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HCAL 10/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 10 OF 2010

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BETWEEN

MA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 73/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 73 OF 2010

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BETWEEN

GA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

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AND

HCAL 75/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 75 OF 2010

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BETWEEN

PA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

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AND

HCAL 81/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 81 OF 2010

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BETWEEN

FI Applicant

and

DIRECTOR OF IMMIGRATION Respondent

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AND

HCAL 83/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 83 OF 2010

BETWEEN

JA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

(Heard Together)

Before: Hon Andrew Cheung J in Court
Dates of Hearing: 24-26 November 2010
Date of Judgment: 6 January 2011

J U D G M E N T

Facts

1. These 5 applications for judicial review, which have been heard together, concern 4 mandated refugees and 1 screened-in torture claimant. They raise some common issues. Stated generally, the main issue raised concerns the circumstances, if any, under which a mandated

refugees or a screened-in torture claimants, who has been stranded in Hong Kong for a prolonged period of time and has little prospect of resettlement (or departure) in the immediately foreseeable future, may be permitted to take up available employment in Hong Kong, pending resettlement (or departure).

2. MA is a Pakistani national. He is in his 30s. He was involved in regional politics in Pakistan, where many had been killed in sectarian-related violence. In 2001, MA received information that he and his family were targeted by terrorist extremist groups due to his political involvement. He fled Pakistan in October 2001 and came to Hong Kong as a visitor on 11 October 2001. On the same day, MA sought asylum and applied for protection under the Convention relating to the Status of Refugees 1951 with the UNHCR[1] Office in Hong Kong. MA's permission to stay was extended on several occasions but it eventually expired on 25 January 2002. He went underground shortly thereafter. On 8 June 2004, he was officially mandated by the UNHCR as a refugee. He surrendered himself to the Immigration Department on 18 June 2004 and was released on recognizance in lieu of detention, pursuant to section 36 of the Immigration Ordinance (Cap 115). As such, MA could not work in Hong Kong whilst awaiting overseas resettlement to be arranged by the UNHCR. MA, single and alone in Hong Kong, survived on "assistance in kind" offered by the Government, as a form of "tide-over support" provided on humanitarian grounds, and on other assistance provided by religious and charitable organisations.

3. By a letter dated 20 October 2009, MA through solicitors wrote to the Director of Immigration, pointing out that according to the

[1] United Nations High Commissioner for Refugees

UNHCR, previous resettlement efforts had been in vain and the prospect of resettlement was remote. The letter went on to say that MA was unable to return to his home country, nor could he be sent elsewhere. He would remain in Hong Kong indefinitely. In those circumstances, the letter maintained that the only practical solution, as "the appropriate durable solution" for MA, was for him to be allowed to live and work in Hong Kong, as a resident. The Director was therefore asked to exercise his power to grant MA permission to remain in Hong Kong, on such conditions as he might consider appropriate.

4. The request was rejected by the Director. In his letter of reply dated 2 November 2009, the Director pointed out that the Refugees Convention 1951 was not applicable to Hong Kong; the Government had a firm policy of not granting asylum and did not have any obligation to admit individuals seeking refugee status under the Convention. The letter went on to point out that removal actions against mandated refugees might, upon the exercise of the Director's discretion on a case-by-case basis, be temporarily withheld pending arrangements for their resettlement elsewhere by the UNHCR. Finally, the letter stated categorically that the Administration owed no obligation to mandated refugees arising from their refugee status.

5. GA, of Burundi nationality, is in his mid-40s. He was involved in political activities in his home country. In June 2004, armed soldiers raided his house and his two elder sons were killed. He fled the country and eventually arrived in Hong Kong on 26 June 2004. He sought asylum shortly after arrival. On 5 July 2004, he was recognised by the UNHCR Office in Hong Kong as a mandated refugee. He was released from detention on recognizance. However, attempts by the UNHCR Hong

Kong Office to resettle him elsewhere had not been successful. GA had lost contact with his wife and remaining children. Alone in Hong Kong, he could not work. On 20 October 2009, through the same firm of solicitors (Barnes & Daly) who represented also MA, GA wrote to the Director asking for permission to stay in Hong Kong so as to allow him to live and work here as a resident. The contents of the letter were similar to that written on behalf of MA. By the same letter of reply dated 2 November 2009 already described, the Director refused both the request of MA and that of GA.

6. PA, a Sri Lankan national, is in his mid 40s. He was involved with the Tamil Tigers. Because of his involvement, he was subjected to arrest, detention and torture on more than one occasion whenever there was any significant Tamil action against the government. On 24 December 2000, he arrived in Hong Kong as a visitor. On 4 January 2001, he approached the Immigration Department for an extension of stay on the ground of fear of torture in Sri Lanka. In April 2001, he was joined by his wife and three children in Hong Kong, who were all permitted to remain as visitors. Since October 2002, PA together with his family were placed on recognizance, after the expiry of their permissions to stay. At one stage, a removal order was issued against him, but it was withdrawn one year later (in 2004). He was screened in by the Director as a torture claimant under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) on 14 May 2008. He was, as at the time of hearing, the first successful screened-in torture claimant. PA has not been permitted to work in Hong Kong since his arrival. By a letter dated 28 January 2010, PA through his solicitors wrote to the Director of Immigration, pointing out that for an unforeseeable and indefinite period of time, the prospect of returning PA to his country or to

resettle him in a safe third country was remote, and PA and his family would remain in Hong Kong indefinitely. The solicitors maintained that the only practical solution available to the Director was to allow PA to live and work in Hong Kong with a permission to remain. The Director was asked to exercise his discretion accordingly. Furthermore, the Director was asked to clarify his policy on "post-screening management" of successful claimants, whether they would be allowed to work in Hong Kong, and under what circumstances they would be able to exercise such a right. Up to the time of hearing, no substantive reply had been given to this letter of PA. According to the evidence filed on behalf of the Director in these proceedings, as of 15 October 2010, PA's request was still "under consideration".

7. According to the expert evidence filed on behalf of the applicants in these proceedings (affirmation of Dr Susan Mistler dated 9 November 2010), PA is suffering from "a severe major depression", and according to Dr Mistler's opinion, "his inability to work and provide for his family is a major contributing factor to the cause and maintenance of his mental illness" (para 45).

8. FI is a Sri Lankan national. He is now in his late 30s, single. He was heavily involved in politics in his home country, and as a result, he was a target of political assassination. In July 2005, an attempt on his life failed. He left Sri Lanka for Hong Kong in September the same year. On 19 September 2005, he arrived in Hong Kong and contacted the UNHCR Office in the following month. His permission to stay expired on 4 October 2005 and thereafter he became an overstayer in Hong Kong. On 6 December 2006, FI was mandated by the UNHCR as a refugee and granted protection in Hong Kong pending a durable solution. He was

arrested by the police on 10 December 2006 for overstaying. Following an interview with the Immigration Department, he was released on recognizance on 12 December 2006. Efforts by the UNHCR to resettle him in a third country have thus far been futile. According to expert evidence filed shortly before the substantive hearing, as a result of the assassination attempt he experienced in Sri Lanka, FI had a series of psychiatric complications. He is suffering from post-traumatic stress disorder that has resulted in episodes of high anxiety and paranoid, although the treatment he has received has alleviated many of these symptoms. According to Dr Mistler, "his inability to work and earn a living for himself is a maintaining factor in his mental illness" (para 54). Allegedly, his inability to work in Hong Kong has led to the breakdown of a relationship which FI has once developed with a local woman.

9. JA is a Pakistani national. He is in his mid-20s, single. He and his family fled Pakistan for Hong Kong and arrived on 1 October 2002 to escape religious persecution in their home country. They claimed protection as refugees immediately upon arrival. They were detained for 7 days until they were mandated as refugees by the UNHCR on 7 October 2002. Since then, JA has been remaining in Hong Kong on recognizance.

10. At one stage, arrangements were made by the UNHCR to resettle JA to Canada, but the plan did not materialise because JA was suspected of and charged for committing a rape in 2004 even though the charge was later withdrawn. JA ran into difficulties with the law and was convicted on 3 occasions in 2008, 2009 and 2010 for theft, burglary and possession of dangerous drugs respectively. As a result, a deportation order was issued against him on 11 December 2009. His criminal

convictions have substantially affected his chances of overseas resettlement.

11. According to Dr Mistler, because of his idling in Hong Kong for the past 8 years, JA "feels alone, helpless, useless, his brain foggy" and he "lives in the darkness"; he is suffering from a major depression (para 57).

Applications for judicial review

12. All 5 applications for judicial review challenge the so-called blanket policy of the Director not to permit mandated refugees or screened-in torture claimants to work in Hong Kong, even where the individual concerned has been stranded in Hong Kong for a prolonged period of time and has been forced to live on others' mercy and charity and to survive at a subsistence level, and even where there is little prospect of resettlement or departure in the immediately foreseeable future.

13. Essentially, the applicants complain that the blanket policy infringes the injunction against cruel, inhuman or degrading treatment as well as the right to employment. The applicants also complain that their rights to private life have been compromised. In any event, the applicants argue, the blanket policy is irrational or unreasonable in the conventional public law sense.

14. The applicants seek declaratory and other relief accordingly.

15. Furthermore, at the individual decision level, both MA and GA, whose express requests for permission to work have been turned down, challenge the decisions of the Director on essentially the same

grounds. PA has made a similar request, but has not yet received a substantive reply. As for FI and JA, at the hearing, there was a suggestion that the Director was under an ongoing duty to review their cases regardless of whether any request for permission to work was specifically made. On that basis, a similar challenge was also made on behalf of FI and JA. Attempts were also made to make use of the expert evidence (Dr Mistler's affirmation) filed shortly before the substantive hearing to challenge the individual decisions.

16. The applicants also challenge the lawfulness of the recognizances which they have been required to give in lieu of detention. They seek relief accordingly.

17. JA, against whom a deportation order has been made, also challenges the lawfulness of the order, and seeks relief against it.

18. PA, the only screened-in torture claimant, challenges separately the Director's lack of a policy or accessible policy on the post-screening management of successful torture claimants.

So-called blanket policy

19. Before turning to the law and arguments, it is necessary to deal with one factual matter, namely, the so-called blanket policy. I have already described the so-called blanket policy as the applicants see it. The Director does not put his policy as such. According to the Director, the starting point is that he does not accept at all that he has a policy not to *refoule* a mandated refugee. He only considers individual cases on a case-by-case basis and exercises his discretion accordingly. However, there cannot be any serious doubt that there is no known case, at least in recent

years, of the Director (or the Secretary for Security) removing or deporting a mandated refugee from Hong Kong against his will to the country or place where he has fled as a refugee. Invariably, the mandated refugee is allowed to remain in Hong Kong (on recognizance), pending overseas resettlement.

20. In those circumstances, it is apparently a matter of semantics whether the Director has a "policy" not to *refoule* a mandated refugee.

21. As regards a screened-in torture claimant, one learns from the leading case of *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187 that the Secretary for Security has adopted the policy of not deporting a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well-founded (para 3). There is no suggestion that a different policy has since been adopted by the Secretary. Nor is there any suggestion that the Director of Immigration follows a different policy.

22. So much for non-removal/deportation.

23. The so-called blanket policy involved in these proceedings relates to whether a mandated refugee or screened-in torture claimant is allowed to work whilst remaining in Hong Kong pending resettlement overseas or departure.

24. Mr Paul Shieh SC (Ms Grace Chow with him), for the Director, maintains that the policy of the Director is as set out in paragraph 6 of the affirmation of Tam Kwok Ching, Assistant Secretary of the Security Bureau, dated 15 October 2010, filed in HCAL 75/2010. In

short, the Assistant Secretary says that the Government's immigration policy on entry for employment is very stringent, in order to ensure that it will not undermine the protection of the local workforce or open a floodgate for the admission of foreign workers. The immigration guidelines for entry for work cover various categories of immigrants, such as employment as professionals or entry for investment; non-local graduates; Mainland talents and professionals; imported workers; foreign domestic helpers and so forth. The guidelines do not cover and have no category for mandated refugees or screened-in torture claimants. According to Ms Tam (paragraph 6), the Government's policies (and guidelines) may change taking into account the prevailing circumstances, especially any immigration concerns faced by Hong Kong at the relevant time, and the need to maintain stringent immigration control with regard to entering or staying in Hong Kong for employment. The paragraph goes on to say that there is nonetheless no fetter on the discretion of the Director by these policies because "each case is to be considered on its own individual merits and the discretion is to be exercised on a case-by-case basis having regard to the entire circumstances of the case".

25. Mr Shieh explains that since mandated refugees and screened-in torture claimants do not fall within any of the established categories in the immigration guidelines, *prima facie*, they are not permitted to take up employment in Hong Kong. However, this does not mean that the Director will not look at their cases individually and exercise his discretion accordingly. Counsel elaborates that strong compassionate or humanitarian reasons or other special extenuating circumstances may persuade the Director to exercise his discretion to permit, exceptionally, an individual to work in Hong Kong.

26. In my view, this is a long way of saying that save in exceptional cases, mandated refugees and screened-in torture claimants are not permitted to work in Hong Kong.

27. It is also plain from the evidence that thus far, no mandated refugee or screened-in torture claimant has been permitted, exceptionally, by the Director, in the exercise of his discretion, to work in Hong Kong.

28. This is not surprising at all on the evidence. Paragraph 17 of Ms Tam's affirmation says:

> "The point I seek to make above is a simple one. Hong Kong's position is unique and vulnerable. Any sign (however tenuous) of potential relaxation in the Government's attitude towards illegal immigrants would likely be interpreted (with or without attempts on the part of "human smugglers" to talk up their hopes and expectations) as a ray of hope for them. It is not a matter of how many claimants eventually succeed in being screened in. It is, sadly, human experience and sheer common sense that even a mere possibility of being allowed to stay and work in Hong Kong can have a strong pulling force in attracting a large number of illegal immigrants to Hong Kong."

29. The same point is made by John Cameron, a police superintendent, in his affirmation dated 15 October 2010 filed in HCAL 75/2010, in which he outlines the perspective of the police (para 9):

> "Human experience and common sense suggests that if there is a hope (and a signal is given out) that if illegal immigrants succeed in their claims (whether under CAT, or as mandated refugees) then they would or might be able to establish themselves in Hong Kong and to work, then there is a significant risk that there would be a steep surge in the number of illegal immigrants who would wish to enter Hong Kong to "take their chances". The above statistics, in my respectful view, serves as a timely reminder of this common sense conclusion and of the "pulling effect" of decisions which might be understood or interpreted by potential illegal immigrants as giving them a risk worth taking."

30. All this is also plain from the minutes of meeting of the Bills Committee on the Immigration (Amendment) Bill 2008 relating to the addition of section 38AA to the Immigration Ordinance to make it illegal for asylum-seekers, refugees and torture claimants to be employed in Hong Kong without permission[2], in which the Administration has been recorded as saying that it had no plan to change "the present policy of not allowing the employment of torture claimants and refugees/asylum-seekers" (para 31 of LC Paper No CB(2)77/09-10).

31. The number of mandated refugees stranded in Hong Kong at any particular point of time is not particularly high. As at 31 January 2010, there were a total of 82 mandated refugees in Hong Kong. 29 of them had been remaining in Hong Kong for 4 or more years since mandated as refugees. However, as is illustrated by the cases of the applicants, if one were to start counting from the date of arrival, the period of time that the refugee has spent in Hong Kong would be much longer.

32. As mentioned, PA was the only screened-in torture claimant as at the time of hearing. He has been in Hong Kong since December 2000. It is a known fact that there are still thousands of torture claimants awaiting screening.

Fundamental rights directly relied on

33. It is now necessary to go to the law. As mentioned, the applicants rely on various rights under different instruments. These instruments include the Basic Law, the Hong Kong Bill of Rights in the

[2] The amendment was introduced to close a loophole resulting from the first instance decision of Wright J in *Iqbal Shahid v Secretary for Justice*, HCAL 150/2008, 2 March 2009 – the decision was partially reversed on appeal subsequent to the enactment of section 38AA: [2010] 4 HKLRD 12.

Hong Kong Bill of Rights Ordinance (Cap 383) which is the domestic implementation of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CAT. The substantive rights invoked include the right to human dignity; the prohibition against cruel, inhuman or degrading treatment; the right to private life; and the right to work.

Rights under the Hong Kong Bill of Rights/ICCPR

34. A necessary prior question to answer is the extent to which these instruments, or the relevant rights provided thereunder, apply to mandated refugees or screened-in torture claimants in Hong Kong. I start with the Hong Kong Bill of Rights, which is based on the ICCPR. The applicants rely on or refer to article 3 (no torture or inhuman treatment etc), article 14 (privacy) and article 19 (family rights) in the Hong Kong Bill of Rights (and the corresponding articles in the ICCPR) in support of their respective cases. However, section 11 of the Hong Kong Bill of Rights Ordinance specifically provides:

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

35. Mr Robert Whitehead SC (Mr Earl Deng with him) submits on behalf of the applicants that their cases are not caught by section 11. Leading counsel argues that their immigration status has already been decided by the Director, who suffers their presence and stay in Hong Kong pending resettlement or departure. What is in issue is whether they should be permitted to work pending resettlement or departure, which, it is argued, is not an immigration matter, but a welfare matter. In those circumstances,

one is not concerned with the applicants' "stay" in Hong Kong, and section 11 has no application.

36. Section 11 of the Hong Kong Bill of Rights Ordinance simply reflects the so-called immigration reservation made by the Government of the United Kingdom when it ratified the ICCPR and extended its application to Hong Kong in 1976. It reserved to the UK Government and to each of its (then) dependent territories, including Hong Kong, the right to continue to apply such immigration legislation "governing entry into, stay in and departure" from the UK or the dependent territory concerned as might be deemed necessary from time to time.

37. In my view, the phrase "entry into, stay in and departure from Hong Kong" must be given its natural and ordinary meaning. The phrase covers, amongst other things, the entire period, from arrival until departure, that a foreigner is on Hong Kong soil, irrespective of his so-called "immigration status" (ie as a lawful visitor, an illegal immigrant, an overstayer, and so forth). The Immigration Ordinance gives the Director powers to permit or authorise a foreigner to enter or to remain in Hong Kong on conditions, one of which is restriction on taking up employment here.

38. Thus analysed, I have no difficulty in rejecting the applicants' argument that the present cases only concern the applicants' right to work in Hong Kong, rather than their "stay" in Hong Kong. In my view, their ability or inability to work is just one facet of their "stay" in Hong Kong, controlled by the Immigration Ordinance. Here, the word "stay" is used in its natural and ordinary meaning, and may cover both lawful and illegal

stay. In other words, the applicants' cases are caught precisely by section 11.

39. Mr Whitehead then seeks to argue that section 11 is incompatible with article 39(1) of the Basic Law and is therefore unconstitutional and of no effect. Article 39(1) of the Basic Law provides that the provisions of the ICCPR, the ICESCR, and international labour conventions "as applied to Hong Kong" shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. For various reasons put forward in a supplementary submission, leading counsel argues that section 11 cannot exclude the application of the provisions of the ICCPR, on which our Hong Kong Bill of Rights is based, to the applicants.

40. I need not go into these reasons. In my view, it is plain that the matter is covered squarely by the very recent Court of Appeal decision in *Ubamaka Edward Wilson v The Secretary for Security*, CACV 138/2009, 19 November 2010. Amongst other things, the Court of Appeal rejected a similar argument based on article 39(1) of the Basic Law against the validity of section 11 of the Hong Kong Bill of Rights Ordinance in relation to certain rights guaranteed under the Hong Kong Bill of Rights: paras 126 to 148. This is dispositive of the issue in question as far as this Court is concerned. In short, as the Court of Appeal has decided, the ICCPR is only applicable to Hong Kong pursuant to article 39(1) to the extent it was applied by the UK Government to Hong Kong as at the time of promulgation of the Basic Law in 1990. As mentioned, the UK Government applied the ICCPR to Hong Kong subject to the immigration reservation, which is fully reflected by section 11 of the Hong Kong Bill of Rights Ordinance. Before 1997, the Ordinance gave the

ICCPR, as applied to Hong Kong internationally by the UK Government, domestic effect. After 1997, the Ordinance was and is the domestic legislation by which the ICCPR as applied to Hong Kong is implemented, as is required by article 39(1).

41. I note that in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752, the Court of Appeal held that the power of detention under section 32 of the Immigration Ordinance was contrary to article 5(1) of the Hong Kong Bill of Rights and was therefore unlawful. In that case, in which I sat as a member of the Court of Appeal, the Director did not rely on section 11 of the Hong Kong Bill of Rights Ordinance to argue that section 32 of the Immigration Ordinance was excepted from the operation of the Hong Kong Bill of Rights. In *Ubamaka*, it was not argued before the Court of Appeal, of which I also sat as a member, that the decision in *A (Torture Claimant)* stood in the way of the Court's eventual conclusion that section 11 was effective to except the Immigration Ordinance from the operation of the Hong Kong Bill of Rights in relation to matters concerning entry into, stay in and departure from Hong Kong.

42. Given this state of the law (as stated in *Ubamaka*), the applicants' reliance on the rights guaranteed under the Hong Kong Bill of Rights or the ICCPR must be rejected.

Right to employment under the ICESCR

43. I now turn to the ICESCR. The applicants rely on article 6 of the ICESCR. Paragraph 1 of article 6 reads:

> "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to

> gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

44. Article 39(1), as mentioned, provides, amongst other things, that the provisions in the ICESCR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

45. The applicants' reliance on article 6 of the ICESCR raises immediately several issues. First, whether article 39(1) of the Basic Law *by itself* gives the provisions of the ICESCR as applied to Hong Kong domestic force, or whether domestic legislation is required to give the provisions such force in Hong Kong. It should be noted that article 39(1) specifically provides for the implementation of the provisions of the ICESCR through domestic legislation. Secondly, if the ICESCR has no domestic force as such absent implementation, whether the provisions therein may nonetheless be resorted to by way of legitimate expectation. Thirdly, there is the question of whether the provisions of the ICESCR are merely "promotional" or "aspirational" in nature only. See *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125, 133C/D to 134A & 135E to H; *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109, 131D to 134B; but *cf* United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports submitted by State Parties under articles 16 and 17 of the Covenant – China: Hong Kong Special Administrative Region*, 21 May 2001, paras 16 and 27. See also *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628, paras 65 to 67; *Yeung Chung Ming v Commissioner of Police* (2008) 11 HKCFAR 513, para 63.

46. However, it is unnecessary for me to express any concluded views on these issues. This is because, in my opinion, there is a fatal objection to the applicants' reliance on article 6 of the ICESCR as applied to Hong Kong. When the ICESCR was applied by the UK Government to Hong Kong,

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

47. It cannot be denied that one of the major purposes of the Director's stringent policies on employment is the protection of the local workforce. In those circumstances, the matter falls squarely within the reservation made by the UK Government when the ICESCR was applied to Hong Kong. In other words, regardless of whether article 39(1) by itself gives the provisions in the ICESCR domestic force and regardless of whether those provisions are merely promotional or aspirational in nature, the restrictions placed by the Director on mandated refugees and screened-in torture claimants in relation to their ability to work whilst remaining in Hong Kong cannot be challenged under article 6 of the ICESCR. Nor can there be any legitimate expectation arising in relation to article 6 in the light of the specific reservation.

48. Mr Whitehead contends that there is a distinction between a reservation and an interpretative declaration by reference to Shaw, *International Law* (5th ed), pp 822 to 823:

> "… This is not the case with respect to multilateral treaties, and here it is possible for individual states to dissent from particular provisions, by announcing their intention either to omit them altogether, or understand them in a certain way. Accordingly, the effect of a reservation is simply to exclude the treaty

> provision to which the reservation has been made from the terms of the treaty in force between the parties.
>
> Reservations must be distinguished from other statements made with regard to a treaty that are not intended to have the legal effect of a reservation, such as understandings, political statements or interpretative declarations. In the latter instance, no binding consequence is intended with regard to the treaty in question. What is involved is a political manifestation for primarily internal effect that is not binding upon the other parties. A distinction has been drawn between 'mere' interpretative declarations and 'qualified' interpretative declarations, with the latter category capable in certain circumstances of constituting reservations. Another way of describing this is to draw a distinction between 'simple interpretative declarations' and 'conditional interpretative declarations'. The latter is described in the ILC Guide to Practice as referring to a situation where the state subjects its consent to be bound by the treaty to a specific interpretation of the treaty, or specific provisions of it."

49. I have no difficulty with the distinction. However, it is plain from the "reservation" made by the UK Government extracted above that what is involved is a reservation made "upon ratification", rather than an "interpretative declaration". This is clear from the "Declarations and Reservations" relating to the ICESCR relied on by the applicants (applicants' authorities, item 6). In the document, declarations and interpretative declarations are described as such. On the other hand, reservations are made when a government reserves the right to do or to refrain from doing a particular thing upon ratification, accession or succession. The wording of the reservation itself supports such a reading. Furthermore, the United Nations Committee on Economic, Social and Cultural Rights, in its *Consideration of Reports, supra*, relating to Hong Kong, also referred to the article 6 reservation as a "reservation", as opposed to an "interpretative declaration" (para 29).

50. In any event, what matters is not whether the UK Government's reservation (or supposed reservation) over article 6 is

"binding upon the other parties" to the ICESCR, a matter of concern to the author of the book relied on by Mr Whitehead. What matters is the extent to which article 39(1) applies the provisions of the ICESCR to Hong Kong under our Basic Law. Article 39(1) provides that the provisions of the ICESCR "as applied to Hong Kong" – by the UK Government as at the time of promulgation of the Basic Law in 1990 – "shall remain in force". Article 39(1) itself is based on the Sino-British Joint Declaration, Annex I (JD Ref 156)[3]. What is therefore important is the extent to which the UK Government considered itself to have applied the provisions of the ICESCR to Hong Kong. That is a question of subjective intention and understanding of the UK Government, rather than an objective question of international law. What matters is the subjective intention and understanding of the UK Government which applied the provisions of the ICESCR to Hong Kong subject to the reservation in question, rather than whether, as a matter of international law, the reservation or purported reservation was binding on the other parties to the Convention. A similar approach has been adopted by the Court of Appeal in *Ubamaka* in relation to the suggested invalidity under international law of the immigration reservation made by the UK Government when it ratified the ICCPR and applied it to Hong Kong: paras 134, 135 and 143 to 146. In short, the Court took the view that regardless of whether the UK's position on the validity of the immigration reservation she made was sound at the international law level, so far as article 39(1) of the Basic Law and the domestic courts are concerned, one must proceed from the immigration reservation as it was understood by the UK Government at the time. In my view, the same approach applies to the article 6 reservation in relation to

[3] "The provisions of the [ICCPR] and the [ICESCR] as applied to Hong Kong shall remain in force."

the ICESCR, and that represents the true meaning of the important phrase "as applied to Hong Kong" in article 39(1).

Rights under the CAT

51. I now turn to the CAT. Only article 16 is relevant. It prohibits acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 of the Convention.

52. As has been noted by the Court of Appeal in *Ubamaka* (para 95 and fn 12), the CAT is a treaty which has not been incorporated into domestic law and therefore *prima facie* cannot give rise to any directly enforceable right. It is fair to point out that the applicants have not placed any real reliance on article 16 of the CAT.

Rights incorporated under common law?

53. Before I turn to the last instrument, namely, the Basic Law, for the sake of completeness, I should deal with one peripheral argument briefly touched on during submission. It has been suggested by the applicants in reply submission that the various rights recognised and guaranteed under the international instruments reflect corresponding rules of customary international law or even preemptory norms. By the doctrine of incorporation, they form part of our common law and are therefore enforceable as such.

54. I do not accept the argument. A similar argument has been rejected by the Court of Appeal in *Ubamaka* (paras 149 to 151).

Article 17 of the Refugees Convention 1951

55. Also for the sake of completeness, it should be pointed out that article 17 of the Refugees Convention provides that the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. However, as noted, whether before or after 1997, the Refugees Convention has not been extended to Hong Kong.

Rights under the Basic Law

56. I turn now to the Basic Law. The applicants rely on articles 28, 29, 30, 33, 37 and 41 of the Basic Law.

57. The significance of article 39(1), for the purposes of the present proceedings, needs no further elaboration. Article 41 is also of importance. It provides that persons in Hong Kong other than Hong Kong residents shall "in accordance with law" enjoy the rights and freedoms of Hong Kong residents prescribed in Chapter III of the Basic Law, where all the other articles relied on by the applicants may be found. On that basis, the applicants argue that the substantive rights given under these other articles are also applicable to them.

58. The applicants rely on article 28. Article 28 is concerned with the freedom of the person of Hong Kong residents, arrest, detention, imprisonment, search, and deprivation or restriction of the freedom of the person. The applicants apparently rely on the last sentence in article 28(2) which provides that "torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited".

59. However, it is not the applicants' case that the treatment they have received amounts to "torture", as opposed to "cruel, inhuman or degrading treatment". In those circumstances, article 28 is not engaged at all.

60. Article 29 of the Basic Law provides that the homes and other premises of Hong Kong residents shall be inviolable. It prohibits arbitrary or unlawful search of, or intrusion into, a resident's home or other premises.

61. It is plain that this article does not provide a general right to privacy or to private life as such. It is only concerned with protection of the homes and other premises of Hong Kong residents. It is not engaged on the facts of the present case.

62. Likewise, article 30 of the Basic Law has nothing to do with the present case. It provides a very specific type of protection against intrusion of privacy:

> " The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

63. In short, articles 29 and 30 of the Basic Law, unlike article 14 of the Hong Kong Bill of Rights, do not guarantee a general right to privacy. Moreover, on the facts, those two articles in the Basic Law are simply not engaged.

64. That leaves article 33 of the Basic Law:

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

65. According to case law, article 33, even when interpreted generously and purposively, does not guarantee the right to be employed, or to be employed in any particular field of occupation. It is to be interpreted rather in the light of what it seeks to prevent, namely, outside of issues of national service, any form of conscription to particular fields of occupation: *Cheng Chun-ngai Daniel v Hospital Authority*, HCAL 202/2002, 12 November 2004, Hartmann J, para 55; *Financial Services and Systems Limited v Secretary for Justice*, HCAL 101/2006, 6 July 2007, Fung J, paras 49 to 53; *Ng King Tat Philip v Post-Release Supervision Board*, HCAL 47/2010, 23 August 2010, Lam and Andrew Cheung JJ, paras 116 to 117. See also Yash Ghai, *Hong Kong's New Constitutional Order, the Resumption of Chinese Sovereignty and the Basic Law* (2nd ed), 435 to 436.

66. However, Mr Whitehead argues that article 33 clearly pre-supposes that Hong Kong residents enjoy the right to employment (where available), and guarantees the right and freedom of choice of occupation. The freedom of choice of occupation so guaranteed only makes sense if there is a right to seek and take up available employment in the first place.

67. I accept that this argument has not been covered by the case law referred to. The authorities have all focused on whether there is a right to be employed, and particularly, whether there is a right to be employed in a particular field. The answers are in the negative. However, Mr Whitehead argues not for those rights. He contends for a right and freedom to seek and take up available employment.

68. I can see the force of Mr Whitehead's argument, particularly if a purposive and generous approach is to be adopted in interpreting the fundamental right given to Hong Kong residents in article 33. I prefer to leave this point open because in my view, there is a direct answer to Mr Whitehead's argument on behalf of the applicants.

69. In the present case, one is not concerned with a Hong Kong resident's right to take up employment. One is only concerned with the right (if any) under the Basic Law, of mandated refugees and screened-in torture claimants, to take up employment. The matter is not directly governed by article 33 as such. Rather, the contended right is said to be derived from article 41 of the Basic Law. However, as mentioned, a non-resident only enjoys the rights guaranteed in Chapter III of the Basic Law "in accordance with law". The Basic Law must be read as a whole in order to find out what right to take up employment, if any, is conferred on mandated refugees and screened-in torture claimants, as non-residents in Hong Kong.

70. In this regard, one must not overlook the fact that the right to take up employment is a subject matter specifically covered by article 6(1) of the ICESCR. Article 39(1) stipulates that the provisions of the ICESCR, including therefore article 6 thereof, "as applied to Hong Kong" (by the UK Government subject to the article 6 reservation), shall remain in force in Hong Kong. Quite plainly, the article 6 reservation permits the Government to impose restrictions on non-residents regarding taking up employment in Hong Kong.

71. In those circumstances, even if one assumes, for the purposes of argument, that article 33 gives Hong Kong residents the right and

freedom to take up employment in Hong Kong, yet when one reads together articles 33, 39(1) and 41, the only sensible conclusion is that the (assumed) right of Hong Kong residents to take up available employment is not intended by the drafters of the Basic Law to extend to mandated refugees and screened-in torture claimants. Such a right has been specifically removed by the article 6 reservation by the UK Government when it applied the ICESCR to Hong Kong. Article 39(1) maintains the *status quo* and thus excludes, amongst others, mandated refugees and screened-in torture claimants from the ambit of article 6 of the ICESCR. It would then be a strange interpretation to adopt if one were to read the general provisions in article 41 as importing, through the backdoor, the right to take up employment in favour of these non-residents.

72. This interpretation is reinforced by article 154(2) of the Basic Law. It reads:

> " The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the region by persons from foreign states and regions."

73. As mentioned, the Basic Law must be read and interpreted as a whole. One important immigration control that the Government used to impose before 1997 and continues to impose after 1997 is restriction on employment. Construing the Basic Law and the provisions therein as a whole, and having regard to the theme of continuity underlying the Basic Law, it is difficult to see how the very general provisions in article 41 can have the effect of giving non-residents the right to take up employment in Hong Kong, as if they were local residents. This would defeat the obvious intention behind article 154(2) and amount to a drastic departure from the pre-1997 position.

74. In those circumstances, even if one were to assume that article 33 gives residents the right and freedom to take up available employment, the same does not extend to non-residents.

75. In short, none of the provisions in the Basic Law assist the applicants directly.

Cruel, inhuman or degrading treatment

76. In other words, the applicants' challenges, insofar as they are based on rights guaranteed under the various instruments discussed above as directly enforceable rights in their favour, must fail.

77. It is therefore unnecessary to decide whether the prolonged refusal on the part of the Director for the applicants to take up employment in Hong Kong amounts to cruel, inhuman or degrading treatment; or whether the so-called blanket policy has such an effect on the applicants. However, for the sake of completeness, I would very briefly indicate my views.

78. The meaning of "inhuman or degrading treatment" has been examined in *Ubamaka*, paras 71 to 83. *Ubamaka* was of course concerned with a very different type of situation from the one faced by the Court in the present proceedings. However, the general principles stated there are still of relevance. In particular, the ill-treatment in question must obtain a minimum level of severity and must involve bodily injury or "intense physical and mental suffering". It must deny "the most basic needs of any human being" "to a seriously detrimental extent". Paragraph 72 of the judgment, citing Clayton & Tomlinson, *The Law of Human Rights* (2nd ed), para 8.19. See also the leading case of *Pretty v United Kingdom* (2003) 35

EHRR 1, para 52; and the House of Lords case of *R (Limbuela) v Home Secretary* [2006] 1 AC 396. The absence of an intention to humiliate does not necessarily mean that the conduct or treatment is not cruel, inhuman or degrading: *Price v United Kingdom* (2002) 34 EHRR 53.

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

80. However, it would all turn on the circumstances of an individual case. This is because, in my view, there are both an objective and a subjective element to the question of inhuman or degrading treatment. So far as it turns on the subjective element, obviously all personal and other circumstances pertinent to an individual's case must be taken into account. A prolonged period of restriction on employment may, quite obviously, have different subjective effects on different individuals depending on their sex, age, former and present status in life and so forth. Thus in *Lorsé v Netherlands* (2003) 37 EHRR 3, para 59, it was pointed out that the assessment of the minimum level of severity required to be reached would depend on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

81. Of course, the objective element cannot be overlooked. Here, the prohibition against employment must be viewed against, amongst other things, the overall programme of assistance provided by the Government

and other agencies to refugees and torture claimants. However, life as a human being is not all about survival and subsistence. The right to work has been recognised in many international instruments, for instance, the Universal Declaration of Human Rights (article 23), to be a fundamental human right[4]. Moreover, I accept that there is a subtle distinction between doing unpaid voluntary work only and having gainful employment, and over time, the former may be no substitution for the latter. I also accept that the right to work is closely related to the inherent dignity of a human being and his right to privacy or to private life. All this must also be borne in mind when considering any individual case.

82. In short, so far as looking at the matter at the policy level is concerned, my view is that one cannot say, as a sweeping statement, that the so-called blanket policy amounts to inhuman or degrading treatment of mandated refugees and screened-in torture claimants, even in a prolonged type of situation. All one may say is that if carried out to extreme and without meaningful exception, the policy may potentially have such an effect in individual cases. In an extreme case, it could even amount to constructive *refoulement*.

83. There is medical evidence filed on behalf of the applicants to the effect that prolonged deprivation of the opportunity to work, in the circumstances of refugees and torture claimants, is detrimental to the mental health of the individuals concerned. There is some expert study to similar effect: see eg, Noel Calhoun, *UNHCR and community development: a weak link in the chain of refugee protection?* (October 2010). On the other hand, the respondent has filed expert evidence to dispute the

[4] For other international and regional human rights instruments which protect the right to work, see *The Michigan Guidelines on the Right to Work* 31 Mich J Int'l L 293-306 (2010), at pp 293-294.

proposition. The Court cannot, of course, resolve the differences in expert opinion in these proceedings. Nor is it absolutely necessary to do so. For even if the Court were to proceed on the basis that prolonged deprivation of the opportunity to work in the circumstances under discussion could have a potentially adverse impact on the mental health and condition of the individuals concerned, one would still have to look at the individual cases to see the actual impact involved.

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

Conventional public law review – intensity of review

85. I now turn to the applicants' challenges against the Director's so-called blanket policy and decisions in individual cases based on conventional public law. A preliminary question that has arisen is the intensity of review. Mr Shieh for the Director contends that the orthodox

Wednesbury unreasonableness test is the appropriate standard of review to adopt. Mr Whitehead submits otherwise.

86. The *Wednesbury* unreasonableness test of course represents the orthodox approach of judicial review. However, it is now firmly established in conventional public law in the UK that even within the conventional limitations on the scope of the court's power of review, the court must be entitled to subject an administrative decision to the more vigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. At the extreme end of the scale where, for instance, the individual's right to life, the most fundamental of all human rights, is said to be put at risk by a decision, "the basis of the decision must surely call for the most anxious scrutiny", even though the human right itself is not directly enforceable as such domestically: *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514, 531 E/F to G, per Lord Bridge. In other words, there is a sort of a sliding scale in terms of the intensity of review, and as Bingham MR (as he then was) accepted, "the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable": *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554F to G. See *de Smith's Judicial Review* (6th ed), paras 11-007; 11-086; 11-092 to 11-097, where the book's editors refer to the type of review under discussion as the "anxious scrutiny unreasonableness review", "heightened scrutiny unreasonableness review" or "variable scrutiny unreasonableness review"[5]. Irrespective of what it is called, the court's function remains one of review for error of law. The court is not a fact-finder. However, the burden of argument shifts from the applicant to the

[5] For the sake of convenience, the remainder of this judgment will simply use the term "anxious scrutiny approach" to describe this type of review.

decision-maker, who needs to produce a justification[6] for the decision. The court will be less inclined to accept *ex post facto* justifications from the decision-maker, compared to traditional *Wednesbury* unreasonableness review. On how far the common law in the UK has gone down the path of proportionality in applying the anxious scrutiny approach particularly in extreme cases, see for instance, *Doherty v Birmingham City Council* [2009] 1 AC 367, para 135 (Lord Hope).

87. In a refugee case decided in November 1997, the Hong Kong Court of Appeal has, without much discussion, accepted and applied the anxious scrutiny approach: *The Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641, 648G, per Godfrey JA.

88. On the other hand, in *Bahadur v Secretary for Security* [2000] 2 HKLRD 113, 125C/D to J, the Court of Appeal (differently constituted) doubted the anxious scrutiny approach in the immigration or deportation fields, on the ground that section 11 of the Hong Kong Bill of Rights Ordinance excluded the application of immigration legislation from its ambit, and section 12 limited the operation of article 9 of the ICCPR in its application to deportation decisions.

89. In *Society for Protection of the Harbour Ltd v Chief Executive in Council*, HCAL 102/2003, 9 March 2004, Hartmann J (as he then was) clearly pointed out that when fundamental human rights are involved, the classic *Wednesbury* test is not appropriate. Rather, the greater the degree of interference with a fundamental right, the more the court will require by way of justification before it is satisfied that the decision is reasonable in

[6] The word is used here in a non-technical sense.

the public law sense (paras 74 to 77). However, it should be noted that the case was not concerned with immigration matters.

90. Despite some initial hesitation to exactly adopt the same approach (see *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1, para 67, where the point was expressly left open[7]), the Court of Final Appeal has since referred to the anxious scrutiny approach as part of the law of judicial review on more than one occasion: *Prabakar*, *supra*, paras 44 to 45 (concerning screening of torture claimants); *Shiu Wing Steel Ltd v Director of Environmental Protection* (2006) 9 HKCFAR 478, para 93 (in the context of relief).

91. In particular, in *Prabakar*, para 44, the Court of Final Appeal pointed out that the determination of the potential deportee's torture claim by the Secretary for Security was plainly one of "momentous importance" to the individual concerned, as his "life and limb" were in jeopardy and "his fundamental human right not to be subjected to torture [was] involved". That was why high standards of fairness must be demanded in the making of such a determination. Equally importantly, the Court went on to point out (in paragraph 45) that in any future challenge against a determination of the Secretary:

> "the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met. *R v Home Secretary, ex p Bugdaycay* [1987] 1AC 514 at p. 531E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully."

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[7] In his partially dissenting judgment in *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1, paras 367 to 374, a case concerning legitimate expectation in the context of the right of abode governed by the Basic Law, Bokhary PJ discussed without coming to any definite conclusion on whether there could be different standards of review depending on the subject matters involved as a matter of Hong Kong law.

92. The case law speaks of fundamental rights or fundamental human rights. By definition, one is concerned with fundamental rights that are not directly enforceable in domestic courts. If it were otherwise, the individual involved could simply sue on the right and the decision-maker would have to act in accordance with it save where his departure therefrom could be justified (under the proportionality test). In that scenario, the question of whether the right was really engaged and whether it was infringed (using the proportionality test) would indeed be one ultimately for the court to determine. This is why after the enactment of the Human Rights Act in 1998, the need for the UK courts to resort to the anxious scrutiny approach has greatly diminished, as the fundamental rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms have become domestically enforceable as such: see *de Smith*, para 11-096. In the present discussion, one is concerned with the situation where the relevant fundamental right is not domestically enforceable. The decision-maker is therefore not required by law to act in accordance with the right as such. Nor can the court, under a conventional public law review, require him to do so. *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. What the court may do, however, is to subject the relevant decision to anxious scrutiny.

93. The underlying rationale of the anxious scrutiny approach and the basic reason why it is compatible with the well-known constraints of a conventional public law review are not difficult to see. Substantively speaking, where the subject matter of a decision or exercise of discretion engages an individual's fundamental right, commonsense would dictate that the decision-maker should not, for no good reason, make a decision or exercise his discretion in such a way that would amount to an infringement

of the right even though it is not domestically enforceable by the individual as such. Thus for instance, even though the injunction against inhuman or degrading treatment protected under the Hong Kong Bill of Rights is not directly enforceable by a non-resident in immigration matters for reasons already explained, it does not follow that a public authority may make a decision or exercise a discretion that would have the effect of inflicting such treatment on a non-resident for no good reason. For to do so would render the decision or exercise of discretion unreasonable, irrational, arbitrary or perverse, even in the conventional public law sense. Even within the considerable conventional latitude accorded to a decision-maker, it must still be generally correct to say that the more important the fundamental right concerned or the more serious the (potential) encroachment on the right, the weightier the reasons or justification[8] the court would expect the decision-maker to provide in explanation of his decision or exercise of discretion.

94. Procedurally speaking, conventional public law demands an appropriate degree of procedural fairness in the decision-making process. The degree of fairness required is dependent on the entire circumstances. That, by definition, includes the importance of the subject matter concerned. Everything being equal, the more fundamental the decision to the individual concerned, the greater procedural protection the court would require from the decision-making process. That again is simply natural and commonsense. For instance, the court would require the decision-making process to meet "high standards of [procedural] fairness" and subject the decision to "rigorous examination and anxious scrutiny" where what is at stake is an individual's life and limb. Indeed that is precisely what *Prabakar* has held, as described above.

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[8] The word is used here in a non-technical sense.

95. How does all this fit into immigration and deportation cases in Hong Kong? First, I do not think the mere fact that many of the fundamental rights, including all the fundamental rights involved in the present proceedings, are not directly enforceable as such by non-residents such as mandated refugees and screened-in torture claimants (for reasons given above) makes the anxious scrutiny approach inapplicable. As explained, the approach works within the established confines of a conventional public law review and does not require the decision-maker to act in accordance with the relevant fundamental right as such. Rather it requires the decision-maker to provide reasons to justify[9] his decision and subjects it to a suitably intensive review. Yet, secondly, the approach sits comfortably well with the relatively generous degree of latitude allowed by the courts to the Director (and Secretary for Security) in immigration and deportation matters. This apparent paradox is explained by the well-known saying that "in public law, context is all": *R v Secretary for State for the Home Department, ex p Daly* [2001] 2 AC 532, para 28 (per Lord Steyn). The anxious scrutiny approach does not ignore, but rather has full regard to the context, when it requires the decision-maker to provide reasons to justify his decision. And in immigration and deportation matters, almost invariably, the overall immigration picture would provide an important, if not overwhelming, justification[10] for the stringent policies of the Director and his apparently harsh decisions, even though fundamental rights are or may be involved.

96. For instance, in these proceedings, the reason why the important rights concerned are not directly enforceable in Hong Kong by mandated refugees and screened-in torture claimants, is that they have

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[9] The word is used here in a non-technical sense.

[10] The word is used here in a non-technical sense.

been specifically excluded from application by the Basic Law and the relevant legislation (ie articles 39(1) and 41 of the Basic Law, section 11 of the Hong Kong Bill of Rights Ordinance and the Immigration Ordinance). All this represents a clear intention on the part of the drafters of the Constitution and on the part of the legislature to exclude mandated refugees and screened-in torture claimants from the protection afforded under these internationally recognised rights. This is to be contrasted with the position in the UK before the Human Rights Act 1998, which gave the European Convention which the UK Government had signed direct domestic force, was enacted. There, Parliament had simply not (yet) legislated to implement the European Convention domestically. Here, in Hong Kong, the legislature has specifically legislated to exclude immigration legislation from the protection under the relevant rights and the Basic Law is to the same effect. This is an important part of the context that the court must bear firmly in mind.

97. The legislative (and indeed constitutional) intent and purpose is plain to see. As the courts, including this Court, have noted on various occasions, in the light of Hong Kong's small geographical size, huge population, substantial daily intake of immigrants from the Mainland, and relatively high per capita income and living standards, and given Hong Kong's local living and job market conditions, almost inevitably Hong Kong has to adopt very restrictive and tough immigration policies and practices. The courts recognise that the legislature has chosen to entrust the high responsibility for and wide discretions on immigration matters to the Director. It is an important responsibility, given Hong Kong's unique circumstances, and the discretions conferred are indeed wide. And it is not at all surprising that the Director has consistently devised and implemented very restrictive and stringent immigration policies. The courts have said

repeatedly that they will not lightly interfere with the Director's policies or exercise of discretion, even though many of the cases involved, or potentially involved, family reunion, detention/freedom of the person, or other important subject matters. This approach represents not only a specific application of the general principle of public law that a court in its conventional public law jurisdiction only exercises a supervisory jurisdiction, and it does not sit as an appellate court from the decision of the decision-maker. But it also represents an acknowledgment on the part of the courts that the legislature, in its wisdom, has entrusted the Director with the unenviable task of manning Hong Kong's immigration controls. More generally speaking, the courts' consistent approach also demonstrates their recognition that under the Basic Law it is the executive which has been given the right and the responsibility to administer the affairs in Hong Kong generally. As mentioned, article 154(2) of the Basic Law specifically authorises the Government to apply immigration controls on entry into, stay in and departure from Hong Kong by persons from foreign states and regions. The role to be played by the courts is essentially supervisory in nature. See, for instance, *Hai Ho-tak v Attorney General* [1994] 2 HKLR 202, 204, 209 & 210; *Aita Bahadur Limbu v Director of Immigration*, HCAL 133/1999, 10 December 1999, Stock J, p 2; *Bhupendra Pun v Director of Immigration*, HCAL 1541/2001, 22 January 2002, Hartmann J, paras 9 to 23; *Durga Maya Gurung v Director of Immigration*, CACV 1077/2001, 19 April 2002, paras 53 to 60; *Re Singh Sukhmander*, HCAL 89/2008, 18 September 2008, Andrew Cheung J, paras 7 to 9; *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219, paras 19 to 22. This important and well-established body of case law throws important light on how the court should approach its task of review in immigration and deportation matters.

98. In my view, therefore, when deciding whether the decision of the Director, whether at the policy level or at the individual decision level, is rational or reasonable in the public law sense, the court is bound to have substantial regard to the overall immigration picture as a general justification[11] for the Director's policy or exercise of discretion concerned, in deciding whether the Director has acted outwith the degree of latitude public law allows to him. The court must firmly bear in mind that it is not entitled, even under the anxious scrutiny approach, to dictate to the Director what policy he should make or how he should exercise his discretion or otherwise act, in accordance with the relevant fundamental right (which is not directly enforceable). Nor does the anxious scrutiny approach entitle the court to tell the Director that he must take into account humanitarian or similar considerations under any or any particular circumstances when exercising his wide discretions. Indeed the Court of Final Appeal has specifically said in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, a case where, amongst other things, family rights were potentially at stake, that the Director is under no duty and hence not bound to take humanitarian considerations into account (at p 322F/G).

99. On the other hand, where, as here, it is part of the Director's own policy that each case will be looked at on its individual merits and he will take into account the entire circumstances, including humanitarian or other similar considerations, when considering how to exercise his discretion on a case-by-case basis, the court is entitled to hold the Director, with an appropriate degree of strictness that is commensurate with the importance or seriousness of the fundamental right at stake, to his own policy, so as to ensure due compliance thereof. Where, for instance, the

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[11] The word is used here in a non-technical sense.

lawfulness of the Director's decision depends on whether he has taken into account all relevant considerations and has disregarded all that are irrelevant, the court would examine the record and evidence carefully to see whether the Director has really done so conscientiously or is just paying lip service to the law's requirement. As mentioned, the court would be suitably wary of *ex post facto* justifications. Where, by way of a further example, the Director's decision turns on a finding of fact, the court would, generally speaking, examine the relevant factual materials and fact-finding procedure sufficiently closely, yet without taking over the role of the primary fact-finder, in order to satisfy itself that the decision has been lawfully made. And if the court is so satisfied, the mere fact that the decision is one that adversely affects the concerned individual's fundamental right is no ground for interfering with the decision. This is because, *ex hypothesi*, the right is not directly enforceable by the individual.

Conventional challenge against the "blanket policy"

100. I now turn to the so-called blanket policy of the Director. I have already set out my own understanding of the actual policy of the Director. It is fair to say that *prima facie*, no mandated refugee or screened-in torture claimant is permitted to work in Hong Kong, regardless of how long they have been in Hong Kong and how much longer they may have to stay in Hong Kong pending resettlement or departure. The *prima facie* rule is subject to discretionary exceptions based on strong compassionate or humanitarian reasons or other special extenuating circumstances. Thus far, there is no known case of the Director exercising his discretion to allow a mandated refugee or screened-in torture claimant to work.

101. The preamble to the ICCPR and that to the ICESCR both recognise the inherent dignity of the human person from which various rights under the Conventions flow. Here, what is potentially involved is the right against cruel, inhuman or degrading treatment, and thus the individual's inherent human dignity. What is also involved is the right to work. Furthermore, there is the right to privacy to be considered. In my view, it cannot be seriously disputed that these are important, fundamental rights, recognised in many international instruments.

102. I have already expressed the view that the policy, as described, may potentially, depending on the facts of an individual case, result in inhuman or degrading treatment of the individual concerned. I have already emphasised the importance of looking at the facts of the individual case. No general conclusion can be drawn.

103. As regards the right to work or the right to privacy, I do not view them in isolation. I view them together with cruel, inhuman or degrading treatment. On their own, they are important rights. However, on the facts, it is the potential infringement of the injunction against cruel, inhuman or degrading treatment that must assume the greatest significance in the present type of situation. It goes directly to the individual's inherent human dignity and respect. In the South African case of *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21, it was held that the right to productive work is a fundamental human right inherently connected to the right to human dignity and the right to life, even where that is not required in order to survive. For mankind is, according to the Court, pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful (para 27).

104. Having looked at the matter in the round, I am unable to conclude that the so-called blanket policy is irrational or unreasonable, even under the anxious scrutiny approach. The bottom line, as explained, is that the Director is not bound to devise his policy in accordance with the relevant human rights, which are not directly enforceable by mandated refugees and screened-in torture claimants. In any event, the policy admits of discretionary exceptions. Any complaints about inhuman or degrading treatment can be taken care of under the discretionary exceptions. In my view, the policy as such is not irrational or unreasonable. The interference with the right to work and the right to privacy or private life is an inevitable outcome of the policy itself, which is the product of Hong Kong's unique circumstances already described. Any hardship it may potentially cause is fully counter-balanced by the needs of society to impose restrictions in the first place. Furthermore, the Director has the discretion to depart from his own policy or *prima facie* rule in appropriate cases.

105. The Director is entitled to adopt the policy given the various considerations outlined in the evidence. In particular, I have already extracted from the evidence the concerns over the "strong pulling force" in attracting a large number of illegal immigrants to Hong Kong by any or any apparent relaxation in the employment policy of the Director. Mr Whitehead has argued that this is not reasonable or rational because any relaxation of the employment policy towards mandated refugees and screened-in torture claimants would only benefit those who are genuine refugees and torture claimants. It would not have an effect on those who are not, in terms of their decision to come to Hong Kong.

106. However, human beings do not always act rationally. The Director is entitled to think that any sign, however tenuous, of potential relaxation in the Government's attitude towards illegal immigrants would likely be interpreted, with or without attempts on the part of "human smugglers" to talk up their hopes and expectations, as "a ray of hope" for illegal immigrants. The Director is entitled to believe that even a mere possibility of being allowed to stay and work in Hong Kong can have a strong pulling force in attracting a large number of illegal immigrants to Hong Kong.

107. It has to be emphasised again that even under an anxious scrutiny review, a court does not substitute its own decision for that of the decision-maker. I do not believe the Director can be faulted for thinking in the way he does, as described in the evidence, from the public law point of view.

108. I do not think the Director can be criticised for taking into account the fact that under his policy, mandated refugees and screened-in torture claimants are not left without assistance. I have already described the assistance that the Government and other voluntary agencies offer to these protected persons. In my view, this is a relevant consideration to bear in mind when one talks about prohibiting individuals from seeking employment.

109. Likewise, I do not accept that the Director has taken an irrelevant consideration into account when he takes the view that his existing policy does not prevent mandated refugees and screened-in torture claimants from doing voluntary work, in the light of the importance of engaging in meaningful endeavours to a person's self-perception and

mental health. In my view, this is a relevant consideration that the Director is entitled to take into account. It does not follow that this is necessarily a good and sufficient answer in itself to the complaints made by the applicants. However, it cannot be regarded as an irrelevant or irrational consideration.

110. The applicant argues that the Director cannot put an individual's life "on hold" indefinitely (see *Tekle v Secretary of State for the Home Department* [2008] EWHC 3064, para 40(vii) and *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, para 37, cases involving quite different contexts from ours). Whether a person's life is put on hold indefinitely under the policy depends on the circumstances of the individual concerned. At the policy level, I do not accept the applicants' argument. Moreover, the policy admits of discretionary exceptions.

111. In conclusion, at the policy level, I do not believe the policy of the Director can be challenged, even under the anxious scrutiny approach.

Conventional challenges against individual refusals (MA and GA)

112. I now turn to the application of the Director's policy when faced with a request by a mandated refugee or a screened-in torture claimant for permission to work.

113. It should be apparent from the above discussion that a major reason for the Court's view that the Director's policy as described cannot be challenged is that it admits of exceptions. According to the evidence and leading counsel's submission, the Director is prepared to look at each case on its individual merits and he will take into account the entire

circumstances, including strong compassionate or humanitarian reasons or other special extenuating circumstances, when considering how to exercise his discretion on a case-by-case basis.

114. Yet it is self-evident that having such a policy, which admits of exceptions, only provides half of the answer. Unless the policy, particularly that part of the policy which deals with exceptions, is applied conscientiously with sufficient regard to the facts of an individual case, the position is no different from having a policy which does not admit of exceptions. In conventional public law parlance, there must be no fetter on the Director's discretion, and the Director must be always prepared to listen to anyone with something new to say. See *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp* [2009] 5 HKLRD 620, paras 31-33, and the cases cited therein.

115. Certainly, the Director denies that his discretion has been fettered and maintains that he keeps an open mind. However, the fact that there has never been any known case of any mandated refugee being permitted to work over the years would tend to suggest otherwise. The way the Director dealt with the requests by MA and GA for permission to work would also tend to support that perception.

116. In particular, if one were to simply look at the *single* reply given by the Director to the two requests, the impression one would get is that the Director's mind was really closed. The letter of reply was a letter written in reply to two different requests made by MA and GA separately for permission to work . The Director simply wrote one letter, which did not touch on the respective personal circumstances of MA and GA at all. The letter reads:

"Dear Sirs,

Mr [MA] and Mr [GA]

Thank you for your letters of 20 October 2009 concerning the captioned persons, who have been recognized as refugees by the United Nations High Commissioner for Refugees ("UNHCR") and are to date still awaiting resettlement.

The 1951 United Nations Convention relating to the Status of Refugees ("the Convention") is not applicable to Hong Kong. The Administration has a firm policy of not granting asylum and does not have any obligation to admit individuals seeking refugee status under the Convention. Claims for refugee status which are lodged in Hong Kong are dealt with by the UNHCR. For those accepted as having refugee status by the UNHCR, removal actions against them may, upon the exercise of the Director of Immigration's discretion on a case by case basis, be temporarily withheld pending arrangements for their resettlement elsewhere in the world by the UNHCR. Albeit these persons have been so recognized by the UNHCR, the Administration owes no obligation to them arising from their refugee status.

Yours faithfully

[Signature and name]
for Director of Immigration"

117. It is true that in the letters of request written on behalf of MA and GA, their solicitors did not say much about the personal circumstances of the two refugees. However, the Director had their personal files, and must have been aware that they had been stranded in Hong Kong for a prolonged period of time. In fact, MA's letter specifically mentioned that he had arrived in Hong Kong in October 2001 and had been mandated as a refugee since June 2004. It further attached a letter from the UNHCR dated 8 September 2009 about MA's prospect of resettlement. Likewise, GA's letter mentioned that he had arrived in Hong Kong in July 2004 and had been mandated as a refugee shortly thereafter. A letter from the UNHCR dated 4 September 2009 relating to GA's chances of resettlement was also enclosed.

118. The very general and brief way the Director dealt with the two separate requests for permission to work would hardly suggest that the Director had seriously considered whether the respective personal circumstances of the two individuals were such that he should exercise exceptionally his discretion to allow them to work, whether on conditions or otherwise. As a matter of fact, the letter of reply did not even say that the Director had a discretion to exercise on whether to allow the individuals exceptionally to work, let alone mention that the Director had seriously considered their respective circumstances and had come to the respective decisions against exercising his discretion in their favour.

119. In the evidence filed in these proceedings, the Director sought to provide further justifications for his refusals. The Director pointed out that the solicitors' respective letters had overstated the positions regarding the chances of resettlement. The evidence stated that the respective letters from the UNHCR did not say for certain that there was definitely no prospect of resettlement. The evidence went on to say that the solicitors were wrong to think that the Director had a general policy not to *refoule* a mandated refugee (a matter which I have dealt with in the earlier part of this judgment). The evidence continued to say:

> "Having considered all relevant circumstances of the present case, including (i) the firm policy of the Government not granting asylum which has been set out for the purpose of the present proceedings in Ms Tam's affirmation, (ii) the fact that UNHCR HK has confirmed that, the Applicant being a recognized refugee, they will assess his needs, and provide assistance for his accommodation and subsistence expenses, if necessary, during his stay in Hong Kong pending the arrangement of a durable solution for overseas resettlement as mentioned in paragraph 16 above, and (iii) the correspondence between UNHCR HK and the Immigration Department from time to time repeatedly indicating that UNHCR HK is yet to fully review the Applicant's case and to assess the most viable durable solution option, the Director therefore came to the view that there is no justifiable ground to warrant exceptional

> consideration to accede to the request by the said letter from [the solicitors]."

See paragraphs 33 to 35 of the affirmation of Chow Wing Hei dated 15 April 2010 filed in HCAL 10/2010 in respect of MA. The evidence filed in relation to GA was almost identical in contents in this regard: See affirmation of Chow Wing Hei dated on 15 October 2010 filed in HCAL 73/2010, paras 37 to 42.

120. I have already mentioned that under the anxious scrutiny approach, the court will be less inclined to accept *ex post facto* justifications from the decision-maker, compared to traditional unreasonableness review: *de Smith*, at para 11-094, citing *R (Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358.

121. In any event, even if one were to take into account the subsequent reasons given, one would still see quite immediately that there was next to no consideration of the individual circumstances of MA and GA, apart from whether their solicitors had overstated their positions in relation to the chances of resettlement.

122. Whilst I have no quarrel with the three specific reasons given in the evidence for the Director's refusal[12], in my view, in a request of the present type, one should bear in mind certain considerations. First, one is, by definition, concerned with a mandated refugee or a screened-in torture

[12] Although the point has not been specifically expressed as such, I have read the first specific reason given as including a concern on the part of the Director that if he were to grant permission to the mandated refugee to remain and work here as a *resident* pursuant to section 11 or 13 of the Immigration Ordinance, which was what was asked for, there would be a possibility – and I put it no higher than that – of the refugee becoming, one day, a permanent resident of Hong Kong (if he could not be resettled), and thereby defeating the Government's long-standing policy of not granting asylum to refugees and turning Hong Kong itself to a place of settlement for refugees. This is no doubt a highly relevant consideration that the Director may take into account.

claimant; in other words, a person in genuine need of protection and help in a foreign land. The person is a vulnerable person, who cannot return to his home country or the place where torture is genuinely feared. Almost by definition, the person has gone through some traumatic events, which have prompted him to leave his place of origin in the first place. Moreover, such a person is, *ex hypothesi*, in a most disadvantaged position, and has to rely on other's charity and goodwill for almost all aspects of his life, and that would even include the making of a request to the Director for permission to work or the setting out of his case properly and sufficiently. He is in no equal footing with the Director. As Bokhary PJ observed in *Prabakar*, *supra*, at p 210F/G, "the vulnerability of persons in situations of this kind [ie torture claimants, and by the same token, mandated refugees] must be recognised so that proactive care can be taken to avoid missing anything in their favour."

123. Secondly, such a refugee (or torture claimant), in the type of situation under discussion, has been stranded in Hong Kong for a very substantial period of time. In the case of MA, it was 8 years; in the case of GA, it was 5. In other words, they have not been permitted to work, even if work is available, for a substantial period of time. The significance of this is at least threefold. First, the individual has been deprived of his basic right to work as a human being, a right recognised in many international conventions and treaties, for a prolonged period of time. Second, he has been, for a very substantial period of time, forced to rely on the goodwill and charity of others for his survival, even though he may well have preferred to earn his own living by his own efforts. This affects the person's inherent human dignity. Third, because the assistance that he gets is only for subsistence purposes, therefore, by definition, the individual has, for a substantial period of time, only been able to live at the subsistence

level. The longer the period he has been stranded in Hong Kong, the longer this situation has persisted. The situation would be aggravated if the individual also happens to have a family with him that he is supposed to support financially.

124. Thirdly, not only is the individual someone who has been stranded in Hong Kong for a substantial period of time, he is, in the type of situation under discussion, somebody with little prospect of resettlement or departure in the immediately foreseeable future. In other words, if the prohibition against employment is not lifted or otherwise relaxed, the situation that the individual has experienced, as described in the preceding paragraph, would continue indefinitely, thereby adding to the sense of hopelessness that the individual may have already experienced or would likely experience.

125. Fourthly, the individual is somebody stranded in Hong Kong. He has no choice but to stay here pending resettlement or departure. This distinguishes his case from that of a tourist, a foreign student studying in Hong Kong, an overseas person seeking employment in Hong Kong under the sponsorship of a local intending employer, or a dependant seeking to come to Hong Kong to live (and work) here under the sponsorship of some family member here. In a typical case, these persons can always leave Hong Kong and return to where they came from, or, as the case may be, remain where they are, and work and lead their life there as before. Nor are mandated refugees and screened-in torture claimants in exactly the same position as asylum-seekers and torture claimants awaiting verification or screening, whose claim may or may not be genuine.

126. Fifthly, as mentioned, there are materials to suggest that a prolonged period of enforced unemployment is detrimental to mental health. Although this is disputed by the respondent's expert, the possibility or the risk involved cannot be ignored, and much would depend on the personal circumstances of the individual concerned. At the level of individual request/decision, the decision-maker must be ever sensitive to the possibility of the prohibition, when applied in a prolonged situation, causing or contributing to adverse mental condition on the part of the individual. And if such mental condition has indeed been developed, one must bear that seriously in mind in deciding whether there are exceptional circumstances to warrant departure from the *prima facie* rule of no employment. As mentioned, it must depend on individual circumstances, including the treatment indicated and the prognosis.

127. In my view, all these considerations should be borne in mind by the Director when faced with a request for permission to work in the type of situation under discussion. I do not accept Mr Shieh's argument that these matters must be specifically raised by the individual before they need be considered by the Director. That may well be true in a normal case. However, as mentioned, one is, by definition, concerned with a genuine refugee or torture claimant, who is staying in Hong Kong at the mercy of others. Their vulnerability must be recognised so that proactive care be taken to avoid missing anything in their favour. Furthermore, many of the above points are simply commonsense matters to any reasonable decision-maker who seriously applies his mind to the circumstances of genuine refugees or torture claimants of the type under discussion. Moreover, the Director must be regarded as an expert decision-maker in relation to this sort of matter – someone who hardly requires a mandated refugee or screened-in torture claimant to remind him

what considerations or matters he should bear in mind when considering a request by them for permission to work after having been stranded in Hong Kong for a prolonged period of time with little or no prospect of resettlement or departure in the near future.

128. For these reasons, I am not satisfied that the Director has properly considered the respective requests by MA and GA for permission to work. I am not satisfied that the Director has taken into account all relevant considerations as per his own policy. I am not saying that the considerations taken into account by the Director, as set out in the correspondence and evidence, are not relevant considerations. The Director was entitled to take them into account. However, as explained, I am not satisfied that the Director has taken into account all relevant considerations that should have been taken into account in accordance with his own policy, when understood in its proper context.

129. That said, it does not mean that the Director is to be told how his discretion is to be exercised after all relevant considerations have been taken into account. Even in an anxious or heightened scrutiny unreasonableness review, it is for the decision-maker, but not the court, to make the decision. The court must not usurp the role of the Director.

130. Nor is the Court saying that the Director must devise some sub-policy or guidelines governing his exceptional exercise of discretion to depart from the *prima facie* rule. It is a matter for the Director to decide. However, if there are no guidelines or sub-policy to govern the exercise of discretion to depart, exceptionally, from the *prima facie* rule, certain consequences may follow. I would only mention two. First, different immigration officers may exercise the discretion in similar situations

differently. It may open the Director to a complaint that like cases have not been treated alike (and different cases have not been treated differently). Secondly, the absence of guidelines would mean that the Director would have to give more detailed reasons for his refusal to exercise his discretion in an individual case. Amongst other things, those reasons would be required to demonstrate that the Director has indeed looked at the individual circumstances of the case, taken into account all relevant considerations and disregarded all those that are not relevant, and have come to his decision accordingly. But as I said, whether the Director would like to devise guidelines for the exercise of his discretion to depart exceptionally from the *prima facie* rule is a matter for the Director.

131. In conclusion, I am of the view that the decisions to refuse the respective requests by MA and GA for permission to work are flawed and should be quashed.

PA's outstanding request for permission to work

132. As regards the request for permission to work made by PA, thus far no substantive reply has been made. According to the evidence filed, as at October 2010, the request was still under consideration. There is no complaint in the Form 86 that the Director has unreasonably delayed in making his decision. As the request has still not yet been answered, the Court would say nothing about it, save to say that now that the Director is aware of Dr Mistler's expert opinion that PA is suffering from a severe major depression, it is incumbent upon the Director to bear that assertion in mind and take whatever appropriate steps he might wish to take in relation to the same, in considering the request for permission to work.

The Court would refrain from making any further comment on the outstanding request.

Positions of FI and JA

133. As for FI and JA, they have not made any request for permission to work. There is, therefore, no specific refusal to challenge. I do not accept Mr Whitehead's argument that the Director is under a continuing duty to review the situation on his own initiative. No authority has been cited to support that broad proposition. The case cited, *E v Secretary of State for the Home* Department [2004] EWCA Civ 49, para 76, simply does not support the contention. As presently advised, I do not believe the Director is under any such continuing duty. In any event, the argument is not contained in the Form 86. The existence of the suggested continuing duty and/or its alleged breach are matters that may turn on evidence. That is a strong reason for not entertaining this argument in these proceedings in any event.

134. That said, there is nothing to stop FI and JA from making a request to the Director for permission to work. In particular, there is nothing to stop them from drawing to the Director's attention the views of Dr Mistler that the prolonged period of prohibition has, in the case of FI, been a maintaining factor of his pre-existing mental condition and that, in the case of JA, it has been a causative factor of his severe major depression diagnosed by Dr Mistler. It will then be up to the Director to take into account all relevant considerations and decide how his discretion should be exercised.

Challenges against the recognizances

135. I turn now to the challenges against the recognizances required to be given by the applicants by the Director. The recognizances have been given under section 36 of the Immigration Ordinance. Section 36(1) of the Ordinance reads:

> " An immigration officer and any police officer may require a person –
>
> (a) who is detained under section 27, 32 or 34; or
>
> (b) who, being liable to be detained under any of those sections, is not for the time being so detained,
>
> to enter into a recognizance in the prescribed form in such amount and with such number of sureties as the Director or such police officer may reasonably require; and where a person who is so detained enters into such a recognizance he may be released."

136. The parties' arguments have centred on whether the applicants were/are persons "liable to be detained" under section 27, 32 or 34 of the Ordinance which deal with detention pending examination and decision as to landing, detention pending removal or deportation and detention of a person arrested under section 54(3).

137. The applicants' argument is essentially that since there is no realistic prospect of the applicants' resettlement or departure within the reasonably foreseeable future, they are not liable to be detained. Therefore, no recognizances should be required of them.

138. I do not accept the argument. It is plain from the evidence that the positions of all mandated refugees in terms of their resettlement prospect are under the Director's regular monitoring. The Director liaises with the UNHCR Hong Kong Office on a regular basis. Certainly, the Director is intent on removing the refugees for resettlement once a third country willing to accept the refugees can be found. The position in

relation to PA is similar. In *A (Torture Claimant), supra*, the Court of Appeal said (para 31):

> " We agree with Mr Chow that these authorities show that so long as the Secretary is intent upon removing the applicant at the earliest possible moment, and it is not apparent to the Secretary that the removal within a reasonable time would be impossible, the power to detain pending removal is in principle still exercisable."

139. In my view, despite the apparently slim chances of resettlement or departure of the applicants in the immediately foreseeable future, the same is not wholly "impossible", as the examples given in the evidence have demonstrated, and therefore the applicants are still persons liable to be detained.

140. For these reasons, the challenges against the recognizances must be rejected.

Deportation order against JA

141. I turn to the deportation order made against JA who has committed 3 offences in Hong Kong.

142. Again, the main thrust of the argument on behalf of JA is that there is no realistic prospect of his being resettled in the reasonably foreseeable future. Therefore the deportation order should be rescinded. The mater is apparently put on a public law unreasonableness basis.

143. I do not accept the argument. It cannot be seriously disputed that it was within the power of the Secretary for Security to make the deportation order under section 20 of the Immigration Ordinance given the criminal convictions. There is no dispute that there is a discretion to

rescind the deportation order. The fact that apparently there is little prospect of resettlement in the immediately foreseeable future is a relevant consideration to take into account. However, it does not follow that the only reasonable decision, in the public law sense, that may be made in the circumstances is to rescind the deportation order.

144. I reject the challenge.

No policy on post-screening management

145. Finally, there is a challenge by PA, a screened-in torture claimant, that there is no policy regarding post-screening management of successful torture claimants.

146. PA argues that the Government's duty of *non-refoulement* does not stop with screening or a positive recognition that someone requires protection under the CAT, but is a continuing duty. The Government, it is argued, owes a duty to ensure that for the duration of their protection within its jurisdiction, successful torture claimants are not subjected to any form of cruel, inhuman or degrading treatment as set out in article 16 of the CAT. He argues that the Government has to take such steps so as to maintain the human dignity of the successful claimants and to respect for the private life and family life of the protected claimants.

147. In my view, the arguments have overstated the position. I have already discussed the position of successful torture claimants in the earlier part of this judgment, in conjunction with the position of mandated refugees. Like a mandated refugee, a torture claimant, who has been stranded in Hong Kong for a substantial period of time with little prospect of departure in the immediately foreseeable future, may make a request to

the Director for permission to work. The Director would no doubt apply his policy (described above) to his case and would no doubt also seriously consider whether he should, exceptionally, exercise his discretion to allow the successful torture claimant to work. I have already discussed the considerations that the Director should take into account, besides the many public policy considerations that the Director has described in the evidence filed which he would no doubt take into account. The Director should also take into account all other relevant personal circumstances of the successful torture claimant in question, including, in particular, any allegation that the individual is suffering from a mental condition caused or contributed to by the prolonged prohibition against employment.

148. Whether one would like to call the above process a sort of policy for managing successful torture claimants pending their departure from Hong Kong is really a matter of semantics. However, the important point here is that apart from what has been described, there is really no legal basis for saying that the Director must have some or some other post-screening policy for the management of successful torture claimants. That is not to say that the Director may not devise any such policy. It is entirely a matter for the Director. The Court cannot and should not direct the Director to do so.

149. I reject the present challenge.

Outcome

150. In conclusion, in relation to MA's and GA's respective challenges against the Director's refusals of their respective requests for permission to work, an order of *certiorari* is granted in each case to bring

up and quash the refusal. In other words, in each case the Director must consider the request for permission afresh bearing in mind, amongst other things, the latest information (and allegations) known to the Director through these proceedings as well as any other further information or materials that may be brought to the attention of the Director before any new decision is made.

151. Save to the above extent, all 5 applications for judicial review are dismissed.

152. As for costs, on an order *nisi* basis, I order that the respective costs of the proceedings in HCAL 75/2010, HCAL 81/2010 and HCAL 83/2010, including all costs previously reserved, be paid by the relevant applicants to the respondent, to be taxed if not agreed. I grant a certificate for two counsel. As regards the respective costs in HCAL 10/2010 and HCAL 73/2010, I make no order as to costs. There shall be legal aid taxation of the respective applicants' own costs.

153. I thank counsel for their assistance.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Robert Whitehead SC and Mr Earl Deng, instructed by Barnes & Daly, for the applicants in all cases

Mr Paul Shieh SC and Ms Grace Chow, instructed by the Department of Justice, for the same respondent in all cases

HCAL 10/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 10 OF 2010

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BETWEEN

MA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 73/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 73 OF 2010

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BETWEEN

GA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 75/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 75 OF 2010

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BETWEEN

PA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 81/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 81 OF 2010

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BETWEEN

FI Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 83/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 83 OF 2010

BETWEEN

JA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

(Heard Together)

Before: Hon Andrew Cheung J in Court
Dates of Hearing: 24-26 November 2010
Date of Judgment: 6 January 2011

CORRIGENDUM

In paragraph 1, lines 4 to 5, “a mandated refugees or a screened-in torture claimants” should read “a mandated refugee or a screened-in torture claimant”.

Dated the 6th day of January, 2011

(S K Chow)(Miss)
for Registrar, High Court