instructing Mr Mok and Ms Lam, had not taken the trouble to supply this material to the Applicants' solicitors when these issues were raised in correspondence between the parties solicitors prior to the commencement of the proceedings. At the very least they should have been disclosed after the exchange of written submissions prior to the commencement of the hearing, when the extent of the challenge by the Applicants became abundantly plain. Had this material been made available, as it ought to have been, a great deal of time and expense would have been saved.

12. Mr Kat invited me, when drawing inferences from the evidence, to apply the principle in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [2002] All ER (D) 450, in which it was held that when a court had not been given a true and comprehensive account, but had teased the truth out of late discovery, it might be appropriate to draw inferences against the defendant upon points which remained obscure. While the nature of the late discovery was such that this was an appropriate case for the application of this principle, I have not found it necessary to have resort to that option.

The nature of the challenge:

13. Mr Kat, for the Applicants, describes the challenge made as both a "system" challenge, as well as an "individual" challenge. He says that irrespective of the individual circumstances of the various Applicants, certain procedures adopted by the Department in the screening process, and by the Secretary in the appeal process, are fundamentally flawed. These constitute the system challenge. He goes on to say that if the system challenge fails then, having regard to the particular features of each individual case, the same and additional factors in the screening process render the process procedurally unfair in the particular case of each separate Applicant.

14. First, it is argued that in each case the Department has, pursuant to a blanket policy, declined to permit lawyers to be present during the completion of a questionnaire or the conduct of interviews that are part of the screening process. Second, also pursuant to a blanket policy, the Department has declined to provide any of the Applicants with legal representation during the screening process. Both of these policies, the Applicants say, render the screening procedure systemically procedurally unfair, or at least, individually unfair.

15. The third ground comprises five subheadings upon which, in each case the Applicants say procedural unfairness arises. They may be summarised thus:

(i) the person making the Convention determination (the decision-maker), is a different person to that conducting the interviews;

(ii) the persons conducting interviews, and making Convention determinations, or considering and deciding upon appeals, are insufficiently guided or instructed in the nature of Convention screening and decision-making;

(iii) the conducting of Convention screening interviews by officers of the Department, which Department is duty-bound to enforce and implement the immigration policies of the Government of the Hong Kong Special Administrative Region (HKSARG), raises an inherent conflict of interest, giving rise to a lack of impartiality and independence on the part of interviewers and decision-makers;

(iv) the failure to provide for an oral hearing at the petition (appeal) stage, following the rejection of a claim;

(v) the failure of the Secretary to give reasons for the refusal of a petition.

16. The first two grounds are common to all Applicants. Ground 3(i), (ii) & (iii) are also common to all Applicants. Of the six groups of Applicants, only the claims of FB and NS have reached the stage of having been rejected and appeals made. Ground 3(iv) & (v) arise directly in their cases.

The Applicants:

17. The brief circumstances of each of the Applicants are as follows.

FB:

18. FB was born in Brazzaville in the Republic of Congo and is now 35 years old. His primary language is French, and he speaks, in a basic manner, two Congolese dialects, Kikongo and Lingala, and also basic English. He fled Brazzaville to Kinshasa, in the Democratic Republic of Congo, and by reason of alleged threats to his security in Kinshasa fled to Hong Kong, arriving on 10 November 2003 where he was permitted to remain as a visitor until 24 November 2003.

19. On 11 November 2003, he made a claim for refugee status with the United Nations High Commissioner for Refugees, (UNHCR). His claim and appeal were rejected. On 9 March 2006, he made a claim under the Convention.

20. Since 25 November 2003, he has been in breach of his conditions of stay and was arrested for that offence on 7 March 2006. Until 15 March 2006 he was in administrative detention pursuant to s 26 Immigration Ordinance, Cap 115 (the Ordinance), and from then until 29 April 2006, under detention pending a decision as to whether to order his removal pursuant to s 32(2A) of the Ordinance. He was released on recognisance on 29 April 2006.

21. On 27 September 2006, he received a letter from the Director of Immigration, (the Director), indicating that the Director was minded to refuse his claim under the Convention. That decision was confirmed in a letter from the Director dated 16 October 2006. He appealed against the decision by way of petition to the Chief Executive (CE), on 8 November

2006, which petition was delegated by the CE to the Secretary. On 17 September 2007, his petition was rejected.

NS:

22. NS was born in Sri Lanka, and is now 29 years old. He is Muslim by religion, and Tamil by ethnicity. He speaks Tamil, Sinhalese and basic English. He fled Sri Lanka, allegedly following incidents of torture at the hands of both the Muslim Congress, and the Sri Lankan police. He subsequently arrived in Hong Kong.

23. On 22 November 2004, he was arrested for suspected robbery. No charges were laid against him, and on 13 December 2004, he was released unconditionally by the police, but re-arrested on the same day for overstaying.

24. On 2 December 2004, while in police detention he was interviewed by the UNHCR regarding refugee status. On 17 December 2004, in the course of an interview by Immigration Officers he made a statement which impliedly raised the issue of a claim under the Convention. The claim was not pursued by the Department, and on 3 February 2005, a removal order was issued, authorising his deportation to Sri Lanka.

25. NS appealed to the Immigration Tribunal against the removal order, stating in his appeal:

> "…I cannot go back to my country, Sri Lanka because there, my life is in danger."

The appeal was dismissed on 7 February 2005. The Department did not treat the statement in his appeal as a claim under the Convention.

26. On 10 February 2007, while in administrative detention, having heard from a fellow detainee that the Department would conduct investigations into his claim of torture if he made an application, he formally lodged a claim under the Convention with the Department by way of an undated handwritten letter. He supplemented the claim with two further letters on 17 February 2005, and 2 May 2005. On 29 July 2005, following the first interview after the claim was made he was released on recognisance.

27. Following 14 interviews, by a letter dated 20 October 2005, he was informed that the Director was minded to refuse his claim under the Convention. Further interviews were conducted, at the request of NS, and on 20 January 2006, the Director informed him that his claim under the Convention was refused.

28. NS appealed against the decision by way of petition to the CE, which appeal was rejected by the Secretary on 16 November 2006.

M:

29. M was born in Sri Lanka and is now 23 years old. He is Tamil by ethnicity, Roman Catholic by religion, and speaks Tamil. He fled Sri Lanka, allegedly following torture by both the Liberation Tigers of Tamil Eelam, (LTTE), and the Sri Lankan police. He arrived in Hong Kong from Shenzhen on 11 December 2002 and was permitted to remain in Hong Kong until 10 January 2003.

30. On 25 November 2003, by which time he was an overstayer, he approached the UNHCR to seek protection as a refugee. His claim for protection was rejected in January 2005, and an appeal to the UNHCR was rejected on 30 May 2005.

31. During an interview with the Department in late March or early April 2005 he sought protection under Article 3 of the Convention. After 17 interviews between 24 April 2005 and 21 November 2006, there has still been no determination of his application. As at the date of these proceedings the application has still not been determined.

RO & Family:

32. RO was born in Bafoussam, Cameroon, and is now 32 years old. He speaks French and basic English. With him are his wife, MO, born in Douala, Cameroon, now aged 27, a son, YO, aged five, and a son, WO, born in Hong Kong and now aged three. The couple also have a daughter now aged about nine, who remains in Cameroon. RO claims that since about 1991, he has been a supporter of the Social Democratic Front, (SDF), one of the main opposition parties in Cameroon.

33. In January 2004, the family fled Douala and arrived in Hong Kong on 21 January 2004. They claim to have fled following persecution by the Rassemblement Democratique du Peuple Camerounias, (RDOC), the ruling party of the Cameroonian Government. RO and MO alleged extensive and traumatic torture administered by the police and/or military of the Cameroonian government.

34. RO says that on the arrival of the family in Hong Kong on 21 January 2004, they were deceived by a Cameroonian man who disappeared with their luggage, plane tickets and money, leaving them stranded at Hong Kong International Airport. They were unable to pass through immigration for two days. On 23 January 2004, MO fainted and was taken to Princess Margaret Hospital, and at this point the family entered Hong Kong territory.

35. With the assistance of hospital staff a refugee claim was lodged with the UNHCR on 28 January 2004. The refugee claim was rejected by the UNHCR on 26 April 2004 and a subsequent appeal, and a request for the re-opening of the claim by solicitors for the family have been unsuccessful.

36. On 1 April 2005, RO and MO approached the Births Deaths and Marriage Registration sub-division of the Department to register the birth of WO. On the instruction of an Immigration Officer their passports were seized when they were required to report to the Kowloon Baby Immigration Office on 8 April 2008. There they were cautioned and interviewed, and told the Immigration Officer that they came to Hong Kong to seek asylum and that they were threatened with violence in Cameroon. By letter on or about 19 April 2005, they registered a request to make torture claims under the Convention.

37. As at the date of these proceedings their application for the protection of the Convention remains undecided.

PVK:

38. PVK was born in Sri Lanka and is now 44 years old. He is of Tamil ethnicity.

39. Since an early age he has been a supporter of the LTTE. In 1986, he went to Europe and acted as a fundraiser for the LTTE for several years. In February 1990, he travelled to France and claimed asylum. He was granted refugee status in France in February 1992, but that status has now lapsed.

40. In April 1993, he returned to Sri Lanka for family reasons. He says that although he wished to distance himself from the LTTE he was arrested on numerous occasions by the Sri Lankan authorities and was tortured in detention.

41. On 24 December 2000, he arrived in Hong Kong on a Sri Lankan passport and was permitted to remain as a visitor until 4 January 2001. He did not then claim asylum. On 4 January 2001, he sought recognition from the UNHCR as a refugee and approached the Department to apply for an extension of stay. He specifically told the Department that he was afraid of being tortured if he was sent back to Sri Lanka. He was granted an extension of stay for two weeks, until 18 January 2001.

42. In 19 April 2001, his wife and three children came to Hong Kong to join him, and were permitted to remain as visitors until 26 April 2001, when they sought an extension of stay.

43. An issue arose over the validity of the family's passports, and on 10 October 2002, his application for further extensions were refused and he was required to leave Hong Kong on or before 12 October 2002. On 15 October 2002, he and his family surrendered to the Department and were placed on recognisance.

44. Despite internal minutes recorded by Immigration Officers documenting that PVK had claimed that he would be tortured if sent back to Sri Lanka as early as 2001, formal screening of PVK's application under the Convention did not begin until 14 January 2004.

45. At the date of commencement of these proceedings there had been no conclusion to the application.

46. In the course of the proceedings I was informed by Mr Mok that the Director had reached a conclusion that PVK was entitled to protection under Article 3 of the Convention, and that he and his family would be granted stay in Hong Kong until such time as a place could be found to remove them, where they would not face the risk of torture.

ND:

47. ND was born on 25 July 1989, in Pointe-Noire in the Republic of Congo, and is now aged 18. His principal language is French, and he can also communicate in Lari, a dialect of Congo-Brazzaville. His mother is deceased, and the whereabouts of his father, and his only sibling, an elder sister, is unknown. ND, his sister and father are Catholic by religion.

48. His father was a prominent and active member of the Matsouaniste Church, which was supporting the cause of M. Bernard Kolelas, a Minister in the former Lissouba administration in the Republic of Congo, and an opponent of the incumbent President Denis Sassou-Nguesso.

49. It is said that the Matsouaniste Church, including ND's father, campaigned to assist M. Kolelas to return from exile to the Republic of Congo. ND says that on about 5 September 2005, his father and sister were removed from their home by armed men and have never been seen again. ND says that he hid and was able to gain protection from a pastor of the Matsouaniste Church. He says that arrangements were made for him to be placed on an aeroplane on about 21 September 2005, and that he eventually arrived in Hong Kong with an adult, and was given permission to remain in Hong Kong for three months. He says he has never seen that adult again.

50. On 23 September 2005, he was taken by some French speaking people in Hong Kong to the UNHCR office where he sought protection. His claim for refugee status was rejected by the UNHCR on 19 July 2006.

51. On 19 March 2007, ND surrendered to the Department and was taken into custody. At that time he was 17 years, 4 months old, and a minor in the eyes of Hong Kong law. He was interviewed by an Immigration Officer on 27 March 2007, and in the course of the interview stated:

> "…. I cannot return to my country because my life is in danger according to what I lived. That is why I would like to make a torture claim…."

52. On 28 March 2007, Department records show that the Department recognised that he had raised a "torture claim". On 7 June 2007, he completed a formal Department document entitled: "Questionnaire for Persons who have made Claims under The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment" (the questionnaire). He had still not attained the age of 18 years.

53. On 25 July 2007, ND attained legal majority. On 20 August 2007, the Department informed ND that his next interview would be on 19 September 2007. On 27 August 2007, the Department received a letter from solicitors for ND, in which the issue of the steps taken by the Department while ND was still a minor were raised.

54. The solicitors were informed that the next interview was on 19 September 2007, that the formal notice that had been given to ND at the commencement of the procedure, and the questionnaire would be read back again to enable ND to make any amendments or additions to the information if he requested. This was duly done.

55. It appears that in the Department's view, ND having achieved legal majority, any flaw in the procedure would be remedied by this process.

56. At the date of the hearing of these proceedings the application by ND has not been concluded.

Is a "system" challenge, before decision, premature or permissible:

57. Mr Mok's preliminary submission was that a "system" challenge was not permissible, as in respect of four cases, M, RO, PVK and ND, there had not yet been any final determination of the claims. Mr Mok said that cases such as these are highly fact sensitive and it was simply wrong for the court to approach the consideration of the process until the result was known. It was entirely possible, Mr Mok said, that the claims might be successful, in which case no right to relief would arise and judicial review would be refused.

58. In *Prabakar* the Court of Final Appeal decreed that the consideration of Convention claims must be accorded a high standard of fairness. The Respondents assert that the process they have adopted is fair and they sees no reason to make any change to the process. They continue to operate the process, notwithstanding the continued demands of the Applicants and their solicitors for changes in the process to yield what they say is the appropriate standard of fairness.

59. The evidence of the Respondents is that there are over 2,600 Convention claimants, (out of about 3,000 in 3½ years) awaiting assessment by the Respondents.

60. I have no doubt at all that it is just, convenient, and in the interests of good administration that if a policy is unfair or unlawful, and that if a decision-maker will act upon that policy unless corrected, those

policies should be quashed before any further current decisions may be made pursuant to such policies. The early correction of a flawed process is all the more important when there are so many claims awaiting consideration by the process under challenge.

61. In simple terms the cases brought by the Applicants are test cases. The courts are perfectly accustomed to dealing with test cases in appropriate circumstances, particularly in judicial review.

62. In *R (Q) v Secretary of State for the Home Department* [2004] QB 36 the English Court of Appeal had no hesitation in dealing with a similar challenge to the system adopted by the Home Secretary in dealing with asylum claims. The case was in the context of whether or not a fair system of questioning had been adopted in the investigation process. In *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, the court examined a so-called "fast track" system of asylum adjudication in circumstances where no specific case was challenged, but those required to operate the process for the claimants sought review.

63. It is right that usually an applicant for judicial review must exhaust his remedies before coming to the court. In most cases that will be likely to mean that he must await a decision and then undertake any appeal that is open to him. But I accept Mr Kat's submission that there is no requirement in administrative law that an Applicant must be obliged to await an arguably unfair determination after having submitted to an arguably unfair procedure, simply to obtain a decision capable of challenge,

or to exhaust what arguably unlawful procedures there may be, in search of what may be an alternative remedy.

64. Mr Mok relied upon a decision in *Financial Secretary v Felix Wong* [2004] 1 HKLRD 303, to support his argument, and in particular the following passage from Bokhary PJ at p. 311G (para 13):

> "The courts' judicial review jurisdiction is of a supervisory nature. This extremely important jurisdiction is not meant for the purpose of micro-managing the activities of subordinate tribunals or administrative decision-makers. It should hardly ever be exercised to review decisions that go only to procedure rather than to the end result. I say "hardly ever" rather than never because there can be wholly exceptional cases calling for special treatment."

65. Following that passage, Bokhary PJ referred to a collection of English cases in Judicial Review Handbook 3rd Ed, para 4.8.2, Fordham, under the sub-heading "Whether to wait until the conclusion of the matter". That edition has now been superseded by the 4th edition where two paragraphs, 4.7.4 entitled "Whether to let proceedings take their course", and 4.7.5 entitled "Clarification better at the start", collect the relevant authorities. It is abundantly plain from the authorities collected in those two paragraphs that while there will be circumstances in which it is inappropriate for the court to rule on a grievance which is not yet ready for review, particularly where the review may not turn out to have practical significance. But it is entirely appropriate where judicial review will result in a potentially unlawful process being corrected, before a decision is reached.

66. I am quite satisfied that these "system claims" are entirely appropriate and the fact that a decision has not yet been reached in four of

the claims is no bar to judicial review. It would be quite wrong to deny the Applicants the opportunity to challenge a system, said by the Respondents to be consistent with a high standard of fairness, the very requirement imposed on the process by the Court of Final Appeal, in circumstances where the Applicants plainly have an arguable case that the system is not fair.

The process adopted:

67. In order to determine whether a claim under the Convention is justified, a screening process has been established by the Secretary, administered by the Department. That screening process involves an assessment mechanism, created by the policy, which is both administrative and extra-statutory.

68. The screening process is undertaken by officers of the Department comprised in a Special Assessment Section, unfortunately known by the acronym: SAS.

69. First, in order to invoke the assessment mechanism a claim under Article 3 of the Convention is required. In the absence of a claim I accept that there is no obligation on the Respondents to take any steps at all towards a person who might otherwise benefit from the Convention.

70. A claim under the Convention, having been identified by the Department, the claimant is then served with a document entitled “Notice to Persons Making a Claim under the Convention”. This document sets out the procedure to be followed, including the completion of a questionnaire, that there will be an interview, how information obtained in

the questionnaire or interview may be used, the determination of the claim, the right to petition the CE in the event of an adverse decision, and the procedure involved in the making of a removal order or deportation order.

71. This document is in a pre-printed standard form, and where a claimant cannot understand English it is interpreted to him in his own language.

72. The claimant is then provided with, and required to complete, a "Questionnaire for Persons who have made Claims under The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", (the questionnaire). The claimant is given privacy, with the assistance of an interpreter where necessary, to complete the questionnaire. A copy of the completed questionnaire is made available to the claimant.

73. Following the completion of the questionnaire the claimant is interviewed by an immigration officer who investigates and assesses the claim. This immigration officer is known as "the examiner", and is usually an Immigration Officer (IO), or a Senior Immigration Officer (SIO). The claimant may if he thinks necessary make written representations, supplementing the questionnaire, to the examiner as well as giving answers at interview.

74. Following interview the examiner considers the circumstances and make a recommendation to a more senior immigration officer, who reviews the claim and forwards it to an Assistant Director of Immigration (ADI), for the final determination whether or not the Convention claim

will be upheld. The ADI makes the decision, which is made in the name of the Director.

75. The process accordingly involves the claim being considered by three officers of the Department, with the decision-maker, the ADI, removed from contact with the claimant by both the examining officer, and the intermediate reviewing officer. The examining officer merely advises on the claim; he is not the decision-maker.

76. If the Director is minded to refuse the claim a "minded-to-refuse" letter is given to the claimant stating the Director's preliminary determination and the reasons for the intended refusal. The claimant is invited to make final written representations within a two-week period, before the ADI, in the name of the Director, makes the final determination of the claim. Upon final determination, the decision, and the reasons for that decision, are notified to the claimant in writing.

77. If the decision is adverse, the claimant may appeal by petition to the CE, and may make further representations in writing in support of the petition. The petition to the CE is considered, without an oral hearing, by the Secretary under authority delegated from the CE. The Secretary is advised by subordinate officers of the Security Bureau in respect of the petition. The claimant is notified of the result by letter.

The magic words argument:

78. The assessment mechanism is stimulated by a claim under Article 3 of the Convention. The Applicants contended, and the evidence tended to establish, although it was denied by Department, that a series of

"magic words" specifically invoking the Convention and a desire to make a claim, were required to constitute a claim. As each of the Applicants' claims were ultimately received and considered by the Department nothing turns on this point.

79. But it is right that I should say that I was concerned that certain assertions on the part of some persons do not appear to be treated by the Department as a claim. The assertion by NS to the Immigration Tribunal that he could not go back to Sri Lanka "as his life would be in danger"' was not regarded by the Department as sufficient to constitute a claim under the Convention. By contrast, because ND added after an assertion that he could not return to his country because his life would be in danger, the words, "That is why I would like to make a torture claim…", his assertion constituted, in the mind of the Department, an appropriate claim.

80. It is only sensible that the Department should take a broad and liberal view of statements of risk or danger upon return to their country of origin, made by any person who does not have the right of abode in Hong Kong. To insist upon a particular formula being expressed by a person would be contrary to the high degree of fairness required by *Prabakar*, and would be tantamount to sitting back and putting the person concerned to strict proof of the claim.

81. Just as the Department is enjoined by Prabakar not sit back and put a claimant to strict proof, neither should they sit back and wait silently until a potential claimant specifically mentions the Convention, or the word "torture". I would expect that in future the Department will take

an appropriately liberal view, and proactively look for language which may reasonably be interpreted as an assertion that upon return to his home country the person making the statement may be subject to conduct at which the Convention is directed, whether or not precise words "torture", or "Torture Convention", are used.

82. In the case of NS, on any reasonable reading, with a knowledge of the political situation in Sri Lanka, an assertion by a Sri Lankan that upon return to his country he will be in danger, must raise the prospect of a claim under the Convention. A simple enquiry seeking the reasons why there may be danger to life would enable an otherwise unsophisticated person, probably unaware the existence of, let alone his rights under, the Convention, to express himself, thereby enabling the Department to clarify the source of danger. If the danger arose from issues other than those dealt with by the Convention, then the assertion does not constitute a claim under the Convention. But if the danger arguably arose from Convention issues, then the Department have an obligation to begin the Convention procedure.

83. I accept that it is a legitimate concern on the part of the Secretary and Department that there may well be persons who have come to Hong Kong and have manipulated the process. They do so first by making no claim whatsoever after entry into Hong Kong, until found to be an overstayer. They confine any claim to a simple refugee claim to be assessed by the UNHCR. It appears that it is only after that claim has been rejected a Convention claim is made. But amongst those who may abuse the system there will be genuine claimants and the only way that justice

may be done to those genuine claimants is that all claims must be processed with a high standard of fairness.

84. The Department may well wish to consider the value of making a specific enquiry of persons coming to Hong Kong from countries in respect of which Convention claims have been made in the past, whether or not they wish to make a claim. A denial at that time would be a relevant factor to be taken into account in the consideration of any subsequent claim.

The right to legal representation:

85. The first issue here is not the question whether or not a claimant is entitled to obtain legal advice in the course of making a Convention claim, but rather the extent of the involvement of the lawyer in the process. The second issue is the question whether or not, if a lawyer may be involved in the process, free legal advice must be made available by the Respondents to those who have no funds to pay for that advice.

86. Mr Mok accepted that there was no basis upon which the HKSARG could say that a person making a Convention claim was not entitled to seek private legal advice in respect of that claim. That must be right. The matter under challenge by the Applicants is the Respondents position that the claimant may not have his lawyer present while he is completing the questionnaire or during interview. Also under challenge by the Applicants is the position adopted by the Respondents that the HKSARG is under no obligation to provide free legal advice to a person who cannot afford to pay for the advice.

Is there a blanket policy:

87. The first argument made by Mr Kat was that the HKSARG had a blanket policy under which it had pre-determined that in no circumstances would a claimant be entitled to have his lawyer present while completing the questionnaire, or at the interview. On the same basis it was argued that there was a blanket policy that no free legal advice would be provided. If there was not a blanket policy, it was argued that in the individual case of each Applicant, it was unfair not to provide free legal advice and to permit the involvement of the lawyer, to the extent sought by the Applicants.

88. I am left in no doubt at all that there is a blanket policy on the part of the Respondents both as to the involvement of legal advisors and as to funding.

89. Notwithstanding Mr Mok's valiant efforts to say otherwise, it is quite plain from the evidence on the part of the Respondents that the denial of access by lawyers to the interview process is pursuant to a blanket policy. It is equally clear that the refusal to establish funding arrangements for Convention claimants to have access to independent legal assistance is also a blanket policy.

90. Following the production of the three central policy documents Mr Mok argued that the was nothing in those documents which prevented the Respondents deciding in any specific case to allow the presence of a lawyer and to provide legal advice without charge to an applicant. That is right, but it does not assist his case.

91. Mr Mok's position was based upon an affidavit from Assistant Secretary of the Security Bureau, Choi Suet Yung and the second affirmation of Principal Assistant Secretary (Security) of the Security Bureau, Chow Wing Hang.

92. The affidavit of Ms Choi asserted as follows:

> "As regards their complaints detailed in paragraph 5, I wish to clarify that whilst there is not seen to be a need, in general, for torture claimants to gain access to legal advice in the course of the administrative screening process, the Government has not excluded exceptions where the provision of lawyers or the presence of lawyers during torture claim interviews may be allowed. Where the circumstances of the case are justified, exceptions to the general policies will be made. It is not correct to assume that no exceptions can be allowed under the policies."

93. The affidavit acknowledges that the policy is a "general policy". While asserting as to exceptions, no document or policy guide was produced to indicate in what circumstances, when or how, any exception might be made. It seems to me that the assertion that the policy is a general policy is founded on the basis that there is, in the mind of the Respondents, a presumption that there is neither a need nor a right to permit a Convention claimant to have legal advice in the course of the screening process.

94. Next, the first affidavit filed by Assistant Principal Immigration Officer Li Pei Tak in the claim by NS, was in the following terms:

> "9 The claimant can be accompanied by his lawyer to attend the SAS office, but the completing of questionnaire or the interview will take place in the absence of his legal representation. The lawyer may wait for any instructions from the claimant at the reception area.

> 11 The claimant is free to contact and/or consult his legal representation before, during or after completing the questionnaire or interview. If the claimant wishes to contact and/or consult his legal representation during completing the questionnaire or interview, he can request to suspend the process and have it resumed after his contact with his legal representation.
>
> 14 The assessment of torture claims is based on facts and evidence provided by the Applicants. The intention is to provide administrative screening which could meet high standards of procedural fairness, during which there is not seen to be a need for a claimant to gain access to independent legal assistance in the course of the administrative screening process.
>
> 15 …There is, therefore, no legal obligation for the Government to provide free legal assistance to the torture claimant in making his claim. Given the fact-based nature of the torture claim assessment, we also do not consider free legal representation is warranted."

95. Although made in relation to a specific claimant, the paragraphs cited are expressed in general terms, and are not confined to the particular claimant in whose application the affidavit was made. In the affirmations made by Mr Li in respect of each of the other claimants, Mr Li adopts those paragraphs as part of the case in respect of those other claimants.

96. No attempt at all is made to suggest that in any of the individual cases the decision in relation to the involvement of legal representation is a decision specific to that case, made following a consideration of the issues of that case. Instead it is clear that the starting point is that there will be no involvement of the legal advisor in the completion of the questionnaire or at interview.

97. Next, on 8 November 2004, the Secretary in response to a general enquiry made by the solicitors for the Applicants, said:

> "We have considered your view that it is necessary to establish funding arrangements for CAT claims so that they have access to independent legal assistance and medical examination in the course of CAT screening process. Our conclusion is that the Government is not obliged to do so under any international or domestic law. We do not consider it necessary to establish a special funding arrangement on the matter."

98. In all respects, that is a clear statement of a general policy on the part of the Secretary. As expressed, it is a policy which cannot in any way be argued to be a policy that is applied only after the individual consideration of a particular case. As stated it does not admit to any exceptions.

99. In a letter dated 6 March 2006, to the solicitors for the Applicants, in respect of NS, in relation to an invitation to NS to attend a meeting so that the Director's decision and the reasons for it could be explained, the Director stated:

> "In accordance with our usual practice, the meeting will take place in the absence of a lawyer."

100. On 25 July 2006, in relation to NS's solicitors advice to the Director that NS wished to appeal against the refusal, the Director stated, again referring to an explanation of the decision and the reasons for it, and offering interpretation services to lodge an appeal:

> "The interpretation services will be rendered in the absence of a lawyer.

101. That letter went on to say in relation to the consideration of the appeal:

> "There will be no oral hearing and accordingly no lawyers will be necessary."

102. In a letter dated 17 November 2006, again to NS's solicitors, the Director said:

> "Before providing the requested information, you are asked to note that it is the HKSARG's policy not to provide legal representation to torture claimants during CAT screening. There should therefore be no dispute over the non-provision of legal representation in this case."

This assertion was repeated in a letter dated 24 November 2006 in relation to FB's claim. That letter further asserted as follows:

> "Regarding item (c) in your letter, CAT screening is a fact-finding exercise during which legal representation is considered not necessary. Interpretation services are provided where required. The claimant is provided with a copy of interview notes at each interview whereupon he/she is free to seek legal advice, if he/she so wishes. The Court of Final Appeal in considering high standards of fairness in the Prabakar case made no reference to the provision of legal representation during the CAT screening process."

103. The assertion made by the Director, referred to in paras 98-99 above, with the additional advice that an interpreter would be made available, was made to FB's solicitors by letter from the Director dated 9 June 2006. In a further letter in relation to FB, dated 14 July 2006, the director said:

> "Whilst CAT interviews are conducted in the absence of a lawyer, a CAT claimant will be provided with a copy of the notes of interview in English upon its conclusion."

104. In a letter dated 2 December 2006 to NS's solicitors the Director stated:

> "It is the HKSRG's policy not to provide legal representation to torture claimants during the screening of their claims. However NS is free to seek legal advice from you if he wishes. In any event as CAT screening is a fact-finding exercise, legal representation during the CAT interviews is not considered necessary."

105. I have already commented that it is a matter of concern that the three central policy documents were not earlier disclosed. The consideration of the question of the right to legal representation demonstrates the reason for that concern. The Respondents had not disclosed to the court that the first two policy documents, (which I will call for convenience the "Assessment Mechanism", and the "Guidelines" documents). These contain the following paragraphs:

Assessment Mechanism:

> "8. The relevant facts of a claim under the Convention will have to be furnished in the first place by the claimant in his own words. For this reason and to avoid any misunderstanding, the questionnaire (Appendix B) should be completed and the interview (Appendix C) conducted in the absence of the claimant's legal representative. Nevertheless, the complainant should be given the necessary guidance as to the procedures to be followed and every reasonable opportunity to establish his claim."

Guidelines:

> "8. There should be no legal representation while the claimant is completing the questionnaire for during the interview."

106. These are clear statements of a firm policy, and no suggestion is made that there might be any exceptions to that policy, or that there might be any preliminary enquiry of a Convention claimant to determine whether or not legal representation might be appropriate in a particular case.

107. Not surprisingly, Mr Mok was embarrassed at the revelation contained in these documents. I accept that both he and Ms Lam were quite unaware that this policy documents existed. The same cannot be said of the Department of Justice who advised the Respondent on the documents and must have known of their existence.

Exceptions to the policy:

108. In addition to his general contention that there was no blanket policy, and his reliance on the affidavits set out above, Mr Mok pointed to what he contended were two exceptions to the policy, arguing that those exceptions demonstrated that the policy was not a blanket policy. The first is in relation to minors, the second to fugitive offenders.

The exception for a minor:

109. In his affirmation Mr Chow outlined the circumstances of an unaccompanied minor who had arrived in Hong Kong, then just over 16 years of age. The minor made a Convention claim on 7 November 2007, after having overstayed. On 7 January 2008, two months after the claim had been lodged, the Department referred the case to the Security Bureau for a policy directive as to whether the case of the minor, given his exceptional individual circumstances, warranted exceptional treatment. Mr Chow said:

> "7 Since early 2008 the Security Bureau has commenced in detail internal deliberations on the case of the minor to see how his torture claim should be handled in accordance with the relevant prevailing policies and procedural guidelines. After several rounds of internal consultation and deliberations, a decision was reached in May 2008.

> 8 It was decided that, in view of the minor's individual and exceptional circumstances, the Administration considered that this particular case warrants special and exceptional consideration. Having regard to the individual and exceptional circumstances of the minor, the Administration is agreeable to -
>
> (a) allowing the presence of a lawyer during his torture claim interviews on an exceptional basis; and
>
> (b) arranging for publicly funded legal assistance through the Duty Lawyer Service on an exceptional basis to this particular case.
>
> 9 I wish to emphasise that the above arrangement is made after due consideration of the individual circumstances of this individual subject. For the avoidance of doubt, I wish to stress that this does not imply that the Government will provide or arrange for such assistance in other cases in general, as each case must be determined in the light of its individual merits and circumstances on a case-by-case basis."

110. It was on the last part of the last sentence that Mr Mok primarily relied to assert that there was no blanket policy, but that each case was considered on the basis of its individual merits and circumstances, case by case.

The Fugitive Offenders "exception":

111. The evidence establishes that the Respondents also allow an exception in relation to a fugitive offender. The exception arises in the following way. Where a person is the subject of a request for extradition or rendition under the Fugitive Offenders Ordinance, Cap 503, (FOO), that person, if he has no funds, is provided with free advice and representation in the extradition proceedings.

112. By s 3 FOO, the CE in Council may publish Orders in Council reciting or embodying the terms of any arrangement made by the

HKSARG with a government of a place outside Hong Kong for the surrender of fugitive offenders. By the Fugitive Offenders (Torture) Order Sub Leg Cap 530I, an application by a government of a place outside Hong Kong to the surrender of the fugitive offender is made subject to the Convention. Consequently, as a matter of discretion Hong Kong may refuse to surrender a person where that surrender may be in breach of the Convention.

113. Similar provisions have been made in relation to specific countries. By way of example, *the Fugitive Offenders (Sri Lanka) Order, Sub Leg V Cap 503*, provides that Hong Kong may, as a matter of discretion refused to surrender a person if it considers that:

> "(d) the surrender might place [Hong Kong] in breach of its obligation under international treaties; or
>
> (e) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations…."

114. Further, there is a general restriction on surrender for extradition in s 5 FOO. That section provides that where it appears to an appropriate authority that the offence for which surrender sought is of a political character, (s 5(1)(a)), or that the surrender is sought in fact for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinions, (s 5(1)(c)), or that he might, if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of race, religion, nationality or political opinions, (s 5(1)(d)), then surrender may be refused.

115. The Respondents have determined that in relation to a person who is subject to an application under the FOO, and consequently entitled

to free legal advice and representation. From that the Respondents have decided that should that person make a Convention claim, that person will be entitled to that free legal advice and representation in respect of the Convention claim, and that the legal adviser will be entitled to be present during the completion of the questionnaire and at the interview.

116. Mr Mok said that this exception also went to show that there was no blanket policy.

Discussion:

117. Mr Mok's submission, based upon these two exceptions, completely ignores the plain assertions in the correspondence, and in the affidavits in relation to the minor, that the HKSARG would not permit the presence of a lawyer or arrange for publicly funded legal assistance in other cases in general. It is plain from those statements that the policy is a policy which generally denies lawyers the right to be present and publicly funded legal assistance. That is a blanket policy, and pays no heed to individual considerations

118. That it was a blanket policy, and continues to be a blanket policy, is plain from the fact that in order to gain an exception from the policy it was necessary, in relation to the minor, for there to be "detailed internal deliberations" within the Security Bureau, and that those deliberations should constitute "several rounds of internal consultation and deliberations".

119. It is a matter of both surprise and concern that it should have taken the Department two months after the minor made his claim, before

his position as a minor was thought worthy of "special consideration". It is even more surprising and concerning that it should then take the Department as long as four months, to reach a conclusion on the issue.

120. It takes little imagination to conclude, in respect of something so elemental as the provision of free legal advice for a minor, in relation to something as momentous as a Convention claim, that free legal advice should be provided, and that the lawyer should be allowed to be present throughout the process in order to give advice.

121. If the policy was not a blanket policy, the decision to provide free legal advice, and to allow the legal adviser to be present at the interview, is a decision that would have been made immediately upon it becoming known to the examining officer that the claimant was a minor. In the absence of a blanket policy the examining officer would not have needed to seek advice, but would have known immediately that this was a proper case to permit the presence of a lawyer during the interview.

122. The submission also disregards the fact each of the three central policy documents clear statements are made to the effect that a claimant will not be permitted legal advice during the completion of the questionnaire or at the interview. It further disregards the fact that in none of the three central policy documents is any suggestion made that consideration needs to be given by an examining officer, at the beginning of the process, whether or not the Convention claimant should be entitled to have a lawyer present throughout the process or receive free legal advice. Notwithstanding the exceptions that have been made, no document was

produced detailing the circumstances of the exceptions or reminding examining officers that those "exceptions" even existed.

123. The existence of these two exceptions does not provide a basis to conclude that the policy is not a blanket policy. It is a blanket policy because no special consideration is given to a Convention claimant, other than a minor or an alleged fugitive offender, as to whether or not it is, in appropriate circumstances necessary to provide free legal advice or permit the presence of a legal adviser during the completion of the questionnaire or interview. That two plainly ad hoc exceptions have been granted to the policy does not detract from the blanket nature of that policy.

124. There is no evidence at all of a case-by-case consideration of whether or not the circumstances of a particular Convention claimant are sufficiently exceptional to be provided representation. There is nothing whatsoever in the evidence which to demonstrate any procedural instructions by either the Secretary or the Director to the persons undertaking the process at any level at all by which the consideration of a claimant's circumstances might be undertaken, so as to lead to a considered conclusion that legal advice might or might not be appropriate.

125. I deal next with the Respondents' response to the argument contained in the evidence, namely that the decision in *Prabakar*, in considering the high standard of fairness, made no reference to the provision of free legal advice in the Convention screening process, (see para 101 above).

126. It is correct that no mention of a free legal advice is made in *Prabakar*. But one would not expect the Court of Final Appeal to condescend to particulars, having determined that a high standard of fairness is required. It is plain that in *Prabakar* the CFA was dealing with a matter of principle, and not with the detail of the procedure to be adopted. It is entirely appropriate that the CFA should leave it to the Respondents to determine the process. It is for the Respondents to take such advice as they may consider appropriate, and establish the procedure to be followed in the assessment mechanism.

127. The policy to deny both the right of a Convention claimant to have his legal adviser present while he completes the questionnaire or at the interview, may be usefully compared with the policy of the Director when dealing with a person who is under investigation and may be charged with overstaying or a related offence under the Ordinance. The invariable practice of the Director in those circumstances is to advise persons under investigation, by formal notice, of their right to call a lawyer, to be advised by a lawyer of their choice, and to have a lawyer present when being interviewed or investigated with such offences.

128. In my view it is no answer to say that a claim under the Convention will not result in criminal proceedings. A refusal of a claim under the Convention will entitle the Respondents to return the claimant to his country of origin where, if the refusal was wrong, there may be dire consequences for the claimant.

129. Nothing that Mr Mok was able to say could justify a distinction being drawn between an overstayer or an illegal immigrant,

each facing a relatively short sentence in jail on the one hand, and a Convention claimant who is at risk of being returned to jurisdiction where he may be subjected to torture and possible loss of life if his claim is denied. In the judgment of the Court of Final Appeal in *Prabakar* the risk was described, at para 43, in these terms:

> "Here, the context is the exercise of the power to deport. The determination of the potential deportee's torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination."

130. It is difficult to see how it can possibly be said that if a person facing 15 months imprisonment in Hong Kong is entitled to free legal advice throughout the process leading to that brief period of imprisonment, a person facing a decision of momentous importance which may put his life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture does not have the same right.

131. But the arguments in favour of the Applicants do not end there.

132. I am greatly assisted in my conclusion in respect of this aspect of the case by the decision in *Wabz v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687, a decision of the Federal Court of Australia in which the issue was the right of a refugee to representation before the Refugee Review Tribunal. At para 69 the court said:

> "The tribunal clearly has a discretion to allow a person to be represented before it. The question that arises is whether there may be circumstances in which a decision to disallow

> representation of an applicant before the tribunal amounted to a denial of procedural fairness. Considerations relevant to that question include:
>
> (1) The applicant's capacity to understand the nature of the proceedings and the issues for determination.
>
> (2) the applicant's ability to understand and communicate effectively in the language used by the tribunal.
>
> (3) the legal and fact or complexity of the case.
>
> (4) the importance of the decision to the applicant's liberty or welfare."

The court went on to say at para 71:

> "It is necessary to have regard to the four factors listed above in considering whether procedural fairness requires that an applicant for review be permitted to have a representative before the tribunal. In most cases before the tribunal, the relevant factors will favour the view that representation should be permitted as an aspect of procedural fairness. Non-English-speaking applicants may have some capacity to understand the nature of the proceedings and the issues for determination. But the use of an interpreter, even a very good one, does not completely overcome deficiencies in understanding. This is particularly so in relation to oral submissions made across a cultural and linguistic divide. There are some issues or legal concepts to be addressed by the tribunal which may have no equivalent in the language or cultural background of an applicant. The legal questions arising under the Refugees Convention and the Migration Act have generated much debate internationally and in the courts of this country. The notion of a "well founded fear of persecution" and the various Convention grounds connected with that fear, raise issues of construction and application to the facts which are not likely to be adequately addressed by an applicant in person. Finally, for most persons applying for a protection visa, the outcome is of importance and may affect life liberty and future welfare in a variety of ways."

133. For the Refugees Convention and the Migration Act, the Torture Convention may be substituted with validity. Equally, for the expression "well founded fear of persecution", the expression "substantial grounds for believing that he would be in danger of being subjected to

torture", that expression of course coming from Article 3(1) of the Convention, may be substituted with equal validity. Finally, for "protection visa", the words "Convention claim" may be substituted. None of those substitutions detracts from the powerful nature of the passage cited.

134. The policy is also quite inconsistent with the views of the United Nations High Commission for Refugees (UNHCR) as provided to the Director's staff in training for the assessment of Convention claims.

135. In that training, when considering the conduct of an interview, the interviewer is expressly directed to consider the question of the right to counsel. If it is the general policy of the Respondents, and I am satisfied that it is, that a claimant is not entitled to a lawyer being present at interview, then such consideration is a futile exercise. In the training the interviewer is advised to record the names of third parties present at the interview. On the Respondents' policy no third party, other than an interpreter, will be present. An interpreter cannot be classified as a "third party", as he is merely the voice of the subject. The expression "third party" is plainly directed to someone other than the interviewer or the subject.

136. It is clear from the authorities that the usual course in England, a major source of jurisprudence in relation to asylum and torture claims, is that the applicant is entitled to be accompanied by a representative, legal or otherwise, and an interpreter of his or her own during the process: see *R (Dirshe) v Secretary of State for the Home Department* [2005] 1 WLR 268, at para 4. I do not know whether the attention of the Respondents were

drawn to either *Wabz* or *Dirshe*, when the policy was determined. They ought to have been specifically referred to by those advising the Respondent. They are as clear a guide as could be asked for, that a high standard of fairness will require legal representation on the part of a Convention claimant.

137. It is asserted in the evidence from the Respondents that:

> "….there is not seen to be a need for independent legal assistance in the process".

and

> "that given the fact based nature of the ….assessment, we also do not consider free legal representation is warranted".

But there is nothing in either the evidence or the submissions to justify those general assertions. When regard is had to the significance of the decision to be reached, more than a general assertion is required. It is incumbent upon the Respondents to explain why there is neither a need nor a warrant for legal representation. The evidence is devoid of any such explanation.

138. Having regard to all of these matters I am left in no doubt at all that it was and is the blanket policy of the Respondents that a claimant under the Convention is not entitled to have a lawyer present during either the preparation and completion of the questionnaire or during the interview. It is also the blanket policy of the Respondents that free legal advice will not be provided by the Respondents to Convention claimants who are unable to afford that advice. That two isolated ad hoc exceptions have been made does not detract from the fact of the policy.

139. By applying a blanket policy of denial of legal representation to Convention claimants, and only allowing ad hoc exceptions, the Respondents have applied an unlawful policy that does not meet the high standards of fairness required.

140. It is plain from the evidence from the Respondents that there is a concern on the part of the Respondents that if lawyers are permitted to be present at the interview they will somehow corrupt the process. In his affirmation Mr Li asserts that legal advisers may interfere with the building of "a climate of confidence between the claimant and the officer in the interviews". Again a bald assertion is made, but with no justification. If a lawyer does not adversely affect the climate of confidence in the case of a minor or a fugitive offender is difficult to see how a lawyer could have any adverse effect in any other case.

141. If there was genuinely such a risk I would have expected it to be revealed in the English cases such as Dirshe. But there is no such suggestion. As appears from Dirshe, the greatest safeguard to a Convention claimant is to tape-record the interview. The tape recording of an interview is not only a safeguard to the claimant, but it also safeguards the position of the interviewer. For if the interview is recorded there can be no suggestion made that the interviewer has acted unfairly towards the claimant. Equally, if a lawyer did attempt to corrupt the process, or interfered inappropriately in the questioning procedure, his acts would be recorded and would provide the Department with a complete answer to any later denial that an improper interference by the legal adviser had taken place.

142. Like the Respondents, the Border & Immigration Agency of the Home Office in the United Kingdom (BIA), takes the view that legal representation at an interview is not necessary. But they do not deny a claimant the right to that representation throughout the whole of the process. The BIA's "Interviewing Protocol Governing the Conduct of Substantive Interviews and the Role of Interviewing Offices, Representatives and their Interpreters", provides as follows:

> "BIA believes that legal representation at an interview is not necessary to enable an applicant to set out his or her grounds for the application. An interview will not normally be postponed to allow a representative to attend. Where a representative is present in the interview, his or her role is to ensure that the applicant understands the interview process and has the opportunity to provide all relevant information."

143. The Protocol sets out that the BIA expect that representatives will not answer questions on behalf of the applicant, and that they should normally wait until the end of the interview to comment; unless it is to draw attention to problems with the standard of interpretation or to request clarification of a question or comment by the interviewing officer. The Protocol goes on to provide:

> "If an interviewing officer considers that a representative is seriously disrupting the course of the interview, the interviewing officer would advise that if this continues the representative may be excluded from the interview. Any decision to exclude a representative will be referred to a senior officer for prior approval. The next steps after exclusion will be at the discretion of the interviewing officer and senior officer, with due regard to fairness."

144. The establishment of protocols such as these, simply not undertaken by the Respondents, would go a very long way to resolve the concerns expressed in the Respondents' evidence. The Respondents would have been well advised, following the decision in *Prabakar*, to have

simply adopted the BIA rules and protocols. Had they done so there is every reason to believe that there would have been no need for this litigation.

145. Mr Mok placed heavy reliance on the following passage from the Canadian decision in *New Brunswick (Minister of Health) v G (J)* [1999] 3 SCR (3d) 46 at 87:

> "I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of the hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent."

146. That is undoubtedly right. But it seems to me the complete answer to the proposition lies in the recognition by the Court of Final Appeal in *Prabakar*, that a determination in relation to the Convention was of momentous importance to the individual concerned, and that life limb and his fundamental right not to be subjected to torture was involved. I have no doubt at all that the seriousness and complexity of the issues to be considered are such that a Convention claimant ought to have access to legal advice throughout the process.

The use of material:

147. The fact that the Department may use material obtained in either the questionnaire or interview in other immigration matters, that

material having been obtained without the claimant being entitled to have his lawyer present, is a further matter of concern.

148. The formal Notice given by the Department to a Convention claimant expressly reserves to the Director the ability to use any information supplied in the questionnaire and interviews in any immigration prosecution. Clause 2 of the Notice is in the following terms:

> "The information provided in the questionnaire and interview will only be used for the purposes of assessing a claim under Article 3 of the Convention. It will not be used for any other purpose *save that, if any part of it be relevant to further immigration decisions concerning the claimant or any person related to him, it may be taken into account."* (my emphasis)

149. The reservation highlighted puts the Convention claimant in an invidious position. The reservation is in quite disingenuous terms. A person being interviewed under caution in respect of an immigration offence will have been told of the nature of the charge he faces. The Notice on the other hand uses the expression "immigration decisions", a neutral and vague expression that does not convey to the subject that he may face prosecution resulting in imprisonment as a result of what he tells the Department. He is effectively denied his fundamental right to silence.

150. Experience shows that invariably Convention claimants are at least overstayers, if not illegal immigrants. Yet to support their claim they are required to make a statement that may be used against them in a subsequent prosecution, and that statement is made in circumstances where they are neither offered legal assistance they would get were they directly facing that prosecution, nor are they appropriately cautioned. It is quite illogical and inconsistent that a person should be subjected to questioning

in a Convention claim, plainly a voluntary process, in which they are not cautioned, may incriminate themselves, all during a period when they are denied legal representation, but a mere overstayer is granted that legal representation.

151. In the course of the proceedings the Respondents said to the Court that incriminating answers given in a questionnaire will not be used in an immigration prosecution. That is hardly satisfactory. The only satisfactory response to the Applicants' argument, which is overwhelming, is that there should be a categorical statement in the Notice that nothing at all said by a Convention claimant in either the questionnaire or at interview will be used against the claimant in any subsequent proceedings of any nature save an attempt to pervert the course of justice.

152. An analysis of the questionnaire shows that it is not at all a simple document. It is highly likely that a Convention claimant may have little knowledge of the technicalities of the Convention, and without proper legal advice might easily omit relevant particulars. To an extent, the answers given to a questionnaire parallel the answers given by a witness to a solicitor taking a brief of evidence. In the case of a Convention claim, the claimant is simply given the questionnaire, the assistance of an interpreter, and privacy to complete the document. He is denied the assistance of a legal adviser in completion of the document. Although he may seek legal advice during the course of completing the questionnaire, he cannot do so with the questionnaire in his possession.

153. The very real difficulties in preparing a statement of evidence, for that is what the questionnaire amounts to, were recognised in *R*

(Wagstaff) v Health Secretary [2001] 1 WLR 292 at 322 in the following terms:

> "But the taking of a statement from a lay witness dealing with facts possibly some time ago and covering a substantial period of time is a skilled art; so is the eliciting the evidence on the basis of such a statement, and in each case it is a lawyer's art."

But the policy adopted by the Respondents, said by them to meet the high standards of fairness required, denies a Convention claimant access to that skill. The only justification for this position offered by the Respondents is that the investigation of a Convention claim is a fact-finding process. That is precisely what is constituted in the taking of statement by a lawyer from a lay witness.

154. I note that in the decision in *Rowse v Secretary for the Civil Service et al*, unreported, HCAL 41/2007 Hartmann J. held that it was procedurally unfair to deny legal representation in a tribunal in which a civil servant faced the prospect of dismissal in circumstances of notoriety and a factually complex scenario: see para 140. Just as that is unfair, so too it must be unfair to deny legal representation to a Convention claimant in what is effectively a tribunal, (the original decision-maker or the Secretary), in circumstances where a momentous decision is being made concerning the claimant which may affect his life, limb and fundamental right not to be subjected to torture.

Is there an obligation to provide free legal advice:

155. Having determined that the necessary high standards of fairness require the Respondents to permit lawyers to be present during the completion of the questionnaire and at the interview, it is necessary to

consider whether there is any obligation on the Respondents to provide that legal advice without charge to a Convention claimant who is otherwise unable to pay for legal advice.

156. In my view the answer is quite straightforward. Almost inevitably a Convention claimant is a person without any means to pay for his own legal representation. While it may be that a person with adequate funds to pay for his own lawyer may arrive in Hong Kong and seek the protection of the Convention, the Respondents did not suggest otherwise than that the vast majority of Convention claimants will require free legal assistance.

157. The reality of the situation is therefore that if the Respondents do not provide free legal assistance they are effectively denying a Convention claimant the right to that legal assistance. As Mr Kat simply put it: in the absence of the means, the right is incapable of exercise. The following statement from Dirshe at para 16, makes the position clear:

> "At the time of that decision, as we have already indicated, applicants were entitled to have a representative and even an interpreter present during the course of the interview. There was public funding available for their attendance. It follows that every applicant had the opportunity, even if some may not have availed themselves of it, of that benefit. The present position is entirely different. The vast majority of applicants will be dependent upon public funding if they desire representation. With the removal of any right to remuneration, no representative will be willing to accompany an applicant to an interview. It follows that the entitlement to have a representative or interpreter present is of no practical value in such cases."

Although the decision in *Dirshe* was not directed at the issue of funding, the foregoing statement carries no less weight.

158. The argument that the denial of free legal representation to those unable to afford representation is a denial of effective participation is one that has found favour in other jurisdictions. In Canada in New Brunswick, the court said, first at p 56-7:

> "When government action triggers a hearing in which the interest is protected by s 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interest at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel."

And at p 82:

> "For the hearing to be fair, the parent must have an opportunity to present his or her case effectively."

And at p 85:

> "Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error…"

159. In *Airey v Ireland* (1979) EHRR 305, an effective participation test was applied in matrimonial proceedings.

160. The Respondents raise no objection to providing free legal assistance to an overstayer or an illegal immigrant facing prosecution which may result in a relatively short period of imprisonment. The Respondents raise no objection to providing free legal assistance to a minor making a Convention claim or an alleged fugitive offender who makes a Convention claim as part of his resistance to extradition. There can be no logical reason why free legal assistance should not be provided to indigent Convention claimants in general, if the denial of free legal

assistance would effectively deny those claimants the right to legal representation.

161. I am accordingly satisfied that, where a Convention claimant is otherwise unable to pay for his legal assistance, by denying free legal assistance, whether it be through the Duty Lawyer Scheme, or the Legal Aid Department, the Respondents had effectively denied the claimant the right to that legal assistance, and have set in place an unfair policy which fails to achieve the required high standard of fairness.

162. Consequently, the Applicants succeed in their application for judicial review on the grounds that the Respondents have established an unlawful blanket policy in which they declined to permit lawyers to be present during the completion of a questionnaire or the conduct of interviews which were part of the screening process, and in which they declined to provide free legal representation for Convention claimants who are unable to fund their own legal representation.

The decision maker a different person from the interviewer:

163. There is no dispute that the examining officer is not the person who is the decision-maker in respect of a Convention claim, although that person is the primary assessing officer. The examining officer receives the questionnaire and conducts the interview. He then makes an assessment report on the claim and, by a minute recorded on the file, makes a recommendation on the claim. The file, including the questionnaire, details of the interview, the examining officer's assessment and recommendation are then passed up a chain of more senior officers. Each

of those senior officers considers the matter and endorses either agreement or disagreement, until the matter finally reaches the decision-maker.

164. On the evidence it appears that there are two intermediate assessments before a final decision is made. In the two cases where a decision has been made, those of FB and NS, the decision-maker held the quite senior rank of ADI.

165. The Applicants complain that this is an unfair system. They say that the credibility of the claimant is of considerable importance and vital to the outcome of the claim. I accept that the assessment of a Convention claim has, if not at its centre, at least of large importance, a determination as to the credibility of the claim.

166. Mr Mok chose to answer this criticism of the system by arguing that the outcome of NS's claim did not turn on credibility. He says that the negative assessment of NS was based upon objective evidence collected by the Department and the comparison of the information presented by NS. He says that NS was made fully aware of all matters of concern and had every opportunity to deal with them.

167. Mr Mok drew my attention to the following passage from the decision of Brooke J (as he then was) in *R v Home Secretary Ex p Akdogan* [1995] IMM AR 176 at p 182:

> "The Secretary of State as an intensely difficult task in analysing the validity of these claims for asylum. It is intensely difficult because the people who take the decisions, …., are not the people who conduct the interviews who can form a view as to the credibility and state of mind of the person in front of them, the way he or she talks and so on. The Secretary of State has a serious problem when assessing credibility in the circumstances,

> quite apart from the problem that there is a language divide and also a cultural divide."

168. The citation does not help Mr Mok. It was relied upon by Mr Kat. Its terms are clear. Where credibility is an issue, fairness demands that the person who examines the questionnaire and conducts the interview, this latter exercise being designed plainly to test the answers in the questionnaire, is the same person as the person who makes the decision.

169. Mr Mok's contention was that NS's claim did not turn on credibility. Yet a significant factor in the rejection of the claim was a purely subjective disbelief of his account of his escape from police, a rejection made without reference to country conditions material. That was plainly an exercise of the assessment of credibility. I accept Mr Kat's submission that the reasons for the decision given in the Assessment Report on NS are largely without direct support from objective evidence contradicting the substance of NS's account. Mr Kat, in my view, put it correctly when he said that the view taken on the credibility of NS "permeates the reasoning for the decision".

170. When regard is had to the whole nature of a Convention claim, it constituting an examination of the claimant's assertions measured against country conditions and all other relevant factors, it is difficult to see how the credibility of the claimant cannot be central to the decision.

171. In *Akdogan* the Secretary found against a claimant for asylum, who had been interviewed by some other person, because particular information had not been supplied in two earlier interviews, and for that reason the claimant 's credibility was affected. While it is right that a

failure to supply information at the earliest opportunity is a factor which may be taken into account on credit, it is a difficult and delicate matter to deal with, and plainly one which is much better dealt with by the person who undertakes the interview, and is able to deal with such factors directly when they are arise.

172. In *Akdogan*, the court drew attention to the fact that the decision maker, removed from the interview process had done nothing to enquire into an explanation given by the applicant of his reason why he did not do justice to himself at the earlier interviews. A perfectly credible explanation for the omission had been offered. The decision demonstrates starkly the very great importance of the first decision-maker being the person who conducts the interview, when issues of credibility are relevant. I cannot see that there is any likelihood at all in respect of a Convention claim that there will be a case where the credibility of the claimant will not be relevant.

173. In *R v (Q) v Home Secretary* [2004] QB 36 CA at 78, in the judgement of the Master of the Rolls, Lord Phillips of Worth Matravers, to which all members[1] of the court contributed, the court had this to say:

> "This had highlighted what, in our opinion, are two further serious defects in the system adopted by the Secretary of State, at any rate until now. The first is that the decision-maker is not in the ordinary course of events the same person as the interviewer. This means that a view has to be formed as to the credibility of the claimant's account by a person who has not seen the claimant but only read the answers noted on screening form by someone else. We understand from the Attorney General that that aspect of the system is to be changed and that the interviewer and the decision-maker will be the same person. In our view that will be a most welcome change for the future."

[1] The other members were Clarke & Sedly LJJ.

174. The answer to the issue is, in my view quite clear. By setting in place a system where the decision on the claim is not made by the examining officer but by some other more senior Immigration Officers, two or three steps removed from the examining officer, the Respondents have established an inherently unfair system of dealing with Convention claims.

175. The assertion by the Applicants that because the interviewing officer and the decision-maker are different persons the process does not meet the high standards of fairness required by *Prabakar* succeeds.

Insufficient training:

176. It must go without saying that the examining officer, and those involved at any decision-making level, (including appeals by way of petition), must have a proper understanding of the Convention. This must include an understanding of the way in which the Convention has been interpreted by the decisions in courts in other relevant jurisdictions such as the United Kingdom, and the European Court.

177. That this is so is abundantly clear from the training materials used in a workshop on interview technique in connection with the Convention, organised by the UNHCR Hong Kong in December 2004. Not only must those making decisions be properly aware of the appropriate international human rights and refugee law, but they must also properly understand the technique of assessing credibility, and how to apply both a standard of proof and a burden of proof to the decision making task.

178. It is obvious, and beyond argument, that if the training given to decision-makers in a system of assessment such as that required under the Convention is inadequate, then the system established will not meet the high standards of fairness required by *Prabakar*. I did not understand Mr Mok to dispute that proposition. To say otherwise would mean, for example, that a magistrate could hear a case and make a recommendation on the result to a quite unqualified person, who then made the decision, without having seen or heard the parties. That would be demonstrably unfair.

179. Mr Mok sought to resist this ground of challenge by arguing that the evidence did not sufficiently establish that there had been unfairness in respect of any of the specific cases of the Applicants. In the context of this case that is a flawed approach.

180. The case advanced makes it quite clear that the primary contention is that the system itself is inherently unfair, and secondly, that each of the individual applicants has been dealt with unfairly. Thus, if it can be shown that there is a systemic lack of proper training on the part of decision-makers, then the Applicants M, RP, PVK and ND, whose claims had not yet been determined will be entitled to relief. If the systemic lack of proper training has affected the claims of FB or NS, whose claims have been determined, they too will be entitled to relief. Equally they will be entitled to relief if the decision-makers in their cases have not been properly trained.

The examining officers:

181. When the proceedings were commenced, the Applicants, not surprisingly, had no knowledge of the extent of training given to officers of the Department in Convention matters. But I am quite satisfied that this matter was properly raised.

182. The evidence from the Respondents in reply to the Applicants contention was sparse. It amounted to three paragraphs covering one and one half pages in the affirmation of Mr Li. It is now plain that those advising the Respondents, and instructing Mr Mok, did not fully appreciate the depth and strength of the argument that was available in relation to the extent of training.

183. Thus, as the matter stood at the end of the argument on 21 May 2008, the evidence from the Respondents fell a very long way short of satisfyingly me that it had been established that the training made available to the decision-makers was sufficient.

184. Subsequent to that stage of the hearing the Respondents, with leave, filed two further affidavits, in which, over some 20 pages the training procedure is set out. Supplementing that description of that procedure, were 11 exhibits, comprising in excess of 400 pages of documentation and constituting the materials that are used in the training process, and which are available to the decision-makers in the course of carrying out their task.

185. At the centre of the material are the three policy documents referred to in para 7 above. The first two, the Assessment Mechanism and

the Guidelines, were prepared by the Respondents, having taken advice from the Department Justice, prior to the original issue in October 2004, and, after further advice amendment and reissue in February 2006. These and other documents comprise part of a "familiarisation package" that is made available to officers of the Department upon joining the SAS. The documentation also demonstrates that examining officers have received training on torture matters and Convention claims through the UNHCR.

186. Mr Kat subjected the new documents to strong criticism. He particularly highlighted a number of aspects which he said were deficient. But he did not point to positive errors in the material.

187. Having regard to the extent of that evidence, now available, and the further evidence as to the steps that are taken towards training examining officers, I am unable to say that the training that is made available to them in the Convention process is such that it can be said to be so deficient as to render the process unfair. Were the examining officers the decision-makers there would be no difficulty, and any decisions made by them could not be impugned on this basis.

188. But there is no evidence whatsoever to indicate that the decision-makers, (as against the examining officers), in the cases of FB or NS have received any training guidance or instruction whatsoever as to Convention matters prior to making the decision in each case. It is right that they have received advice and assistance from junior officers who have had that training, but that is no answer. I have no doubt at all that the ADI considers himself perfectly free to make whatever decision on the claim he thinks appropriate in the circumstances. If the proposition were

put to him that his task is to rubber-stamp the recommendation of a junior officer he would certainly reject that.

189. If the examining officer is not the decision-maker, then the decision-maker himself must be demonstrated to have received sufficient training in order to be able to make an informed decision. There is no evidence that the decision-makers have received appropriate training.

190. Consequently, I hold that so long as the examining officer is not the decision-maker and there is no training in respect of the decision-maker, the system put in place by the Respondents does not meet the high standards of fairness required.

191. The matter does not end there, for the same principles apply to the decision of a petition to be made by the Secretary. Again there is no evidence whatsoever of any specific Convention assessment and determination training, whether training by UNHCR or by otherwise experienced or qualified persons of the Secretary or of his executive officers who deal with and make recommendations on petitions. The best that can be said is in the affidavit of Mr Chow where he says:

> "5. (Security Branch) officers involved in the handling of petitions concerning torture claims are given instructions on the handling procedures and guides. On assuming their respective posts, they are provided with briefing in respect of the definition of torture under the CAT, as well of the relevant legislative provisions, internal guidelines, court judgments and reference materials relevant to the CAT. They are also fully briefed on procedures relating to the handling of petitions."

192. Being "provided with a briefing….of the relevant definition…as well as…(relevant documentation)", does not constitute

training of the nature that would be required to meet high standards of fairness. The assertion is tantamount to an assertion that a person with no legal training at all, could sit in an appellate position from a decision by a magistrate, simply having been given relevant documents in order that he may understand what the matter is about. When regard is had to the momentous nature of the decisions at issue such a procedure is demonstrably unfair.

193. I have said that Mr Kat subjected the new evidence to considerable criticism. There are certainly areas in which the documentation and training may be improved. The deficiencies addressed in his submissions by Mr Kat constitute a valid criticism, although they do not justify a finding that the training of examining officers is inadequate. The Respondents would do well to address themselves to the deficiencies and omissions noted by Mr Kat.

194. A particular matter that ought to be better addressed is the exercise of decision making. It needs to be remembered that in the context of a Convention claim, this is a process that is akin to that of a magistrate or Judge in a trial. It is a difficult task and one which requires experience. It appears to me in particular that in assessing credibility it may be that far too much weight is placed by both examining officers and decision-makers on inconsistencies between, for example, answers in a questionnaire and a subsequent interview. There may be many explanations for an inconsistency and it simply does not follow that if there is an inconsistency there should be a finding of lack of credit against the claimant.

The bias, or conflict of interest argument:

195. The case for the Applicants under this heading may effectively be put in this way. The interviewing officers and decision makers dealing with Convention claims are officers of the Department, which Department administers other policies, including the general immigration policies of the HKSARG. This necessarily includes prosecution of persons for immigration offences, including both overstaying and illegal emigration. A great number of Convention claimants are within this category. Consequently, it is argued that the mind-set of the interviewing officers and decision-makers is such that they have an inherent bias against a Convention claimant, or such a conflict of interest that they are incapable of reaching a fair decision.

196. Mr Kat reminds me in this respect that the Respondents have a firm policy of not granting asylum to refugees. He drew my attention to a Legislative Council paper dated 18 July 2006 containing the following statement:

> "Claims for Refugee Status
>
> 2. The 1951 United Nations Convention relating to the Status of Refugees ("the 1951 UN Convention") does not apply to Hong Kong. Hong Kong is small in size and has a dense population. Our unique situation is set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the 1951 UN Convention were to be extended to Hong Kong. We thus have a firm policy of not granting asylum and do not have any obligation to admit individuals seeking refugee status under the 1951 UN Convention."

197. In addition to this policy Mr Kat reminded me that officers of Department are responsible for undertaking prosecutions for immigration offences and controlling entry into the Territory. He argued that a positive

determination under the Convention in favour of a person who was otherwise an overstayer or an illegal immigrant, potentially conflicted with the duty of the officers of the Department to prosecute that same person for those immigration offences.

198. He points to the response of the Department in the affirmation of Mr Li, who says that the SAS has been set up to handle Convention claims "independently" but goes on to concede that Convention claims are considered and the decisions made by officers above the Head of that section and are therefore not so separated. Mr Kat points out that the decision-makers include Mr Li himself right up to the Assistant Director (Enforcement) who took the decision in NS. He argues that all of those persons are responsible both for the enforcement of policies in relation to Convention claims and for the enforcement of immigration law and policy generally.

199. It is undoubtedly right that a lack of independence which will infect the independence of judgement in relation to the finding of primary facts will provide a basis for judicial review of a decision: see e.g. *Porter v Magill* [2002] AC 357.

200. It is right that there are some aspects of the conduct of Convention claims by the Department which give cause for concern. I have already referred to the apparent inability of the Department to act proactively in assessing statements made by an individual to determine whether or not they might constitute a Convention claim. I have referred also to be quite unacceptable length of time that it took the Department to

determine that a minor ought to be entitled to free legal advice in the presence of a lawyer throughout the process.

201. It is further a matter of concern that it appears that at a very early stage in each assessment of a Convention claim the examining officer records the fact that the claimant is an overstayer or an illegal immigrant, both prejudicial factors, which are in reality quite irrelevant both to the assessment of the claim and the assessment of the credibility of the claimant.

202. But all that said, having regard to the whole of the evidence, I am not satisfied that the Applicants' evidence establishes systemic bias to the extent that I can say, on the balance of probabilities, that there is a real risk of unlawful bias on the part of either the examining officers or the decision-makers, or an unlawful conflict of interest.

203. There are undoubtedly areas in which the examining officers and decision-makers will need to take great care in separating the roles of the Department. Almost inevitably it seems a Convention claimant will be an overstayer or illegal immigrant. That situation arises, it appears, because of a the circumstances they have left behind them in the country from which they flee. While it is right that the fact that a person has committed a criminal offence is a matter which may be weighed against his credit, in the circumstances of a Convention claim I am satisfied that the fact that a claimant is an overstayer or an illegal immigrant goes nowhere against his credit.

204. I would expect that examining officers and decision-makers will have this aspect of this judgment brought to their attention and that appropriate instructions will be issued.

205. But circumstances are not such that I am persuaded that there exists in the Department a systemic unlawful bias or conflict of interest. On this ground, the application for judicial review fails.

No oral hearing at petition, (appeal) stage:

206. If a Convention claim is declined the claimant is accorded a right of appeal against the decision of the Director, on the merits of his case, by way of petition to the CE under Article 48(13) of the Basic Law. No issue arises from the fact that the CE has delegated the power to determine such a petition to the Secretary. The delegation is perfectly lawful. Although no inference can be drawn from the fact, there is no evidence of any such petition having succeeded. The petitions lodged by FB and NS were refused.

207. The challenge to this stage of the process is twofold, first as a matter of principle it is argued that it is wrong to deny the petitioner an oral hearing. Ancillary to that, again as a matter of principle, it is argued that it is wrong to deny a petitioner a right to legal representation in such an oral hearing. Second, presumably on the basis that that argument on principle fails, it is argued that it was procedurally individually unfair to both FB and NS that they were denied oral hearings.

208. To say that there was no right to oral hearing in the context of a petition to the CE Mr Mok relied upon the decision of Hartmann J. (as he

then was), in *Ch'ng Poh v The CE*, (unreported, 3 December 2003, HCAL 182/2002), at paras 98-111. But it is quite clear from that decision that the assertion in that case that there was no right to an oral hearing on a petition is an assertion that is confined to the context of a petition to the exercise of the prerogative of mercy. I find the most useful statement of Hartmann J. to be in para 109:

> "However, in administrative enquiries, where technical rules of procedure and evidence play no part, and adherence to establish practice, while it ensures consistency of approach, cannot exclude the need, when the occasion arises, to offer that practice to accommodate the dictates of fairness. Some flexibility must be inherent in the process."

209. Mr Mok relies also on the decision of Hartmann J. in *C v Director of Immigration*, (unreported HCAL 132/2006), at para 186, to say that it is for the HKSARG to decide what procedure should be adopted. He says further, relying on *Prabakar* at para 45, "that the court should not usurp that official's responsibility". That is of course right. But it does not follow that if the court should find that the procedure adopted is unfair, a declaration that the procedure is unlawful, constitutes a usurping of the officials responsibility.

210. In determining whether or not an oral hearing should be permitted in respect of a petition to the CE guidance may be obtained from the decision of the Court of Final Appeal in *SEHK v New World Development Co Ltd & Ors* (2006) 9 HKCFAR 234. There the court was considering the issue of entitlement to legal representation in what effectively constituted a disciplinary hearing. The leading judgement was delivered by Ribeiro PJ. The primary finding of the court was that since, in relation to the operation of the principle of fairness, everything must

depend on the circumstances of the particular case, an assessment of what procedures were dictated by fairness could only be made were those circumstances were known.

211. The relevant considerations in determining the right to legal representation laid down in *Wabz*, (see para 132 above), are equally applicable to the question as to whether or not there should be an oral hearing. Of those the most significant is the importance of the decision to the petitioner's liberty or welfare. It may sound repetitive but I say again, the decision of a Convention claim is a momentous decision to an applicant. It affects his liberty and welfare and his right not to be subject to torture. Adopting and amending what was said in *Wabz* at para 71, to the context of an oral hearing, in most cases of a petition, the relevant factors will favour the view that an oral hearing should be permitted as an aspect of procedural fairness.

212. In respect of FB, Mr Mok made much of the fact that no additional material or submissions were presented to the Secretary for the consideration of the petition. In my view that is no basis to deny an oral hearing. The petitioner is perfectly entitled to say, for example, in support of his petition, that inappropriate weight has been accorded to some aspect of the evidence by the decision-maker, or that the decision-maker has rejected the petitioner's credit for in appropriate reasons. These are grounds which do not require additional material to be presented. They are matters which may well be argued in an oral hearing.

213. For the foregoing reasons I conclude that by establishing a system in which a petitioner is denied both an oral hearing in respect of his

petition and the right to legal representation in the oral hearing, the system does not reach a high standard of fairness.

214. The late evidence from the Respondents demonstrates a further area which renders the petition procedure systemically unfair. It was revealed that in the course of considering a petition the Secretary takes legal advice from the Department of Justice on the matters raised by the petition and the information put before him. But there is nothing in the procedure which requires the Secretary to disclose that legal advice to the petitioner.

215. It is axiomatic that a judge, for in the circumstances that is what the Secretary is, may not receive an ex parte communication from one side without disclosing it to the other. A Convention claimant is entitled to see any legal advice that the Secretary may receive in respect of his claim or petition, and the failure to provide for this renders the procedure unfair, and fails to meet the high standards of fairness required.

216. It does not follow from the conclusion reached in paragraph 213 that every petition will require both an oral hearing or the petitioner to be represented at that hearing. It will be necessary for the Secretary in each case to have regard to the appropriate relevant considerations and to make an appropriate determination.

217. For the reasons I have given in paragraph 212 above, the decision to deny FB an oral hearing was procedurally unfair to him, and the decision on the petition must be set aside. Having regard to the significant importance in the case of NS of the determination of credibility,

he ought to have been accorded an oral hearing in order that the examiners subjective disbelief could be the subject of a proper merits review. For that reason the failure to give NS an oral hearing was procedurally unfair, and the decision on the petition must be set aside.

The failure of the Secretary to give reasons for the refusal of a petition:

218. In the case of both FB and NS, the decision of the Secretary gave no reasons for the rejection of the petitions. In the case of FB, the decision was communicated in a letter to FB's solicitors dated 15 September 2007, and is in the following terms:

> "I refer to the petition of FB against the decision of the Director of Immigration to refuse his claim under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT). The petitioner is treated as a petition to the Chief Executive under Article 48(13) of the Basic Law. I am delegated with the power to determine his petition.
>
> Having considered all information provided, I am not satisfied that FB have a claim under CAT. His position is hereby rejected."

In the case of NS the decision was communicated in a letter dated 16 November 2006. The first paragraph is identical to the letter addressed to FB's solicitors. The second paragraph reads:

> "I have reviewed your case. Having considered all the circumstances, I cannot find any justifiable grounds to reverse the Director of Immigration's decision."

219. The case of the Respondents begins with the assertion that there is no general duty to give reasons for administrative decision, but such a duty may in appropriate circumstances be in reply: see *R v Home Secretary Ex p Doody* [1994] 1 AC 531 per Lord Mustill at 564. That is a

correct statement of law, and it is worth remembering that in that case the Secretary of State was required to give reasons for the relevant decision.

220. Mr Mok's argument amounted to an assertion that where an unsuccessful claimant petitions the CE and does not introduce new materials or make fresh submissions there was no obligation upon the Secretary to give any particular reasons.

221. Fairness at common law requires the decision-maker to give reasons beyond simply the fact that the appeal has been considered. Mr Kat properly referred me to the decision of the Court of Final Appeal in *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-98) 1 HKCFAR 279 at 289D, with the following passage appears:

> "It is possible that the duty (to give reasons) may be put on a wider ground than implication as a matter of statutory construction. It may be said to arise under common law in the following way. Considering the character of the tribunal, that kind of decision it has to make and the statutory framework in which it operates, the requirements of fairness demands that the Tribunal should give reasons; there being no contrary intention in statute."

When there is a duty to give reasons, the CFA said at p 290J:

> "…. it must be discharged by giving adequate reasons. What would amount to adequate reasons for a decision would depend on context in which the decision maker is operating and the circumstances of the case in question."

222. I reject Mr Mok's submission. The requirement for reasons in an appeal such as this is fundamental. That that is so was recognised by the Court of Final Appeal in *Prabakar* at para 51 in the following terms:

> "Where the claim is rejected, reasons should be given by the Secretary. The reasons need not be elaborate but must be sufficient to enable the potential deportee to consider the possibilities of administrative review and judicial review."

223. It is right that in this paragraph the Court is referring to the initial decision to refuse. The reference to the Secretary is a reference to the fact that the ultimate responsibility for the decision relies upon the Secretary, although his initial decision-making power has been appropriately delegated to the Director. But the statement is equally applicable to a decision on a petition by the Secretary.

224. The argument that there should be reasons, and the requirement for reasons is no less valid in relation to a petition to the CE. If, as in both cases, no reasons whatsoever are given, it is impossible for a potential deportee to consider the possibility of judicial review. Indeed the absence of reasons positively invites judicial review. As the decisions stand, the court is left not knowing whether the Secretary has properly applied his own mind to all relevant matters. A bare assertion that "the case has been reviewed" or that "all information has been considered" falls far short of satisfying the requirements of natural justice.

225. If the appeals have been rejected merely because no new material or submissions had been supplied or made, an argument will be open to a potential deportee that the Secretary has failed to consider the substance of the claim in rejecting the appeal. It is no answer now for the Secretary to say that no reasons were required because no new material or submissions were supplied.

226. I am satisfied that both the high standards of fairness required in the assessment of Convention claims, and the rules of natural justice, require that the Secretary in dealing with a petition must give adequate reasons for that decision.

227. The applications for judicial review by FB and NS based upon the failure of the Secretary to give reasons for the rejection of the petitions to the CE must be allowed.

The constitutional basis for the arguments:

228. As I have found for the Applicants on the basis of the high standard of fairness for the assessment of Convention claims required by *Prabakar*, it has not been necessary for me to consider the constitutional arguments mounted by the which relied upon Articles 13 & 14 of the International Covenant on Civil and Political Rights (1996) (ICCPR), Article 9 of the Hong Kong Bill of Rights Ordinance, and Articles 4, 35 & 39 of the Basic Law.

The pleading point:

229. Finally I should note that Mr Mok took a number of pleading points, contending that submissions made by the Applicants are not made in support of a pleaded ground of review. On the final day of the hearing Mr Kat put to me a schedule setting out the various assertions and submissions made and identifying the relevant pleadings. It is sufficient if I say there was nothing in the pleading point.

The appropriate relief:

230. Subject to any submissions that may be made, it seems to me that the following declarations are appropriate in respect of each claimant:

1. A declaration that the policy of the Respondents not to permit the presence of a legal representative of a Convention claimant during either the completion of a questionnaire by the Convention claimant, or during interview by the Respondents' examining officer is unlawful and in breach of the duty of the Government of the Hong Kong Special Administrative Region to assess Convention claims in accordance with high standards of fairness;

2. A declaration that the policy of the Respondents not to provide, at the expense of the Respondents, legal representation to a Convention claimant who is unable to afford that legal representation, is unlawful and in breach of the duty of the Government of the Hong Kong Special Administrative Region to assess Convention claims in accordance with high standards of fairness;

3. A declaration that the policy of the Respondents in the administration of the screening process for Convention claims is unlawful and in breach of the duty of the Government of the Hong Kong Special Administrative Region to assess Convention claims in accordance with high standards of fairness in that:

   (i) The examining officer in relation to the Convention claim and the decision-maker are not the same person;

(ii) The decision-maker in relation to the Convention claim is insufficiently trained or instructed in respect of the screening and decision-making process on the claim;

(iii) The decision-maker in relation to a petition to the Chief Executive under Article 48(13) of the Basic Law is insufficiently trained or instructed in respect of the decision-making process on the petition;

(iv) No provision is made for an oral hearing on a petition, or for the petitioner to be legally represented at that oral hearing.

231. It appears to me that in addition to the foregoing declarations specific orders in relation to each Applicant will be required in order to settle the future conduct of each individual Convention claim. If the parties are unable to come to terms on the wording of the declarations and any ancillary orders that flow from those declarations I will hear from counsel. Leave is accordingly reserve to apply.

Costs:

232. The Applicants have substantially succeeded in the application for judicial review. There will be an order nisi that they are to have their costs, with a certificate for second counsel if required, to be paid by the Respondents on a party and party basis, and taxed on Legal Aid Regulations.

(John Saunders)
Judge of the Court of First Instance
High Court

Mr Nigel Kat and Ms Ho Wai Yan, instructed by Messrs Barnes & Daly, for the Applicants

Mr Johnny Mok SC, and Ms Rachel Lam, instructed by the Department of Justice, for the 1st & 2nd Respondents