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CACV 59/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 59 OF 2010

(ON APPEAL FROM HCAL NO. 31 OF 2009)

BETWEEN

CH — Applicant

And

DIRECTOR OF IMMIGRATION — Respondent

And

CACV 60/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 60 OF 2010

(ON APPEAL FROM HCAL NO. 24 OF 2010)

BETWEEN

BK — Applicant

And

DIRECTOR OF IMMIGRATION — 1st Respondent

CHIEF EXECUTIVE IN COUNCIL — 2nd Respondent

Before: Hon Hartmann and Fok JJA and To J in Court

Date of Hearing: 16 December 2010

Date of Handing Down Judgment: 18 April 2011

J U D G M E N T

Hon Hartmann JA:

Introduction

1. In Hong Kong, the crime of torture is committed if a public official intentionally inflicts severe pain or suffering on another in the performance or purported performance of his duties. Torture is rightly considered a grave offence, the Crimes (Torture) Ordinance, Cap. 427, providing for a punishment of life imprisonment.

2. The right to be free from torture extends to the right of all persons found in Hong Kong, no matter what their immigration status, not to be removed to a foreign state when, by means of that removal, there are substantial grounds for believing they will be at risk of torture. The source of this protection is to be found in an international instrument which has been extended to Hong Kong. It is the 1984 United Nations Convention Against Torture And Other Cruel, Inhumane or Degrading Treatment Or Punishment ('the Convention'). Art. 3 of the Convention provides that:

> "No State Party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

3. Over the past few years several thousand persons who have come to Hong Kong have sought the protection of Art. 3(1) of the Convention. The two appellants are among that number.

4. The appellant, BK, came to Hong Kong on 9 May 2006 carrying with him a passport of the Democratic Republic of Congo. He was permitted to remain here as a visitor for 14 days. Within that period of time, he approached the Immigration Department in order to seek protection under Art. 3(1) of the Convention.

5. BK was informed of two matters. First, he was informed that no steps would be taken to begin considering his claim under the Convention while he remained lawfully in Hong Kong and while he was therefore free, at such time as he wished, to leave Hong Kong in order to travel to such other destination as he saw fit. Second, he was informed that he would not be granted any extension of his permission to remain in Hong Kong in order to submit his claim and to have it duly determined.

6. The appellant, CH, came to Hong Kong on 12 July 2008, carrying with him a Cameroonian passport. He was permitted to remain here as a visitor for a period of 14 days. On his last permitted day in Hong Kong he approached the Immigration Department to seek an extension of his permission to remain in Hong Kong so that he could lodge a claim under the Convention. He too was told that no such extension would be granted.

7. The decisions made in respect of BK and CH were made in accordance with a policy formulated by the Director of Immigration in order, in part, to govern when and in what circumstances applications for protection under Art. 3(1) of the Convention would be considered.

8. For both BK and CH, the practical result of the decisions made in respect of their applications was that, if they wished to pursue their claims in Hong Kong (as opposed to leaving Hong Kong and seeking to pursue their claims in some other jurisdiction), they would only be able to do so after their permitted periods of stay in Hong Kong had expired and they had become 'overstayers', that is, persons who were now in breach of Hong Kong's immigration laws and were at risk not only of being arrested, detained and prosecuted but were at risk also of being removed from Hong Kong. Put simply, the Director was not prepared to entertain their applications for protection under the Convention while they remained lawfully in Hong Kong.

9. The decisions made in respect of BK and CH must, however, be viewed in perspective, more particularly as to the following two matters.

10. First, once a claim under Art. 3 of the Convention had been made by BK and CH, the Director was not at liberty to remove them from Hong Kong until their respective claims had been finally determined. Therefore, neither have been at risk of being removed to the State where, in terms of their claims, they say they are at substantial risk of being tortured until the issue of such risk is finally resolved. That has never been disputed.

11. Second, although both BK and CH had to remain in Hong Kong past their permitted periods of stay in order to lodge their claims, it is not inevitable that they will be prosecuted for breaching Hong Kong's immigration laws. That also has not been disputed. Whether or not a claimant is prosecuted is a matter that lies within the exclusive province of the Secretary for Justice who has published guidelines on the matter. By way of an overview, the guidelines state that a person making a claim under Art. 3 of the Convention will not be prosecuted for overstaying, and any prosecution already commenced will be adjourned, pending the final determination of his claim. If the outcome

is in his favour, he will not be prosecuted for overstaying. If, however, the outcome is not in his favour, it will lie within the discretion of the Secretary for Justice whether to prosecute him or not. In the exercise of his discretion, the Secretary will take into account the individual circumstances of the failed claimant.

12. Returning to the circumstances of the two appellants, BK remained in Hong Kong past the last day of his permitted stay. While there was dialogue between his solicitors and the immigration authorities, it appears that he chose not to formally surrender himself. He was arrested by police two years later, in May 2008, and was released on recognisance in early June of that year.

13. CH also remained in Hong Kong past the last day of his permitted stay. While there was dialogue between his solicitors and the immigration authorities, it does not appear that he chose to formally surrender himself. He was arrested by police in August 2008 and was released on recognisance a week later.

14. In March 2009, both appellants sought by way of separate applications for judicial review to challenge the lawfulness of the Director's decisions and of his policy insofar as it gave rise to the decisions. Arising out of the applications, both at first instance and now before us on appeal, two questions have fallen for determination. In broad terms, they may be described as follows:

15. First, is the Director, as a matter of policy, lawfully entitled to decline to investigate any claim made under Art. 3(1) of the Convention for so long as the claimant is lawfully permitted to remain in Hong Kong?

16. Second, is the Director, as a matter of policy, lawfully entitled to refuse an extension of permission to remain in Hong Kong to a person who wishes to make a claim under Art. 3(1) of the Convention or has already made such claim?

17. In his judgment of 5 January 2010, Cheung J answered both questions in the affirmative, dismissing the applications for judicial review. It is from that judgment that the two appellants now appeal.

18. Before looking to the grounds of appeal, something should first be said of the nature of the Convention itself.

The Convention and the role of the Director in respect of it

19. Art. 3(1) of the Convention directs that no State Party shall return a person to another State when there are substantial grounds for believing that, by reason of such return, the person would be in danger of being tortured. Art. 3(1) imposes a negative duty only, that is, a duty not to return a person to another State when there are substantial grounds for believing that, if the person is returned to that State at that particular time, he will be in danger of being tortured.

20. Art. 3(2) recognises that the competent authorities of a State Party will need to engage in a process of investigation in order to determine whether there are substantial grounds for such belief and in this regard directs that the competent authorities shall take into account "all relevant considerations" and, if applicable, these will include consideration of evidence of a consistent pattern of gross violation of human rights. Art. 3(2) therefore imposes a positive duty. It is the duty to conduct an investigation, taking into account all relevant circumstances.

21. As to the nature of the duty imposed by Art. 3(2), in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, the Court of Final Appeal directed that all investigations must be conducted in accordance with high standards of fairness. In his judgment, Bokhary PJ emphasised the vulnerability of persons caught in situations of this kind, observing that pro-active care should be taken in order to avoid missing anything in their favour.

22. However, as to the exact nature of investigations conducted pursuant to Art. 3(2), the Convention is silent. It is therefore for each State Party, in accordance with its own laws, to determine the exact nature of such investigations, whether for example they will be administrative or judicial in nature.

23. It is correct that Art. 12 of the Convention directs each State Party to institute a "prompt and impartial investigation" concerning torture allegations. But this is only when the allegations relate to acts of torture carried out *within* the jurisdiction of a State Party.

24. As to how a State Party should otherwise deal with a person who seeks the protection of Art. 3, the Convention is again silent on the matter.

25. On a purposive interpretation of Art. 3 of the Convention, read within the context of the Convention as a whole, Cheung J came to the following conclusion (paragraph 36(8) of his judgment):

> "The ultimate as well as the only aim of the Convention is to prevent torture. Subject to the proper attainment of that goal, it is not a convention to regulate State Parties' practices on immigration matters. Rather, these matters are internal matters of the State Parties, and the Convention has nothing to do with them. It should be noted, in particular, that the Convention is wholly silent on whether a torture claimant may be detained by a State Party pending the determination of his claim."

26. I agree. Indeed, during the course of the appeal hearing, no suggestion was made that the Director's policy contravenes any express provision of the Convention nor that the Convention, directly or by implication, imposes any obligation on State Parties to confer any special immigration status on claimants or, in respect of matters of immigration control or internal security, requires that all claimants must be dealt with in any particular way.

27. By way of summary, as I see it, the Convention does not bestow upon claimants in the State where they seek protection the right to demand any particular immigration status nor any particular form of freedom from immigration control.

28. It is therefore for each State Party to determine how persons seeking protection under Art. 3 of the Convention – those persons, by definition, invariably being aliens in the State concerned – are to be dealt with pending the determination of their claims. In this regard, Cheung J made the following observations (para. 51):

> "One may debate forever the wisdom of the Director's policy not to grant an extension of stay to a torture claimant. It is no secret that in many other jurisdictions, arrangements have been put in place to allow aliens, such as torture claimants or refugees, to enter and stay in the host country under some temporary permission regime. Indeed, even in Hong Kong, in relation to Vietnamese boat people of the 1980s and 1990s, there have been specifically enacted provisions in the Immigration Ordinance (namely, Part IIIA) to establish a special regime to deal with these refugees and their status in Hong Kong, pending verification of their claim of status and re-settlement. However, all these are political solutions made by the relevant governments and/or legislatures to deal with their specific social or political problems. In Hong Kong, we do not yet have a special regime to deal with torture claimants. The Director must act in accordance with the existing law, which confers on him a wide discretion about admission of aliens. He is free to devise his policies. The Court does not sit here to approve or disapprove of his policies. Nor does the Court sit here to offer, still less to impose on the Director, any alternative solutions or policies."

29. There can be no criticism of that passage. In Hong Kong, the legislature has entrusted to the Director the discretionary power to formulate policies governing immigration matters. Hong Kong is a small place with a high population density. There is constant pressure on Hong Kong's infrastructure, both physical and social. In the result, the policy of the Director for many years has been one of strict immigration control. Our courts have long recognised that, because of Hong Kong's unique geographical, social, historical and economic circumstances, the Director has acted lawfully in determining that he is not in a position to devise immigration policies that are perhaps not as generous as policies formulated in other jurisdictions.

30. As to a more specific need to impose restrictive policies in respect of persons who come into Hong Kong seeking asylum under the protection of the Convention, while every claim must be determined in accordance with high standards of fairness, both substantive and procedural, it must also be acknowledged that, as with other international instruments of a protective nature founded on recognition of fundamental human rights, they are open to abuse by those who would seek to take advantage of them. In respect of the Convention, it must also be acknowledged that the right to be free from torture extends to all persons including those who may themselves be guilty of torture or other crimes of a grave nature or who may, by reason of their beliefs, pose a security threat. It is for the Director, in the formulation of his policies, to give such weight to such matters as he deems best in the public interest.

31. That being the case, it is not disputed that in Hong Kong it is the function of the Director to formulate policies governing the matters which are before us in this appeal. The only issue is whether, in respect of those matters, he has done so lawfully.

The first question

32. The first question was whether the Director is lawfully entitled to decline to investigate a claim made under Art. 3(1) of the Convention for so long as the claimant is permitted in terms of Hong Kong's immigration laws to remain in the Territory.

33. In respect of this question, having regard to the requirements of the Convention, Cheung J held that no duty is imposed on the Director to begin processing a claim at any particular point of time subject only to the proviso – and it is in all respects a determining proviso – that, until a claim has been finally determined according to high standards of fairness, the claimant is not returned to the State where he claims to be in danger of being subjected to torture. The judge gave two principal reasons for this. By way of broad overview they may be summarised as follows.

34. First, when exactly a State Party chooses to begin processing a claim is an internal matter to be governed by national law and practice. There may be many reasons determining when and in what circumstances a State Party may wish to commence processing a claim. In Hong Kong, the Director has determined the matter in the context of the need to enforce immigration controls. That is a legitimate purpose.

35. Second, in the context of Hong Kong's immigration laws, the Director's power to remove a person from Hong Kong does not arise until after that person has become an overstayer. Prior to that, the claimant can depart Hong Kong whenever he wishes for any destination that he sees fit. That being the case, a person who seeks to make a claim under Art. 3(1) of the Convention is not at any risk of being removed to a State where he fears torture until *after* his permission to stay has expired and that is when, in accordance

with his policy, the Director will accept and begin processing a claim. As the judge expressed it: "without any immediate risk of removal, there is simply no question of the immediate realisation of the claimed risk of torture".

36. For the appellants, however, Mr Dykes SC, their leading counsel, challenged these findings, making what he described as the 'short point' that, in formulating his policy, the Director has failed to take into account the requirement that all claims must be investigated in accordance with high standards of fairness. Fairness, he said, demanded promptness, more especially in cases of this kind. It was his submission that the Director's policy of refusing to begin investigating a claim until after the claimant had overstayed his permitted time in Hong Kong resulted in delay, even if that delay was only one of weeks or days. That delay, he said, was itself the cause of procedural unfairness and may in individual cases be the cause of substantive unfairness.

37. Mr Dykes argued that delay could fatally undermine a claim made pursuant to Art. 3(1) of the Convention. His submission was to the following effect.

38. Depending on the circumstances, the best evidence that a claimant had a well-founded fear of torture if returned to a particular State was proof that he had already been subjected to torture in that State.

39. The duty lay on the Director to investigate the relevant facts as presented to him by a claimant and, to the extent that the claimant may himself have suffered torture, he was himself the primary source of such relevant facts. If, at the time a claimant attempted to make a claim under the Convention, there was evidence, physical or psychological, of torture then the duty lay on the competent authorities to accurately record that evidence. Evidence of torture

may fade quickly, indeed be gone in days. In Hong Kong, however, by declining to entertain a claim until the claimant had overstayed his permitted time of stay and was in breach of the law, the Director was, by the terms of his policy, preventing his officers from dealing promptly with contemporaneous evidence.

40. In this regard, Mr Dykes made reference to a document known as the Istanbul Protocol, a United Nations manual on the effective investigation and documentation of torture. This 2004 document, when looking to the investigation of torture, states (in para. 74):

> "The fundamental principles of any viable investigation into incidents of torture are competence, impartiality, independence, *promptness* and thoroughness. These elements can be adapted to any legal system and should guide all investigations of alleged torture." [my emphasis]

41. In para. 104, the manual continues:

> "The investigator should arrange for a medical examination of the alleged victim. The timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade."

42. Mr Dykes submitted that, although the manual provides a guideline only, it is nevertheless an indicator of the demands of procedural fairness in considering the duty placed upon the Director to investigate claims made under Art. 3(1) of the Convention.

43. It was accordingly his submission that, in order to meet the requirements of a high standard of fairness in investigating every claim made under Art. 3(1) of the Convention, the duty lay on the Director to entertain each and every claim when it was made, if only for the purpose of ascertaining whether in any individual case a claimant still bore marks consistent with any claim made by him to have been tortured. The failure in the terms of the

policy to ensure such promptness potentially undermined all claims even if in fact it only undermined a few. That failure, said Mr Dykes, rendered the Director's policy unlawful.

44. I have no dispute with the contention that all claims made under Art. 3(1) of the Convention must be handled with the appropriate degree of promptness. In this regard, of course, context is everything. Nor do I think it can be disputed that, if it is known that a claimant alleges recent torture, immediate steps should be taken to arrange for a medical examination. Fairness so demands.

45. But there is nothing to suggest that, in appropriate cases, the Director's policy will not allow for that. Paragraph 3 of the document setting out the Director's policy – under the heading 'threshold for invoking assessment mechanism' – states the following:

> "There first of all has to be a decision by or on behalf of the Director to employ the assessment mechanism in order to screen an individual who has made a claim under Article 3 of the Convention. Such a decision is *unlikely* where the person concerned enjoys dual nationality or is permitted to remain in Hong Kong on a limit of stay. But, where the person claiming has no claim for immigration purposes on the HKSAR and under policy is likely to be deported or removed to the country where he claims that there is a substantial likelihood of him being subjected to torture, the appropriate decision in his individual case will usually be to order screening…" [my emphasis]

46. It will be seen that the policy is not absolute. It allows for the exercise of discretion. Accordingly, if a claimant makes it known to the Director's officers that he may still bear marks of recent torture, physical or psychological, it is open to those officers, within the ambit of the policy, to look to the dictates of fairness and to take appropriate remedial measures, for example, by arranging an early medical examination. Such an examination may be subject to the condition that the substantive claim itself will only be

entertained after the claimant's permission to stay has expired. But in the meantime contemporaneous evidence will have been captured and stored.

47. When looking to this issue, it is relevant, I believe, to observe that, at the very least, the exercise of determining whether a claim made under Art. 3(1) of the Convention is valid must be one of joint endeavour. It is not for a claimant, having stated a claim, to simply sit back and require the Director to disprove it. If a claimant believes that he may still bear marks of recent torture which, unless recorded, are likely to fade and be gone, then he must be expected at least to state the fact so that the Director's officers are put on notice.

48. The difficulty faced by the appellants is that, on the evidence put before us, neither of them at any time alleged that they bore marks of torture. From within days of their arrival in Hong Kong, both appellants were legally represented. Their solicitors made no such claim. Accordingly, neither appellant is able, by reason of their own experience, to say that the policy does not have the flexibility to which I have referred.

49. As to the delay inherent in the Director's policy, in the great majority of cases aliens who seek entry to Hong Kong as visitors are given just 14 days permitted length of stay. That being the case, even if an attempt is made to lodge a claim on the very first day, the delay occasioned by a refusal to entertain the claim at that time will be no more than two weeks. For myself, outside of any special circumstances applicable to an individual claimant, I do not see that such a delay can be said to be inappropriate.

50. In summary, therefore, while I am of the view that the Director's duty to determine claims under Art. 3(1) of the Convention requires him to do so with the appropriate degree of promptness – such promptness being an integral part of a fair investigation – I do not see that, in respect of either

appellant, the refusal to entertain their claims when the attempt was first made to formally lodge them, resulted in any form of delay occasioning unfairness to them.

51. Nor do I see that, for the reasons advanced by Mr Dykes, the policy itself is rendered unlawful. In my view, as published, the Director's statement of policy is sufficiently flexible to deal fairly with the unusual circumstances propounded by Mr Dykes.

The second question

52. The second question was whether the Director is lawfully entitled to refuse an extension of permission to remain in Hong Kong to a person who wishes to make a claim under Art. 3(1) of the Convention or has already made such a claim.

53. In respect of this question, Cheung J held that the Convention does not prevent the Director – by way of the exercise of policy (known as the 'extra immigration policy') – from refusing an extension of permitted to stay to a claimant even if, by that refusal, the person is rendered an 'overstayer' and in breach of Hong Kong's immigration laws. This, however, is subject to three provisos.

54. First, that the claimant is not removed until after an unfavourable determination has been made regarding his claim, that determination being reached following a screening process that has met high standards of fairness.

55. Second, that the refusal to extend a claimant's permitted stay does not have the effect of materially inhibiting the claimant from making or maintaining his claim.

56. Third, that it does not, in respect of the screening process, undermine the requirement that the process must be conducted in accordance with high standards of fairness.

57. The judge came to the finding of fact that there was no evidence in respect of either appellant that the exercise of the Director's policy, including the fact that both appellants were arrested and detained, had inhibited them from making or maintaining their claims. Nor was there evidence that the exercise of the policy had, of itself, undermined the demand for high standards of fairness in the determination of the screening process.

58. There is no reason to doubt these findings of fact nor were they challenged on appeal.

59. As regards the almost inevitable consequence of the Director's two interlinked policies that claimants will be arrested and will undergo some period of detention, the judge took into account that, save for exceptional cases, arrested claimants are released on reconnaissance after a brief period of detention. He observed that the exceptional cases are, generally speaking, those involving a claimant who, in the opinion of the competent authorities, constitutes a security risk, a risk of going underground or a risk of committing offences other than overstaying. The judge further observed (para. 47):

> "I would not understate the significance of the loss of liberty of a person even for a very brief period of time. However, that is not the issue under consideration here. For, as mentioned, the Convention is wholly silent on whether a torture claimant may be detained pending the completion of the screening process."

60. In respect of this second question, Mr Dykes advanced another 'short point', namely, that the policy was unlawful on two bases; first, because it was built upon and was an extension of the first aspect of the policy, that policy itself being unlawful, and, second, because the policy tolerated no

exceptions and thus fettered the exercise of the Director's administrative discretion.

61. The first basis of the submission can be dealt with in short terms. In my view, the first aspect of the policy is not unlawful. My reasons have been given.

62. As to the second basis of the submission, namely, that the policy of not permitting an extension of stay appears to admit of no exceptions, the principle in law is now well understood. When the legislature confers a discretionary power exercisable from time to time the person who is given that power, while he may of course adopt a policy in respect to the exercise of that power, cannot fetter the future exercise of his discretion by committing himself in terms of that policy to the way in which he will in all cases exercise the power. In short, he cannot abdicate the discretionary power given to him by the legislature, surrendering it to the strict terms of the policy.

63. In *Schmidt v Home Secretary* [1969] 2 Ch 149, 169, Lord Denning MR spoke of the issue of fettering policy in the following terms:

> "The second point is whether the Home Secretary was at fault in laying down general policy about scientology and thus fettering his discretion. On this point both sides accepted the law as stated by Bankes LJ in *Rex v Port of London Authority, ex parte Kynoch Limited* [1919] 1 QB 176, 184, which shows that a tribunal may, in the honest exercise of its discretion, adopt a policy, and announce it to those concerned, so long as it is ready to listen to reasons why, in an exceptional case, that policy should not be applied."

64. That the Director's policy allows for few exceptions is no doubt correct. But nothing has been put before us to suggest that the policy tolerates no exceptions, no matter how pressing the circumstances, and is therefore absolute.

65. The statement of policy (cited in paragraph 45 of this judgment), while somewhat dense in its wording, does not suggest that the policy tolerates no exceptions. Indeed, on any ordinary reading it is to the opposite effect. I take nothing from it to the effect that the Director has ruled out of consideration the future exercise of his discretionary power in light of circumstances which may be put before him and which may be relevant to the exercise of his power in a way which falls outside of the policy.

66. In support of his submission, Mr Dykes made reference to the affirmation of Mr Tam Kwok Ching, an Assistant Secretary of the Security Bureau. In his affirmation, Mr Tam explained what had driven the formulation of the Director's policy and, in doing so, said the following (in paragraph 26):

> "In the light of the above circumstances, the Extra Immigration Policy was brought in and implemented. These having been said, the Director has always retained a discretion to allow individual asylum seekers to continue their physical presence in Hong Kong *on recognisance* in appropriate cases, such as where humanitarian or compassionate grounds exist." [my emphasis]

67. While this statement speaks of persons being able to continue to stay in Hong Kong 'on recognisance', I do not see that the statement was intended, when read in context, to define the scope of the Director's exercise of discretion under the policy. For that one needs to go back to the statement of policy itself.

68. During the course of submissions, Mr Anderson Chow SC, leading counsel for the respondent, rejected the suggestion that the Director had fettered his discretion to the extent that he would never grant an exception unless it was also subject to the person being placed on recognisance. There was no evidence of this, he said. The statement of policy did not say so nor could it be read in this way.

69. I agree with Mr Chow that there is no evidence that the policy is absolute in the manner advanced by Mr Dykes. Put another way, there is nothing to suggest that, if exceptional circumstances are put before the Director, he will refuse to exercise his discretion in the light of those circumstances.

70. Again, the two appellants face the difficulty that neither of them pleaded exceptional circumstances when they sought an extension of their permission to remain in Hong Kong. It cannot therefore be said that, even though their circumstances were, in terms of the intended application of the policy, outside of the ordinary, the Director refused to take them into account.

71. Although not advanced in oral submissions, there was an implied suggestion in Mr Dykes' written submissions that the Director's policy appeared to make no exceptions for asylum seekers *sur place*, that is, for persons who may be in Hong Kong, working or living on an entirely legitimate basis but who, by reason of some change in the political order in their country of origin suddenly find themselves in fear of being tortured if returned to that country upon the expiration of their visas. I do not see, however, that this observation advanced Mr Dykes's case. First, neither appellant could claim to be an asylum seeker *sur place* within the meaning that I have given. Second, if anything, it indicates that the policy does not seek to be exhaustive in respect of all applications in all circumstances and that there will inevitably be cases in which the Director will be called upon to exercise his discretion in a way that constitutes an exception to his policy.

Conclusion

72. For the reasons given, I would dismiss the appeal of both appellants with costs to follow the event.

Hon Fok JA:

73. I agree.

Hon To J:

74. I agree.

(M.J. Hartmann) Justice of Appeal	(Joseph Fok) Justice of Appeal	(Anthony To) Judge of the Court of First Instance

Mr Philip Dykes SC & Mr Hectar Pun, instructed by Messrs Barnes & Daly (assigned by Director of Legal Aid), for the Applicants in CACV 59/2010 and CACV 60/2010

Mr Anderson Chow SC and Ms Grace Chow, instructed by Department of Justice, for the Respondents in CACV 59/2010 & CACV 60/2010