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CACV138/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 138 OF 2009
(ON APPEAL FROM HCAL NO. 77 OF 2008)

BETWEEN

UBAMAKA EDWARD WILSON Applicant

and

THE SECRETARY FOR SECURITY 1st Respondent

THE DIRECTOR OF IMMIGRATION 2nd Respondent

Before : Hon Stock VP, Andrew Cheung and Fok JJ in Court
Dates of Hearing : 11 and 12 October 2010
Date of Handing Down Judgment : 19 November 2010

J U D G M E N T

Hon Stock VP :

1. I have had the advantage of reading in draft the judgment of Fok J. I agree with it and with the orders which he proposes.

2. His judgment includes an analysis of the phrase "as applied to Hong Kong" as used in article 39 of the Basic Law, an analysis which is perhaps overdue since the phrase has periodically been the subject of some

misunderstanding by advocates and in this case, there has been an attempt further to limit its meaning. I wish to add a word about the issue because it is one that now deserves some emphasis.

3. The phrase in article 39 "the provisions of the International Covenant on Civil and Political Rights… as applied to Hong Kong" has sometimes been assumed to mean "as applied to Hong Kong by the Hong Kong Bill of Rights Ordinance." In this case, various other suggestions have been made, with which Fok J deals in detail, including one that would have us read it as saying "as lawfully applied to Hong Kong", with "lawfully" to be adjudged according to international law. An implication of that argument, or perhaps a variation on the theme, is that "applied to Hong Kong" means as applied by international law or, possibly, as determined by the Human Rights Committee of the United Nations to apply to Hong Kong.

4. It means none of those things. It means, rather, the ICCPR as applied to Hong Kong by the Government of the United Kingdom in 1976, and as intended to remain in force in relation to Hong Kong after 1 July 1997 by reason of the PRC's Communication of 20 June 1997 to the Secretary General of the United Nations.

5. The background to the application of the ICCPR to Hong Kong is provided in a footnote by Professor Yash Ghai in *Hong Kong's New Constitutional Order*, 2nd ed., p. 406 :

> "The UK did not have the option to exclude its dependencies from the application of the ICCPR, as unlike some other treaties, there is no provision for the exclusion of any territories under a state party's jurisdiction. Article 1 requires each signatory state to ensure rights to 'all individuals within its territory and subject

> to its jurisdiction'. This provision was reinforced by a resolution of the General Assembly that the covenant would be equally applicable to a signatory metropolitan state and all the territories administered or governed by it. …
>
> …
>
> On the other hand, it was then accepted that a state could modify the ICCPR in relation to a territory through reservations, for, there being no special provision on reservations, general principles of international law were deemed to apply … *Reservations were used by the UK to temper the covenant to its perception of the realities, and the future development, of Hong Kong.*" *(emphasis added).*

6. Professor Yash Ghai then goes on, at p. 407, to record the fact that "Britain applied the ICCPR to Hong Kong with a number of reservations."

7. What we see, therefore, is that the Covenant was applied to Hong Kong by no organisation or entity other than the state then exercising sovereignty over Hong Kong and was applied with reservations determined, and determined only, by that state.

8. Whatever view might be taken by the Human Rights Committee or by commentators on the validity or desirability of a reservation thus applied, the phrase "as applied to Hong Kong" which we see in article 39 is a phrase that falls to be determined in the context of a domestically binding constitution and is to be interpreted in accordance with the meaning intended by that constitution.

9. It is true that the Hong Kong Bill of Rights Ordinance gave domestic effect to the ICCPR. But it gave domestic effect to the ICCPR as already applied to Hong Kong, which is why the Ordinance reflects

reservations adopted by the Government of the United Kingdom about 15 years prior to its enactment. As Fok J points out, "the ICCPR as applied to Hong Kong" was, as a matter of law, a concept born well before the Hong Kong Bill of Rights Ordinance, as evidenced by the terms of the Sino-British Joint Declaration 1984 and of the Basic Law promulgated in 1990 — each of which referred to "the International Covenant on Civil and Political Rights as applied to Hong Kong." By the same token, the phrase "as applied to Hong Kong" in the amendment made in 1991 to the Letters Patent — providing that the provisions of the ICCPR "as applied to Hong Kong" were to be implemented through the laws of Hong Kong and that laws made after the amendment were not to be inconsistent with the ICCPR as thus applied — was no more and no less than a reference to the UK's application of the ICCPR to Hong Kong, and carried none of the limitations which are said in this case to apply to that phrase. Even though the date of that amendment was the same as the date upon which the Bill of Rights Ordinance came into effect, that phrase in the Letters Patent was not an allusion to that Ordinance.

10. So too, in referring to the ICCPR "as applied to Hong Kong", the Basic Law did not contemplate that as a reference to the Bill of Rights Ordinance; and it did not contemplate the qualifications to that phrase which have been advocated in this appeal. It contemplated it as a reference to the application, with reservations, in 1976 of the ICCPR by the Government of the United Kingdom to Hong Kong (subject to such modifications if any as may by the time of the Basic Law's promulgation have been made), and it contemplated the continued application of that Covenant to Hong Kong beyond 1 July 1997, upon proper authorisation by the Government of the PRC, with those reservations.

Hon Andrew Cheung J :

11. This appeal raises some important issues. Amongst them is the one concerning the meaning of the important phrase "as applied to Hong Kong" in article 39(1) of the Basic Law. Its proper interpretation provides a good illustration of the well-established principle of constitutional interpretation that provisions in the Basic Law must be interpreted in the light of, amongst other things, their historical context. This issue arises in the context of a challenge, which carries significant implications, against the validity of the "immigration reservation" made by the UK Government when it ratified the International Covenant on Civil and Political Rights (ICCPR) and applied it to Hong Kong in 1976, and of section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) which (in my view) reflects at the domestic level the immigration reservation, particularly where a guaranteed right that is said to embody or mirror a preemptory norm of customary international law is engaged. The key to determining these questions of validity lies, to a significant extent, in a proper understanding of the phrase "as applied to Hong Kong" in article 39(1) and of how that article works at the constitutional level to give effect to and, at the same time, to delimit the application of, the ICCPR in the domestic courts. For the very thorough reasons given both by Stock VP and by Fok J in their judgments on these and the many other issues raised in this appeal with which I entirely agree, I would also allow the appeal to the extent indicated at the end of Fok J's judgment and make the costs order *nisi* he proposes.

Hon Fok J :

A. Introduction

12. For the reasons given in his Judgment dated 5 May 2009, Reyes J quashed a Deportation Order issued against the applicant, Mr Edward Wilson Ubamaka, and also declared that the applicant's administrative detention pending removal from 29 December 2007 until 23 August 2008 was unlawful. This appeal, by the Secretary of Security and the Director of Immigration respectively, seeks to reinstate the Deportation Order and, although it is accepted that the declaration of unlawfulness in respect of the administrative detention is correct, to challenge part of the Judge's basis for that declaration.

13. Since the applicant below is the respondent to this appeal and the respondents below are the appellants in this Court, I shall, to avoid confusion, refer in this Judgment to Mr Ubamaka as "the applicant" and to the Secretary of Security and the Director of Immigration as "the Secretary" and "the Director" respectively and, collectively, as "the appellants".

B. Background facts

14. The applicant, a Nigerian national, entered Hong Kong from Nepal on a Nigerian passport on 11 December 1991. He was arrested for possession of dangerous drugs when he tried to clear customs at the airport. He was charged with the offence of trafficking in a dangerous drug and, after trial, was convicted of this offence on 24 February 1993. He was sentenced to a term of imprisonment of 24 years.

15. On 5 July 1999, a deportation order was made by the Secretary against the applicant requiring him to leave Hong Kong and prohibiting him from being in Hong Kong at any time thereafter. On 6 July 1999, the Principal Assistant Secretary (Security) authorised the detention of the applicant under section 32(3) of the Immigration Ordinance pending his removal.

16. During the course of his imprisonment, the applicant made a number of applications to the Hong Kong and British Governments to be repatriated to Nigeria to serve the remainder of his prison sentence there.

17. Sometime in 1998, the applicant became aware of Decree No. 33 of 1990 promulgated by the National Drug Law Enforcement Agency in Nigeria. The terms of the decree had been incorporated into the National Drug Law Enforcement Agency Act ("the Act"), section 22 of which provides :

> "(1) Any person whose journey originates from Nigeria without being detected of carrying prohibited narcotic drugs or psychotropic substances, but is found to have imported such prohibited narcotic drugs or psychotropic substances into a foreign country, notwithstanding that such a person has been tried or convicted for any offence of unlawful importation or possession of such narcotic drugs or psychotropic substances in that foreign country, shall be guilty of an offence of exportation of narcotic drugs or psychotropic substances from Nigeria under this subsection.
>
> (2) Any Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances and who thereby brings the name of Nigeria into disrepute shall be guilty of an offence under this subsection.
>
> (3) Any person convicted of an offence under subsection (1) or (2) of this section shall be liable to imprisonment for a term of five years without an option of a fine and his assets and properties shall be liable to forfeiture as provided in this Act."

18. After becoming aware of the Decree, the applicant ceased to pursue his applications for repatriation to Nigeria.

19. On 7 September 2006, the applicant made an application for refugee status to the United Nations High Commissioner for Refugees ("UNHCR") Sub-Office in Hong Kong. The UNHCR rejected the applicant's claim for refugee status in December 2007. The applicant's appeal from that rejection was unsuccessful. The UNHCR informed the Director of Immigration by letter dated 28 July 2008 that the file of the applicant was closed and that he was no longer a person of concern to the UNHCR.

20. On 3 March 2007, the applicant made a claim to the Director against the Deportation Order on the basis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The applicant claimed that, if he were deported to Nigeria, he risked imprisonment pending and following trial pursuant to the Act, notwithstanding his previous conviction in Hong Kong. The applicant also alleged that, during such imprisonment, it would be common for officers to subject detainees for drug-related offences to torture and other inhuman or degrading treatment.

21. In accordance with the normal criteria for remission of sentence due to good behaviour, on 29 December 2007, the applicant was released from prison after serving two-thirds of his sentence. He was immediately transferred to the Castle Peak Bay Immigration Centre where he was detained under section 32(3) of the Immigration Ordinance pursuant to the authorisation of 6 July 1999.

22. On 7 January 2008, the applicant applied to be released on recognizance. On 21 January 2008, the applicant made a further request to be released from detention and not to be deported to Nigeria while Decree 33 of the National Drug Law Enforcement Agency 1990 was still in force. The applicant made further representations by way of a letter dated 31 March 2008 in respect of his requests to be released on recognizance.

23. On 9 April 2008, the applicant's first and second requests to be released on recognizance were refused. The Director of Immigration only became aware of the third request for release on recognizance after his letter of refusal of 9 April 2008 was served on the applicant. The Director duly reconsidered the request and came to the same conclusion. Upon a request from the applicant's solicitors to state the facts specific to his case upon which the decision not to release the applicant from detention was premised and the reasoning for the decision, the Director responded by a letter of 4 July 2008 setting out his reasons. In summary, these were as follows :

(1) Given the seriousness of the offence of which he was convicted, the applicant posed a threat to law and order in Hong Kong.

(2) There was a risk of the applicant absconding.

(3) The applicant's deportation could be effected within a reasonable time.

24. On 31 July 2008, the applicant's solicitors wrote to the Director of Immigration enclosing a copy of the Notice of Application for leave to apply for Judicial Review dated 25 July 2008. On 21 August

2008, the applicant was granted leave to apply for judicial review. On that day, the Director decided to release the applicant on recognizance under section 36(1) of the Immigration Ordinance subject to conditions. On 23 August 2008, the applicant was released on recognizance.

25. In the meantime, on 14 August 2008, the Director issued a "minded to refuse" letter in respect of the applicant's CAT claim. In that letter, the Director expressed a preliminary view that "there are no substantial grounds for believing [the applicant] would be in danger of being subjected to torture in Nigeria if … returned there".

26. As regards the applicant's allegation of a risk of double jeopardy, the Director's letter stated the view that the doctrine "does not apply with respect to the national jurisdictions of two or more states". Further, the Director maintained that, since the applicant was not a person with the right to enter and remain in Hong Kong, he could not invoke double jeopardy to challenge a decision by the Director to deport him to Nigeria.

27. In any event, the Director thought that there was "conflicting evidence" as to whether the applicant would be prosecuted under the Act upon being returned to Nigeria. If he were going to be tried, it would be for the offence of "bringing the name of Nigeria into disrepute" and so would be "another crime isolated from drug trafficking". The Director concluded that "[a]ny punishment that may be lawfully imposed upon [the applicant] under Decree 33 of 1990 would amount to lawful sanction which is excluded from the definition of 'torture' under Article 3 of the [CAT]".

28. So far as torture was concerned, the Director believed that "the pain or suffering endured by prisoners [in Nigeria] has its genesis in the poor and outdated design of the prison structure" and that the Nigerian Government "does not intentionally inflict pain or other suffering on prisoners for a forbidden purpose under Article 1 of the [CAT]". Finally, the Director pointed out that the applicant's stance on torture in Nigerian prisons was inconsistent, in the light of his earlier requests to be repatriated to serve the remainder of his prison sentence there.

29. In February 2009, the applicant made a further application for leave to judicially review the Director's refusal to allow him legal representation in the bringing of his CAT claim. Leave was granted by Saunders J on the basis of *FB v Director of Immigration & Anor* [2009] 1 HKC 133, in which the Director's policy of not allowing legal representation in CAT applications was criticised. Mr Anderson Chow SC, leading counsel for the appellants, informed the Court that the applicant's judicial review in respect of his CAT claim had been resolved on the basis that this claim would be assessed in accordance with a new mechanism put in place by the Director. In the meantime, the Director has undertaken not to deport the applicant to any country in respect of which he claims protection under the CAT.

C. The Judgment below

30. The Judge identified three main issues as arising on the judicial review before him.

31. The first issue was whether the delay between the making of the Deportation Order and the judicial review was fatal to the application.

On this issue, the Judge concluded that the relevant delay was from July 1999, when the Deportation Order was made, and September 2006, when the applicant applied to the UNHCR for refugee status and sought legal aid (§45). The Judge considered that there was a special factor excusing the delay of seven years, namely that it would be unjust to dismiss the application on the sole basis of delay because of the alleged serious consequences to the applicant of sending him back to Nigeria (§48). At paragraph 51 of the Judgment, the Judge said :

> "Accordingly, as a matter of discretion, I would extend the time for the bringing of this judicial review insofar as necessary."

32. The second issue was whether the Deportation Order should be quashed. The applicant contended that, if he were deported to Nigeria, there would be a risk of double jeopardy, namely of being tried twice for the same or practically the same offence. The Judge regarded the effect of the Act as giving rise to a practical risk of double jeopardy on the basis that the charge under Nigerian law would arise out of the same acts which led to the applicant's conviction here (§§54 and 70). However, the Judge held that the applicant could not rely on double jeopardy to resist deportation because article 11(6) of the Bill of Rights[1] ("BOR") was subject to section 11 of the Hong Kong Bill of Rights Ordinance, Cap. 383 ("HKBORO"), the effect of which was to exclude the Deportation Order from the ambit of the article (§76), and article 14(7) of the International Covenant on Civil and Political Rights[2] ("ICCPR") was subject to a similar reservation, to like effect (§§80-82). Further, he held that article 14(7) of the ICCPR only provides protection from double jeopardy within the same state (§83). Finally, he also held that double jeopardy

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[1] For the text of article 11(6) of the BOR, see §100 below.

under common law is only available as a defence against a second prosecution in Hong Kong but could not be used to prevent deportation (§86).

33. On the second issue, the applicant also argued that permitting the execution of the Deportation Order would be contrary to article 3 of the BOR, article 7 of the ICCPR[3] and article 3 of the CAT[4]. Although the Judge held that the lawful sanction which might be inflicted on the applicant in Nigeria could not be regarded as torture for the purpose of article 3 of the CAT (§91), he held that the applicant would suffer inhuman treatment if returned to Nigeria. The Judge's holding in this regard was limited to the mental suffering to which he would be subjected by the risk of re-trial in Nigeria and further imprisonment in relation to the same conduct for which he had been sentenced in Hong Kong (§§110-111) and not to any perceived harshness of conditions in Nigeria or its prison system. The Judge held that the applicant was protected against such inhuman treatment by article 3 of the BOR, article 7 of the ICCPR and article 16(1) of the CAT[5] so that acting upon the Deportation Order by returning the applicant to Nigeria would be unlawful (§118). The Judge further concluded that section 11 of the HKBORO and the immigration reservation to the ICCPR could not save the Deportation Order because the injunction against inflicting torture or other forms of inhuman or degrading treatment are peremptory norms of customary international law and that it was not possible for a state to derogate from those norms (§94).

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2 For the text of article 14(7) of the ICCPR, see §100 below.
3 For the text of article 3 of the BOR and article 7 of the ICCPR, see §70 below.
4 For the text of article 3 of the CAT, see §88 below.
5 For the text of article 16(1) of the CAT, see §91 below.

34. On the third issue, the Judge held that the applicant's detention between 29 December 2007 and 23 August 2008 was unlawful (§128) because (i) there was no evidence that the applicant continued to pose a threat to law and order in Hong Kong (§123), (ii) there was no evidence of a real risk of the applicant absconding (§124), and (iii) there was no particular time period in which the deportation was likely to be effected and no transparency about the length of the applicant's detention (§§125-126).

D. The Appellants' contentions

35. On this appeal, the appellants contended that, although the Judge was correct in holding that article 11(6) of the BOR, article 14(7) of the ICCPR and the common law rule against double jeopardy could not provide any basis to quash the Deportation Order, he was wrong to do so on the ground that acting upon the Deportation Order would amount to cruel, inhuman or degrading treatment contrary to article 3 of the BOR, article 7 of the ICCPR and article 16 of the CAT. It was contended that the Judge was wrong in having regard to or attaching undue weight to the risk of double jeopardy in considering whether, in all the circumstances of the case, deporting the applicant would amount to inhuman or degrading treatment or punishment.

36. The appellants contended that, in any event, there would be no double jeopardy within the meaning of article 14(7) of the ICCPR since, first, the protection of that article did not extend to prohibiting deportation from one state to another and, secondly, even if the applicant were to be charged under the Act on his return to Nigeria, the charge would be for an offence different to that for which he was convicted in Hong Kong.

37. Further, the appellants relied on section 11 of the BORO and the immigration reservation to the ICCPR in support of the argument that rights under the HKBORO and ICCPR cannot be invoked to prevent deportation. They contended that the provision against return of a person to a risk of inhuman treatment is not a peremptory norm and cannot override section 11 of the HKBORO.

38. In respect of the applicant's detention, the appellants accepted that, because of this Court's previous decision in *A v Director of Immigration* [2008] 4 HKLRD 752, this Court was bound to hold that the detention was unlawful on the basis that the grounds and procedure for detention under section 32(3) of the Immigration Ordinance ought to be certain and accessible but were not at the material time. However, the appellants contended that the Judge was wrong to find that the detention was also unlawful because the reasons given by the Director for refusal to release the applicant were invalid.

39. Finally, the appellants raised the argument in their Notice of Appeal (but neither in the skeleton or oral submissions made on their behalf) that the Judge was wrong to hold that there was substantive merit in the applicant's application for judicial review such that it would be unjust to dismiss his application on the basis of substantial delay and that time should be extended for the bringing of the application by the applicant.[6]

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[6] Ground 5 of the Notice of Appeal.

E. The applicant's contentions on appeal

40. In answer to the appellants' contentions summarised above, the applicant took a preliminary point that the appellants were seeking to resile from three concessions made by their counsel in the court below and objected to the withdrawal of those concessions. Those concessions were that (i) the injunction against inflicting torture or other forms of inhuman or degrading treatment were peremptory norms of customary international law, so that (ii) no reservation or exemption applies to either article 3 of the BOR or article 7 of the ICCPR,[7] and that (iii) article 16(1) of the CAT could be relied upon in support of the applicant's case.[8]

41. The applicant contended that the Judgment should be affirmed, relying in part on those concessions by the appellants.

42. Further, by respondent's notice, the applicant argued that the Judge's decision should be affirmed on a number of additional or alternative grounds.

43. First, the applicant argued that the Judge was wrong to hold that the principle against double jeopardy under article 14(7) of the ICCPR and/or article 11(6) of the BOR only protects against double jeopardy within a particular state and does not prevent prosecutions for the same offence and/or conduct in different states. The applicant maintained that article 14(7) of the ICCPR and/or article 11(6) of the BOR outlaw the retrial of a person for the same offence and/or conduct for which he has

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[7] Supplemental Notice of Appeal at Ground 1.
[8] Supplemental Notice of Appeal at Ground 2.

already been tried irrespective of whether the second trial is to take place within the same jurisdiction as the first.

44. Secondly, he sought to argue that the Judge should not have relied upon the immigration reservation to the ICCPR, to which effect is given by section 11 of the HKBORO, to conclude that article 14(7) of the ICCPR and/or article 11(6) of the BOR could not be relied upon to strike down the Deportation Order.

45. Thirdly, the applicant contended that the Judge was wrong to hold that the principle against double jeopardy under the common law did not prevent deportation and was simply available as a defence against a second prosecution in a Hong Kong court.

46. Fourthly, the applicant contended that the Judge should have held that the decision to deport him to Nigeria was irrational in the public law sense, by reference to the position under section 5(1)(e) of the Fugitive Offenders Ordinance, Cap. 503, and article 6(5) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

47. Finally, the applicant contended that there was no need for the Judge, at the substantive hearing, to revisit the question of whether there was good reason for extending the period within which the leave application should be made. He contended that, leave having been granted on 21 August 2008 and there being no application to set aside the leave granted on the ground of delay, the only question at the substantive hearing was whether the court should exercise its discretion to refuse to the grant of relief.

F. The issues on this appeal

48. In the light of the parties' respective contentions, the following issues arise on this appeal :

(1) Would the act of deporting the applicant pursuant to the Deportation Order amount to cruel, inhuman or degrading treatment or punishment contrary to ICCPR article 7, BOR article 3 or CAT article 16(1)?

(2) Would the act of deporting the applicant pursuant to the Deportation Order infringe his rights under ICCPR article 14(7) or BOR article 11(6)?

(3) If the applicant's rights would be infringed by his being deported, is any complaint in that regard precluded by the immigration reservation to the ICCPR or section 11 of the HKBORO?

(4) Can the common law principle of double jeopardy be relied upon to resist a deportation order?

(5) Was the decision of the appellants to remove the applicant from Hong Kong to Nigeria irrational in the public law sense?

(6) Was the detention unlawful?

(7) Was the Judge correct not to exercise his discretion against the applicant on the ground of delay?

F1 Issue 1 : Would the act of deporting the applicant to Nigeria pursuant to the Deportation Order amount to cruel, inhuman or degrading treatment or punishment contrary to ICCPR article 7, BOR article 3 or CAT article 16(1)?

49. This issue involves a number of subsidiary questions.

F1.1 Where would the applicant be removed to under the Deportation Order?

50. First, as a preliminary matter, this issue raises the question of the place to which the applicant would be deported if the Deportation Order were to be executed.

51. The appellants submitted that the Judge was wrong to quash the Deportation Order, which does not specify the country to which the applicant is to be removed. The appellants noted that the country will only be specified when the Director seeks to execute the Deportation Order under section 25 of the Immigration Ordinance. Under that section, the Director may give directions requiring the subject of a deportation order to be removed to a specified country. The term "specified country" is defined in section 2 of the Immigration Ordinance as meaning a country or territory of which a person who is to be removed from Hong Kong is a national or a citizen, or in which that person has obtained a travel document, but also includes a country or territory in which that person embarked for Hong Kong, or to which an immigration officer or immigration assistant has reason to believe that that person will be admitted. There is therefore, the appellants submitted, no reason to assume that the applicant will be deported to Nigeria and therefore no reason to think there is any risk of the applicant being subject to further prosecution in Nigeria.

52. In paragraph 11 of the Judgment, the Judge recognised that the Deportation Order "did not specifically refer to deportation to Nigeria" but he observed that "in practical terms there is no other jurisdiction to which [the applicant] can be deported".

53. It is plain that the Deportation Order was made with the intention to deport the applicant back to Nigeria. In a letter as early as 25 May 1993, the Director wrote to the Nigeria Commission expressing the intention to seek a deportation order against the applicant "so as to deport him back to Nigeria after his release from prison". In a letter from the Director to the Consulate General of Nigeria dated 3 October 1997, in anticipation of the making of a deportation order against the applicant, it was stated :

> "As the abovenamed person will be released from prison on 11 December 2007 and it is our intention to seek a deportation order against the abovenamed so as to deport him back to Nigeria upon his release from prison[,] I should be grateful if you would confirm to issue a necessary travel document for his subsequent repatriation."

The Consulate General of Nigeria replied on 9 October 1997 confirming that the necessary travel document would be issued to facilitate the applicant's deportation to Nigeria.

54. It would be unrealistic, in my view, to proceed to consider the issues on this appeal on any footing other than that the Deportation Order, if executed, would result in the applicant being repatriated to Nigeria.

F1.2 To what risk would the applicant be exposed if deported to Nigeria?

55. The next question is to identify the risk to which the applicant would be exposed if he were to be deported to Nigeria.

56. The applicant's conviction and sentence of imprisonment in Hong Kong were referred to in the letters from the Director to the Nigeria Commission and the Consulate General of Nigeria referred to above. It

can therefore be assumed that the Nigerian authorities are aware of his circumstances.

57. In the light of section 22 of the Act, there is a risk that the applicant might be prosecuted either under subsection (1), for the offence of exportation of narcotic drugs or psychotropic substances from Nigeria, or under subsection (2), for the offence of bringing the name of Nigeria into disrepute by reason of having been found guilty in a foreign country of an offence involving narcotic drugs and psychotropic substances, or possibly under both subsections.

58. It should be noted, however, that a successful prosecution of the applicant under section 22(1) cannot necessarily be assumed. The applicant entered Hong Kong from Nepal and it was on that entry that he was detected to have dangerous drugs in his possession for the purposes of trafficking. There is no evidence before this Court as to where the dangerous drugs were exported from by the applicant. For the purposes of the applicant's prosecution in Hong Kong, there would have been no reason for the prosecution to prove the country from which the applicant exported the drugs in question. That was not an element of the offence for which he was charged in Hong Kong.

59. As regards section 22(2), although the applicant's conviction in Hong Kong of an offence involving narcotic drugs or psychotropic substances cannot be disputed, the additional element of that offence, that he thereby brought the name of Nigeria into disrepute, would remain to be established. Self-evidently, it was not an element of the offence for which he was charged in Hong Kong.

60. It is important to note that under section 22(3), the penalty for conviction of an offence under subsection (1) or (2) is a maximum term of imprisonment of five years, without an option of a fine, and a liability to forfeiture of the assets and properties of the person convicted. In this regard there seems to have been some confusion in some of the correspondence written on behalf of the applicant, in that it was suggested that, although he had been sentenced to a term of imprisonment of 24 years in Hong Kong for his offence, he was liable if convicted under the Act to serve the same punishment he received in Hong Kong, namely a further period of imprisonment of 24 years. That is plainly not correct. More importantly, the Judge was incorrect in his finding that, if found guilty, the Act provides for the applicant to be sentenced "to at least 5 years' imprisonment" (§53). That length of imprisonment is a maximum, and not a minimum, sentence.

61. The matters identified above show, in my opinion, that the Act contemplates offences of a different nature to that for which the applicant was imprisoned in Hong Kong. In particular, the maximum sentence of five years is considerably less than the maximum for the offence of drug trafficking in Hong Kong and, it is safe to say, most common law jurisdictions. Indeed, although there is no information in the papers as to the maximum penalty in Nigeria for the offence of trafficking in dangerous drugs in that jurisdiction, it would be most surprising if that offence, if committed there, attracted no more than five years' imprisonment and the relatively low maximum sentence available under section 22 of the Act illustrates, it seems to me, a recognition of the fact of a conviction and sentence elsewhere for related conduct. This reinforces the difference between the applicant's offence in Hong Kong

and the offences for which he might possibly be charged in Nigeria under the Act.

F1.3 Would prosecution under the Act engage any common law principle?

62. There are two concepts under the common law that need to be borne in mind and properly understood in this context. The first is the doctrine of *autrefois acquit* or *autrefois convict* (as the case may be) and the second is the wider rule against double jeopardy.

63. As explained by Stock JA (as he then was) in *Yeung Chun Pong v Secretary for Justice* [2008] 3 HKLRD 1 (at §§16 to 24), the doctrine of *autrefois acquit* is an aspect of *res judicata* and therefore, in the context of criminal proceedings, only arises by reference to a verdict and the elements of the offence necessarily encompassed by that verdict. Procedurally, the doctrine is available as a plea in bar. The plea is of narrow ambit and is only made out where the second offence charged is the same both in law and in fact. It is a purely legal test of whether the person's acquittal in the first proceedings necessarily in law involves an acquittal in the second and this involves a comparison of the constituent elements in law of the two offences charged and the facts asserted therein.

64. The plea in bar is to be contrasted with the exercise of a judicial discretion in the context of an application to stay proceedings on the basis of oppression or abuse of process. As further explained in the same case (at §§25 to 39), the court has the power to stay proceedings where, although the plea in bar could not be made out because the second trial was not for the same offence, the charges in the later case are founded on the same or substantially the same facts as the charges in a previous

indictment on which the accused has been tried to conclusion. In *R v Z* [2000] 2 AC 483, Lord Hutton stated (at p. 497D) that as a general rule the circumstances in which a prosecution should be stopped by the court are where, on the facts, the first offence of which the defendant has been convicted or acquitted was founded on the same incident as that on which the alleged second offence is founded. This is the wider common law principle of double jeopardy which extends beyond the strict limitations of the plea in bar.

65. The principle of double jeopardy at common law, including the narrower plea in bar of *autrefois acquit*, is available in criminal proceedings in Hong Kong wherever the first conviction has taken place : see *Archbold Hong Kong 2010* at §19-120 and *R v Treacy* [1971] AC 537 at 562D.

66. In the present case, for the reasons I have explained above, there is no possibility of the applicant raising a plea of *autrefois convict* to a charge under section 22(1) or (2) of the Act (assuming the law of Nigeria is the same as the common law of Hong Kong on this, which is the basis on which the Court will proceed in the absence of any evidence to the contrary). The elements of the offences under those subsections are not the same as the elements of the offence for which the applicant was tried and convicted in Hong Kong.

67. However, it is arguable that a prosecution under the Act could be said to arise out of or in connection with the same course of conduct as that which gave rise to the applicant's conviction in Hong Kong and that this might embrace the wider common law principle of double jeopardy.

I am prepared therefore to proceed on the assumption that the Judge's conclusion (§70) that the applicant faced a practical risk of double jeopardy by reason of the Deportation Order was correct.

68. Notwithstanding the conclusion that there was a practical risk of double jeopardy, it is relevant to note that Nigeria is a signatory to the ICCPR and does not appear to have entered any reservation in respect of article 14(7) of the ICCPR. Whilst this is not directly relevant to the applicant in this case (because, for reasons that will be addressed below, I agree with the Judge's view that article 14(7) of the ICCPR does not have transnational application), it does demonstrate that the principle that a previous conviction for an offence precludes a subsequent prosecution for the same offence *prima facie* applies in that jurisdiction. Furthermore, there is no evidence to suggest that it is not open to a person facing prosecution in Nigeria to apply to stay a prosecution on the basis of the wider rule against double jeopardy and it is not for this Court to assume that the courts of another common law jurisdiction, which is also a signatory to the ICCPR, do not retain a discretion to exclude a prosecution in such circumstances. Although these points do not detract from the conclusion that there was a practical risk of double jeopardy, they are relevant to the assessment inherent in the next question to which it is now necessary to turn.

F1.4 Would exposure to the risk of double jeopardy amount to cruel, inhuman or degrading treatment or punishment?

69. Given the conclusion that there is a practical risk of double jeopardy in the event the applicant were to be deported to Nigeria, the crucial question arises as to whether exposure to the risk of that double

jeopardy amounts to cruel, inhuman or degrading treatment or punishment. This question lies at the heart of this appeal.

70. The Judge rightly held that exposure to the risk of double jeopardy was not torture (§91) since article 1 of the CAT defines torture and expressly excludes from that definition "pain or suffering arising only from, inherent in or incidental to lawful sanctions".[9] There is no suggestion that "torture" as used in article 7 of the ICCPR and article 3 of the BOR, both of which are in the same terms and materially provide :

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment …",

bears a different meaning. However, the Judge concluded (for the reasons set out at §§110-111) that exposure to this risk would amount to inhuman treatment. The question for this Court on this appeal is whether that conclusion is tenable.

71. Whilst article 1 of the CAT provides an express definition of torture, there is no definition of the phrase "cruel, inhuman or degrading treatment or punishment" used in article 7 of the ICCPR, article 3 of the BOR or article 16(1) of CAT.

72. The phrase "inhuman or degrading treatment" is addressed in *Clayton & Tomlinson, The Law of Human Rights* (2nd Ed.) at §8.19 in these terms :

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[9] Article 1 of CAT defines torture to mean: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

> "In order to constitute 'inhuman or degrading treatment' ill-treatment 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'. Although there is no single standard the minimum level of severity will be attained if one or more of the following is established:
>
> • Unlawful violence – which is especially degrading.
>
> • Intense physical or mental suffering.
>
> • Humiliation of a degree sufficient to 'break moral or physical resistance'.
>
> • Treatment which drives the victim to act against his will or conscience."

73. The general summary above is reflected in *R (Limbuela) v Home Secretary* [2006] 1 AC 396, a case involving the withdrawal of support to three asylum seekers by the Secretary of State which meant they had, or would have, to sleep in the open and had no means of obtaining money to buy food other than by reliance on charity. At §54, Lord Hope said :

> "But the European court has all along recognised that ill-treatment must obtain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment or punishment': *Ireland v United Kingdom* (1978) 2 EHRR 25, 80, para 167; *A v United Kingdom* (1998) 27 EHRR 611, 629, para 20; *V v United Kingdom* (1999) 30 EHRR 121, 175, para 71. In *Pretty v United Kingdom* 35 EHRR 1, 33, para 52, the court said:
>
> > 'As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and

> also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'
>
> It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is an issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3."

The House of Lords held that the decision to withdraw support was an intentionally inflicted act for which the Secretary of State was directly responsible so as to engage article 3 of the European Convention on Human Rights.

74. Treatment need not be intentional to be inhuman, although if the purpose of the treatment is to humiliate or debase the victim it is a further factor to be taken into account : see *Clayton & Tomlinson* at §8.83. At §8.84 in *Clayton & Tomlinson*, the editors state :

> "Inhuman treatment may take the form of mental suffering resulting from a 'sufficiently real and immediate' threat of torture, conduct in the form of physical assault, the use of psychological interrogation techniques, detention in inhuman conditions or *the deportation or extradition of a person to face the real risk of inhuman treatment in another country*, including the lack of proper medical care for a serious illness. …" *(emphasis added)*

One of the cases cited in support of the passage underlined in the quotation above is *Soering v United Kingdom* [1989] 11 EHRR 439, to which it will be necessary to return in due course.

75. Inhuman or degrading treatment may be constituted by the arousal of feelings of fear or anguish and bodily injury itself is not necessary : see *Ireland v United Kingdom* [1978] 2 EHRR 25 at §167 :

> "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."

The five techniques referred to consisted of methods of interrogation of terrorist suspects which involved using disorientation or sensory deprivation techniques. The techniques consisted of: wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink (see §96).

76. In assessing whether punishment is inhuman, regard must be had to the physical or mental suffering, which must reach the level which a person of normal sensibilities, given factors such as the applicant's sex, age and health, would, in the circumstances, consider to be inhuman: *Clayton & Tomlinson* at §8.88. For example, in *Tyrer v United Kingdom* [1978] 2 EHRR 1, the European court did not consider that a sentence of three strokes of the birch on a 15-year-old boy on his conviction for assault occasioning actual bodily harm amounted to inhuman punishment. On the other hand, *Clayton & Tomlinson* note (at §8.89) that a disproportionately severe sentence of imprisonment could constitute inhuman punishment. However, the cases cited in support of this

proposition[10] are both cases of indeterminate life sentences and so not relevant in the context of the present case.

77. As regards the concept of degrading punishment, the European court held in *Tyrer v United Kingdom* that the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation inherent in judicial punishment generally. The court stressed (at §30) that the assessment is, in the nature of things, relative, depending on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of execution. It concluded (at §35) that the judicial corporal punishment sentence of birching imposed in that case amounted to degrading punishment.

78. In the present case, as I have indicated above, the risk to which the applicant would be exposed if the Deportation Order were executed is a risk of being prosecuted and, if convicted, punished under section 22 of the Act. This is therefore not a case in which a punishment has been already imposed by an authority or the infliction of which will be an inevitable result of the deportation. Furthermore, any punishment that would follow conviction under section 22 of the Act would be a lawfully imposed sanction in accordance with the criminal law and procedure of Nigeria. In the circumstances, it is not the case that the applicant would be subject to inhuman or degrading punishment by reason of the making of the Deportation Order. The relevant question remains, however, whether the deportation of the applicant to Nigeria where he may face prosecution

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[10] *Weeks v United Kingdom* (1987) 10 EHRR 293 and *Hussain v United Kingdom* (1996) 22 EHRR 1.

and punishment under section 22 of the Act notwithstanding his earlier conviction in Hong Kong amounts to inhuman or degrading treatment.

79. No authority was cited to the Judge below or to this Court on this particular question. Mr Pun, counsel for the applicant, relied (as he had relied below) on a footnote (FN10) at para. AG21 in the Opinion of the Advocate General in *Van Esbroeck* [2006] 3 CMLR 6, where the Advocate General expressed the opinion that "[i]t could also be argued that the *ne bis in idem* principle [i.e. the rule against double jeopardy] protects the dignity of the individual vis-à-vis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence". However, it is clear from its judgment that the European Court of Justice (Second Chamber) did not accept this argument, nor did the Judge below (§106).

80. It was not in dispute that the Judge was correct to hold (§107) that all relevant circumstances ought to be taken into account : see *Soering v United Kingdom* and *Vuolanne v Finland*, Communication No. 265/1987, para.9.2.

81. As noted above, *Soering v United Kingdom* was one of the cases cited in *Clayton & Tomlinson* in support of the proposition that the deportation or extradition of a person to face the real risk of inhuman treatment in another country could itself constitute inhuman treatment. The issue in *Soering v United Kingdom* was whether the extradition of Soering from the United Kingdom to the United States would give rise to a breach of article 3 of the European Convention on Human Rights. Soering was a German who had killed two persons in Virginia in 1985.

He was arrested in the United Kingdom in 1986 pending extradition to the United States to face trial for murder. If convicted, there was a risk that he would be sentenced to death.

82. As noted by the Judge, in deciding whether or not Soering's extradition to Virginia would constitute inhuman and degrading treatment, the European Court took a number of factors into account, including: the length of detention prior to execution, the conditions on death row (these two factors being referred to as the "death row phenomenon"), the applicant's age and mental state (he was only 18 at the time of the killings and there was psychiatric evidence that he was suffering from an abnormality of mind impairing his mental responsibility for his acts), and the possibility of extradition to and trial in Germany (where there was no death penalty). The European Court concluded (at §111) :

> "… having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3."

83. I pause to observe that the circumstances in *Soering v United Kingdom* are very different to those in the present case. The thrust of the decision of the European Court in *Soering v United Kingdom* is set out in the extract set out in the preceding paragraph, i.e. "the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty". Nothing akin to the "death row phenomenon" is present in this case.

84. In the present case, the Judge took into account the following factors in reaching his decision :

> "110. In my view, having regard to the number of years [the applicant] has already spent in prison, it would obviously be severely frustrating to him as an individual and his efforts to improve himself to have to face yet another trial and imprisonment in relation to precisely the same conduct.
>
> 111. [The applicant] has paid his 'dues' to society by reason of his long imprisonment here. He has turned a new leaf and is a different person from the younger self who foolishly committed a crime. In all the circumstances, to deport [the applicant] at some point in the future to face the real risk of re-trial in Nigeria would, I think, be a cruel blow, amounting to inhuman treatment of a severity proscribed by the HKBORO, ICCPR and CAT."

85. With respect to the Judge, I do not consider the risk of prosecution and punishment under section 22 of the Act in the present case gives rise to anything approaching the level of intense physical or mental suffering or humiliation necessary to constitute cruel, inhuman or degrading treatment. I say so for the following reasons.

86. Even if one assumes that the applicant would experience "severe frustration" if he had to face another trial and imprisonment in relation to the same conduct on his return to Nigeria, severe frustration does not, in my opinion, approach the minimum level of severity of intense physical or mental suffering or humiliation of a degree sufficient to break moral or physical resistance. The Judge thought this would constitute "a cruel blow" to the applicant, but, in my view, even if it does, it falls far short of the mental anguish and suffering necessary to constitute inhuman or degrading treatment. It is not nearly as severe, in my opinion, as the mental anguish involved in a case like *Soering v United Kingdom*, involving exposure to the risk of the "death row phenomenon". Nor does

the treatment involve corporal punishment or physical ill-treatment of the types identified in *Nowak and McArthur, The United Nations Convention Against Torture* at p. 566.[11]

87. Further, as I have already indicated, the risk to which the applicant is exposed is a possibility of prosecution and, if convicted, punishment under section 22 of the Act. And as I have already noted above, it is by no means certain that such a prosecution will be brought since it would be surprising if there was not a prosecutorial discretion in respect of whether to charge the alleged offences under section 22: this is reflected in the "conflicting evidence" as to whether a prosecution was inevitable referred to in the Director's "minded to refuse" letter. Similarly, for the reasons already noted, it would also be reasonable to assume that there is a discretion on the part of the Nigerian court to consider an application for a stay of any prosecution on the grounds of double jeopardy. Finally, there is no reason to suppose that the Nigerian court would not take into account the applicant's age when he committed the original offence, the number of years he has served in prison in Hong Kong, and his efforts to turn a new leaf when considering what sentence to impose if the applicant were convicted under section 22, all this in the context of a maximum term of five years imprisonment. All of these factors must, I think, be taken into consideration in weighing the question of whether the act of deportation in this case constitutes an act of cruel, inhuman or degrading treatment within the meaning to be accorded that concept.

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[11] Namely "hard labour, internal exile and confinement at home, solitary confinement as a punishment, 'chain gangs', electro-shock stun belts and restraint chairs if used as punishments".

88. The CAT codifies the principle of non-refoulement where there are substantial grounds for believing the person would be in danger of being subjected to torture. By article 3(1), the CAT provides :

> " 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."

Since the specific convention against torture does not prohibit refoulement to inhuman treatment, it would be logical to conclude that it would only be in the most exceptional circumstances that such refoulement would nonetheless be held to contravene the terms of the more general ICCPR (through article 7) as in itself amounting to inhuman treatment. The present case does not, in my view, present those exceptional circumstances.

89. There is another potential anomaly that arises from the terms of the CAT. It would seem odd if the mental state incidental to a lawful sanction being imposed constituted cruel, inhuman or degrading treatment, when that mental state is expressly excluded from the definition of torture in article 1 of CAT. Yet that anomaly would follow from the Judge's conclusion in this case. Having said that, however, I would not wish to rule out the possibility that, on the facts of a particular case, the mental suffering incidental to the imposition of a lawful sanction imposed in contravention of the rule against double jeopardy might be found to constitute inhuman treatment. Ultimately it may be a matter of fact and degree whether the imposition of a lawful sanction in such circumstances does amount to inhuman treatment but the fact that the sanction is lawfully imposed will inevitably, it seems to me, carry some weight against that conclusion.

90. Finally, I do not share the Judge's view that the efforts made by the applicant to improve himself or to turn a new leaf are material to the question of whether his being deported to Nigeria where he might face a further prosecution constitutes inhuman or degrading treatment. Those efforts have already been reflected in the remission of one-third of the applicant's sentence resulting in his early release from prison. Similarly, the Judge's reference to the applicant having paid his dues by reason of his imprisonment can only refer to his paying his dues to society in Hong Kong and cannot, in my view, refer to any dues that he may owe to society in Nigeria arising out of the criminal legislation of that country. There is a risk, in my view, if the severe frustration found by the Judge were held to be sufficient to constitute inhuman or degrading treatment, of the Hong Kong courts being said impermissibly to be second-guessing the policy of a foreign state that seeks, as a measure of deterrence in relation to an apparently major social problem, to legislate against the exportation of drugs from that country and the bringing of that country's name into disrepute by that activity.

F1.5 Can article 16(1) of the CAT be relied upon in support of the applicant's case?

91. Article 16(1) of the CAT, so far as material, provides as follows :

> "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. …"

92. The Judge recorded (§93) that counsel appearing below on behalf of the appellants conceded that article 16(1) of the CAT might be apposite as a possible support for the applicant's case. However, the appellants now seek to argue that article 16(1) of the CAT has no application to the present case for various reasons.

93. As a preliminary matter, it falls to consider whether this point can be argued on behalf of the appellants. That is because the relevance of article 16(1) of CAT to the applicant's case appears to have been accepted by way of concession on the part of the counsel for the appellants below (§93). It was contended on behalf of the applicant that it was not open to the appellants to withdraw this concession (and others, which I will address below).

94. For my part, I have no doubt that it is open to the appellants to resile from the position taken in the court below in respect of article 16(1) of CAT. The acceptance of the relevance of that article to the applicant's claim was a pure matter of law and could not in any way have influenced the evidence filed by either party on this judicial review. More importantly, for the reasons that follow, I agree with the submissions of Mr Chow that the concession was wrongly made.

95. First, 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 : see *Madam Lee Bun v Director of Immigration* [1990] 2 HKLR 466 at 470D-F and *R v Secretary of State for the Home Department*,

ex parte Brind [1991] 1 AC 696 at 747G-748F and 760G-762D.[12] Thus, if deporting the applicant to Nigeria amounts to inhuman or degrading treatment, that may engage a right enforceable by the applicant under article 7 of the ICCPR or article 3 of the BOR (but subject to the immigration reservation to the ICCPR and section 11 of the HKBORO), but not under article 16(1) of the CAT.

96. Secondly, article 16(1) of the CAT only seeks to proscribe cruel, inhuman or degrading treatment or punishment occurring within the territory under the jurisdiction of the State Party and committed by its own public official or other person acting in an official capacity. In the present context, the relevant jurisdiction is that of the HKSAR. Since I have concluded above, differing from the Judge, that the applicant would not suffer inhuman or degrading treatment by being returned to Nigeria to face the risk of possible prosecution and punishment under section 22 of the Act, it must follow that the act of the Secretary in issuing the Deportation Order, the only relevant act occurring within the HKSAR, cannot constitute inhuman or degrading treatment or punishment.

97. Thirdly, construing article 1 of the CAT (the definition of torture) and article 3 of the CAT (the prohibition against refoulement to torture alone) together with article 16(1) of the CAT, it would seem most unlikely that the drafters of the CAT, having chosen not to prohibit refoulement to inhuman treatment directly under article 3, would have intended to prohibit such refoulement indirectly through the backdoor of article 16(1).

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[12] Although it should be noted that the CFA left this question open in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187 at §4.

98. I should point out, in fairness to Mr Pun, that he did not seek to argue that deporting the applicant to Nigeria would involve breach of article 16(1) of the CAT. Instead, he relied on article 16(1) of the CAT only in support of the submission that this showed that the prohibition against inflicting torture or other forms of inhuman or degrading treatment were peremptory norms of customary international law, an argument which I shall address below.

F2 Issue 2 : Would the act of deporting the applicant pursuant to the Deportation Order infringe his rights under ICCPR article 14(7) or BOR article 11(6)?

99. Again, this issue involves a number of subsidiary questions.

F2.1 Do ICCPR article 14(7)/BOR article 11(6) protect against prosecution in another state?

100. Article 11(6) of the BOR provides :

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."

It is based on article 14(7) of the ICCPR which provides :

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

101. The Judge held (§83) that article 14(7) of the ICCPR only provides protection from double jeopardy within a particular state and that the article does not prevent prosecutions for the same offence in different states. He supported that holding by reference to a decision of the Human

Rights Committee in *AP v Italy*, Communication No. 204/1986. In that case, the author of the communication contended that he should not be extradited to Italy for trial in relation to an offence for which he had already served a sentence in Switzerland. The Human Rights Committee rejected the communication and said (at §7.3) :

> "With regard to the admissibility of the communication under article 3 of the Optional Protocol, the Committee has examined the State party's objection that the communication is incompatible with the provisions of the Covenant, since article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee says that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State."

102. The same conclusion was reached in another decision of the Human Rights Committee, namely *ARJ v Australia*, Communication No. 692/1996. The author of the communication was an Iranian citizen who was convicted in Australia for illegal importation and possession of cannabis. In the face of a decision by Australia to deport him to Iran, the author complained that this would violate article 14(7) of the ICCPR, since he would face a serious prospect of double jeopardy in the event of his deportation to Iran. The Human Rights Committee rejected the communication and, in respect of this particular complaint, said (at §6.4) :

> "The author has claimed a violation of article 14, paragraph 7, because he considers that a retrial in Iran in the event of his deportation to that country would expose him to the risk of double jeopardy. The Committee recalls that article 14, paragraph 7 of the Covenant does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states – this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State. See decision on case No.204/1986 (*AP v Italy*), declared inadmissible to November 1987, paragraphs 7.3 and 8. Accordingly, this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant."

103. Both these cases are referred to in the General Comment No. 32 (2007) of the Human Rights Committee at §57 (to which the Judge referred at §85) in support of the statement that article 14(7) of the ICCPR does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states.

104. This interpretation of the ambit of article article 14(7) of the ICCPR and 11(6) of the BOR is also supported by judicial pronouncements in Hong Kong : see *Yeung Chun Pong v Secretary for Justice* [2005] 3 HKC 447 *per* Tang JA (as he then was) at §30 and *Yeung Chun Pong v Secretary for Justice* [2006] 9 HKCFAR 836 at §47 *per* Sir Anthony Mason NPJ.

105. Mr Pun challenged the correctness of this interpretation of article 14(7) of the ICCPR. He submitted that the protection against double jeopardy under that article and also article 11(6) of the BOR also applied in respect of prosecutions for the same offence in different states. He made this submission on three bases : first, as a matter of proper interpretation of the wording of the relevant articles; secondly, on the basis of the practice of states to recognise the transnational application of the principle against double jeopardy; and thirdly, on the scope of the protection as required under the ICCPR.

106. As to the wording of the articles, Mr Pun submitted that in the opening phrase in each of the articles, namely “No one shall be liable to be punished or tried again for an offence for which he has already been finally convicted …”, there was no qualification to suggest that the prohibition on punishment or retrial was limited to Hong Kong and that therefore as a

matter of plain language it could refer to punishment or retrial anywhere. In support of this argument, he prayed in aid the object and purpose of the ICCPR and the rationale behind the provision against double jeopardy.

107. In construing article 14(7) of the ICCPR and article 11(6) of the BOR, I think it is important to bear in mind the context of the protection in question. Article 11 of the BOR is entitled "Rights of persons charged with or convicted of criminal offence". The various subparagraphs of the article guarantee the rights of a person charged with a criminal offence in various ways. In my opinion, these are more naturally to be regarded as procedural safeguards relating to trial in one jurisdiction (in the case of article 11 of the BOR, in Hong Kong). It is therefore a good starting point to suppose that article 11(6) of the BOR is also dealing with a trial in Hong Kong. This is the natural reading of the words and also a proper contextual interpretation of them. Furthermore, support for this interpretation is found in *the Guide to the "travaux préparatoires" of the ICCPR* which refers (at p. 316) to the view expressed at the Third Committee, 14th Session (1959), that the provisions in the draft of what became article 14(7) of the ICCPR "would not prevent a State from trying a man for a crime for which he had already been tried in another State" (A/C.3/SR 963 §3). I would therefore reject Mr Pun's argument by reference to the wording of article 14(7) of the ICCPR and article 11(6) of the BOR.

108. As to the practice of states in respect of the application of the principle, Mr Pun submitted that the subsequent practice of States Parties in respect of the application of the ICCPR demonstrated a recognition of the transnational application of the rule against double jeopardy. He

referred in this context to various subsequent international agreements including article 20 of the Rome Statute of the International Criminal Court, articles 54 to 58 of the Convention Implementing the Schengen Agreement, article 9 of the European Convention on Extradition, and others.[13]

109. I do not think that the subsequent practice of States Parties in the application of the ICCPR can be taken to the lengths Mr Pun sought to argue it could. It is true that the transnational application of the principle against double jeopardy has been recognised and applied in numerous other international instruments entered into by various States Parties to the ICCPR. It does not follow, in my opinion, that this demonstrates a recognition by those States Parties that article 14(7) of the ICCPR should be similarly interpreted. I am not persuaded that the fact of subsequent agreement by various States Parties to the ICCPR to the transnational application of the principle against double jeopardy in other international instruments amounts to evidence of the practice of those States Parties "in the application of the treaty" (i.e. the ICCPR) within the meaning of article 31(3)(b) of the Vienna Convention on the Law of Treaties. The entry into subsequent international instruments in which the principle in question has been given transnational application is a separate fact and not evidence of the practice of States Parties in the application of the ICCPR itself. It is clear from the cases before the Human Rights Committee that neither Italy nor Australia took a view consistent with the alleged subsequent practice.

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[13] Viz. Art.3(d) of the UN Model Treaty on Extradition; Arts.53-55 of the European Convention on the International Validity of Criminal Judgments; Arts.35-37 of the Convention on the Transfer of Proceedings in Criminal Matters; Art.10 of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Art.9 of the Statute of the International Criminal Tribunal for Rwanda; and Art.5 of the Statute of the Special Tribunal for Lebanon.

110. Finally, in this regard, Mr Pun relied on the obligation of States Parties to the ICCPR to guarantee the rights recognised in the ICCPR to all individuals within their territories and subject to their jurisdiction. This meant, he submitted, an obligation not to remove an individual to another state where he would be exposed to a sufficiently serious and individualised breach of his ICCPR rights. He supported this contention by reference to passages in General Comment No. 24 and General Comment No. 31 of the Human Rights Committee.

111. General Comment No. 24, addressing article 7 of the ICCPR, states at §9 :

> "In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. …"

112. General Comment No. 31, addressing the nature of the general legal obligation imposed on States Parties to the Government, states :

> "10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. …
>
> …
>
> 12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The

> relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."

113. I accept that these passages are relevant in the context of consideration of article 7 of the ICCPR and the prohibition on torture or cruel, inhuman or degrading treatment or punishment but it does not follow that this requires article 14(7) of the ICCPR to be construed as applying the principle against double jeopardy transnationally as Mr Pun contended it should. If deportation to a country where exposure to double jeopardy would, on the particular facts, amount to inhuman or degrading treatment, such deportation might be contrary to article 7 of the ICCPR and could be relied upon as to preclude deportation but there would not then be a need to rely on article 14(7) of the ICCPR to invalidate the deportation. I do not therefore consider that the passages in the General Comments relied upon support Mr Pun's submissions as to the proper interpretation of article 14(7) of the ICCPR.

114. On the other hand, it is right to note that it has been established that deportation of an alien could infringe the European Convention on Human Rights because of the risk of violation of a Convention right in the receiving country where that right arose, not under the article prohibiting torture, but under some other Convention article (e.g. the article guaranteeing due process). In this regard, see the speech of Lord Phillips of Worth Matravers in *RB (Algeria) v Home Secretary* [2009] 2 WLR 512 at §7 where he said :

> "In *Ullah* the question was raised whether deportation of an alien could infringe the Convention because of the risk of violation of a Convention right in the receiving country where that right arose not under article 3 but under some other Convention article. The European court had stated in *Soering* that this possibility

> could not be excluded in the case of article 6. This House held that it could not be ruled out not merely in relation to article 6 but in relation to articles 2, 4, 5, 7, 8 and 9. The speeches emphasised that it was only in extreme cases that it was possible to envisage these rights being successfully invoked in foreign cases. Lord Steyn ended his speech with this comment:
>
> > '50. It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged.'"

115. Nevertheless, as the passage cited above from *RB (Algeria) v Home Secretary* emphasises, it is "only in extreme cases" that it is possible to envisage a right being successfully invoked in "foreign cases". In the event of a threatened deportation being found in fact to give rise to a risk of the infliction of torture or cruel, inhuman or degrading treatment or punishment in the receiving country (in an extreme case), there may well be an argument that the deportation itself would amount to a breach of a right under the ICCPR on the basis that irreparable harm might occur. But it does not follow, in my opinion, that this argument means that article 14(7) of the ICCPR must be construed as applying the principle against double jeopardy transnationally. Furthermore, it does not follow that a breach of article 14(7) of the ICCPR would in all cases give rise to irreparable harm.

116. Does article 14(7) of the ICCPR therefore apply in respect of a subsequent prosecution in another country? It must be acknowledged that the judicial statements to the contrary in *Yeung Chun Pong v Secretary for Justice* referred to above were strictly *obiter* and that they were not supported by authorities. It must also be acknowledged that the

interpretation of article 14(7) of the ICCPR in *AP v Italy* has been said to be "fairly general and too absolute" (see Nowak, CCPR Commentary (2nd Revised Ed.) at p. 356) and has been criticised "[f]rom a humanitarian point of view" in The International Covenant on Civil and Political Rights: Cases, Materials and Commentary ed. by Sarah Joseph and others (2nd Ed.) at 461.

117. However, in my opinion, having regard to (i) the natural and ordinary meaning of article 14(7) of the ICCPR and article 11(6) of the BOR construed in the context of the respective articles as a whole which point more naturally to the rights guaranteed being in respect of a person charged with a criminal offence in one jurisdiction (and in the case of the BOR, in Hong Kong), and (ii) the fact that General Comment No. 32 published as recently as 2007 adhered to the stance in *AP v Italy* and *ARJ v Australia*, I am of the view that, on their true construction, article 14(7) of the ICCPR and article 11(6) of the BOR only provide protection from double jeopardy within Hong Kong.

F2.2 Is protection under the articles limited to prosecution for the same offence or for any offence arising out of the same facts?

118. Regardless of the question of whether the protection under article 14(7) of the ICCPR and article 11(6) of the BOR apply in respect of a subsequent prosecution in any different jurisdiction, the prohibition is in respect of prosecution "for an offence for which he has already been finally convicted or acquitted".

119. The use of the word "offence" in the article would appear to have been deliberate. The *Guide to the "travaux préparatoires" of the*

ICCPR notes (at p. 316) discussion of the wording of what became article 14(7) of the ICCPR at the Third Committee, 14th Session (1959), in which a proposal to adopt a wider formula prohibiting successive trials, not only for the same "offence" but also for the same "actions", was discussed but rejected (A/4299 §60).

120. As a matter of plain language, the wording of article 14(7) of the ICCPR would therefore protect against a subsequent prosecution for the same offence, i.e. the same protection as the plea in bar of *autrefois acquit* or *autrefois convict* but not the wider principle of double jeopardy.

121. This distinction is supported indirectly by the decision in *Van Esbroeck* where, in commenting on the breadth of the protection under article 54 of the Convention implementing the Schengen Agreement, the European Court of Justice (Second Chamber) said :

> "27. In the first place, however, the wording of Art.54 of the CISA, 'the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification.
>
> 28. It must also be noted that the terms used in that article differ from those used in other international treaties which enshrine the *ne bis in idem* principle. Unlike Art.54 of the CISA, Art.14(7) of the [ICCPR] and Art.4 Protocol No.7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term "offence", which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the *ne bis in idem* principle which is enshrined in those treaties."

122. The Judge thought the distinction drawn in the passage cited above was "a highly artificial distinction with little substantive justification" and seemed to him to be "a matter of semantics" (§63). I respectfully disagree since the relevant *travaux préparatoires* indicate

that the choice of the word "offence" rather than "acts" was deliberate and, so far as the common law is concerned, the choice reflects a real distinction of practical and substantive effect. It is also pertinent to note the wording used in the Rome Statute of the International Criminal Court, article 20 of which (dealing with the principle *ne bis in idem*) provides that "no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court" (underlining added). This supports the conclusion that the choice of words reflecting the ambit of the protection against double jeopardy in the Rome Statute is deliberately wider than the protection in article 14(7) of the ICCPR.

123. I would therefore hold that article 14(7) of the ICCPR and article 11(6) of the BOR prohibit a subsequent prosecution for the same offence and not one for the same actions, thereby restricting the protection to a situation in which the strict plea of *autrefois acquit* or *autrefois convict* would be available but not to one in which the wider principle of double jeopardy would be available.

F3 Issue 3 : If the applicant's rights would be infringed by his being deported, is any complaint in that regard precluded by the immigration reservation to the ICCPR or s.11 of the HKBORO?

124. This issue raises the question of whether, even if transnational double jeopardy in the wider sense is prohibited by article 14(7) of the ICCPR or article 11(6) of the BOR, the immigration reservation to the ICCPR and section 11 of the HKBORO preclude reliance by the applicant on that protection. It also raises the question of whether the Judge was right to accept the concessions made on behalf of the appellants below to the effect that (i) the injunction against inflicting torture or other forms of

inhuman or degrading treatment were peremptory norms of customary international law, so that (ii) no reservation or exemption could apply to either article 7 of the ICCPR or article 3 of the BOR. However, in the light of the conclusions I have reached above on issues 1 and 2 in this appeal, these questions are both academic. Nevertheless, I propose to address these questions in view of the general importance of the arguments addressed to us in the course of this appeal.

F3.1 The Judge's view as to the validity of the immigration reservation and the parties' contentions in this Court

125. The Judge had no hesitation in concluding that the applicant could not rely on article 14(7) of the ICCPR or article 11(6) of the BOR to strike down the Deportation Order (§§76 and 82). In the case of article 11(6) of the BOR, this was because of section 11 of the HKBORO which provides :

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

And in the case of article 14(7) of the ICCPR, this was because of the reservation entered by the UK Government when the ICCPR was originally extended to Hong Kong. That reservation was in these terms :

> "The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, the acceptance of art.12.4 and of other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories."

The reservation was maintained by article 39 of the Basic Law since it implements the provisions of the ICCPR only to the extent that the ICCPR was "applied to Hong Kong" prior to the coming into effect of the Basic Law on 1 July 1997.

126. On the other hand, before the Judge, material concessions were made on behalf of the appellants by their counsel below[14] as follows :

> "94. [Counsel for the appellants] also very properly accepts that the reservations to the application of the HKBORO and ICCPR in relation to immigration legislation do not apply where HKBORO Art.3 and ICCPR Art.7 are concerned. This is because the injunction against inflicting torture or other forms of inhuman or degrading treatment are peremptory norms of customary international law. It is not possible for a state to derogate from those norms."

127. Mr Pun sought to uphold the Judge's acceptance of these concessions in support of his argument that the immigration reservation and section 11 of the HKBORO could not be relied upon to meet the argument that the applicant's rights under ICCPR article 7 and BOR article 3 would be infringed by his being deported. For the appellants, Mr Chow sought to challenge the correctness of the concessions and to withdraw them in order to argue that the immigration reservation and section 11 of the HKBORO precluded reliance by the applicant on ICCPR article 7 and BOR article 3.

128. Mr Pun sought, however, also to argue that the Judge was wrong in holding that the immigration reservation and section 11 of the

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[14] Not Mr Chow or his junior, Ms Grace Chow.

HKBORO were effective to preclude reliance by the applicant on ICCPR article 14(7) and BOR article 11(6). He contended that the Judge should have held that the immigration reservation is and was, prior to 1 July 1997, generally invalid as a matter of public international law because it is incompatible with the object and purpose of the ICCPR.

129. His primary argument was that the whole reservation was unlawful and invalid as being inconsistent generally with the object and purpose of the ICCPR. Consequently, he argued, the immigration reservation was severed automatically by operation of law and was, and remains, of no legal effect. This argument would have the consequence that the ICCPR "as applied to Hong Kong" is the ICCPR without the immigration reservation and that article 39 of the Basic Law should be construed accordingly. It would therefore follow, he contended, that to the extent that section 11 of the HKBORO contradicts the application of the ICCPR without the (invalid) immigration reservation, it contravenes article 39 of the Basic Law and is invalid under article 8 of the Basic Law.

130. Mr Pun's subsidiary submission was that, as a matter of construction, the reservation entered into by the United Kingdom was very narrow and article specific to a person's right to enter his own country in article 12(4) of the ICCPR.

F3.2 Is the injunction against inflicting torture or other forms of inhuman or degrading treatment a peremptory norm of customary international law, so that no reservation or exemption applies to either article 7 of the ICCPR or article 3 of the BOR?

131. Although objection was taken by Mr Pun to the withdrawal of the concessions made below, the Court indicated in the course of the

hearing that, to the extent necessary, leave would be given to the appellants to withdraw the concessions and to argue to the contrary. The concessions are pure matters of law and no prejudice has been sustained by the applicant in reliance on the concessions. Most importantly, for the reasons I will set out below, the concession as to the applicability of a reservation was, in my view, wrong in law and should not have been made.

132. In support of his submission that the Judge was right to regard as correct the appellants' concessions below, Mr Pun referred to General Comment No. 24 of the Human Rights Committee, commenting on issues relating to reservations made on ratification or accession to the ICCPR. The comments included the following statements :

> "8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of the rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiorI* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, … and while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be."

133. It is not necessary for the purpose of deciding this case to determine the issue of whether the prohibition of torture or cruel, inhuman or degrading treatment or punishment is a peremptory norm of customary international law. It is only necessary to consider whether, even assuming the prohibition is a peremptory norm of customary international law, at a domestic law level (which is the only level with which the courts

of Hong Kong are concerned) the immigration reservation to the ICCPR as applied to Hong Kong is valid. In my judgment (subject to Mr Pun's other arguments addressed in Section F3.3 below), there is no question but that, as a matter of domestic law, the courts of Hong Kong must give effect to the immigration reservation to the ICCPR as reflected in article 39 of the Basic Law and section 11 of the HKBORO. I say this for the following reasons.

134. Article 39 of the Basic Law entrenches the provisions of the ICCPR but only "as applied to Hong Kong". This phrase requires a careful analysis of the relevant chronology of the application of the ICCPR to Hong Kong. The ICCPR was originally extended to Hong Kong in 1976 by the UK's ratification of the ICCPR subject to a number of reservations, including the immigration reservation. The Sino-British Joint Declaration signed in 1984 provided (at Section XIII to Annex I) that the ICCPR "as applied to Hong Kong shall remain in force". This was a continuation of the application of the ICCPR to Hong Kong as originally applied by the UK's ratification in 1976. Its continued application was then entrenched in article 39 of the Basic Law which was promulgated on 4 April 1990 and came into effect on 1 July 1997. Between 8 June 1991 and 1 July 1997, the ICCPR was applied domestically through the provisions of the HKBORO. It was through the UK's ratification of the ICCPR, subject to the reservations including the immigration reservation, and the enactment of that domestic legislation that the rights and guarantees of the ICCPR became directly enforceable in Hong Kong prior to 1 July 1997. At the time the HKBORO came into effect on 8 June 1991, an amendment to the Letters Patent, the principal constitutional

instrument of Hong Kong prior to 1 July 1997, simultaneously came into operation and provided as follows :

> "The provisions of the [ICCPR], adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No.2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong."

The clear effect of that constitutional entrenchment of the ICCPR is that one must look to the terms of the UK's ratification of the ICCPR to ascertain the extent to which the ICCPR has been applied to Hong Kong. That was the position before 1 July 1997 and it remains the position since that date by reason of article 39 of the Basic Law which is to the same effect. Furthermore, the effect of article 39 of the Basic Law is that, regardless of the enactment of the HKBORO, the ICCPR as applied to Hong Kong in 1976 (upon ratification), 1984 (when the Joint Declaration was signed) or 1990 (when the Basic Law was promulgated), all of which dates pre-date the enactment of the HKBORO, continues to have domestic force as from 1 July 1997.

135. So far as the courts of Hong Kong are concerned, therefore, the provisions of section 11 of the HKBORO are binding, unless found to be inconsistent with any provision of the Basic Law. Far from being inconsistent with any such provision, in my view, section 11 of the HKBORO is entirely consistent with article 39 of the Basic Law. As was noted in the course of argument, section 11 of the HKBORO reflects the evident fact that the UK Government viewed its reservation to the ICCPR as effective to exclude all the provisions of the ICCPR in the relevant

context of immigration control. It is also relevant to note that the immigration reservation entered into by the United Kingdom (and continued by the PRC in respect of Hong Kong[15]) has not been the subject of any State objection under the Vienna Convention on the Law of Treaties. Moreover, there is a long line of cases decided in Hong Kong in which it has been confirmed that the effect of section 11 of the HKBORO and the immigration reservation to the ICCPR is that the provisions of the BOR and ICCPR respectively cannot be invoked to enable those not having the right to enter and remain in Hong Kong to resist removal or deportation: see, e.g. *Hai Ho Tak (a minor) v Director of Immigration* (referred to above), *Bahadur v Secretary for Security* [2000] 2 HKLRD 113 at 124-125, and *Chan MeI Yee v Director of Immigration*, unrep., HCAL77 & 99/1999, 13 July 2000 at §§31-46. Two of those cases are decisions of this Court and, unless shown to be "plainly wrong"[16], are binding. I do not think they have been shown to be plainly wrong and there is therefore no question of departing from them.

136. Thus, whilst it may be accepted that, as a matter of international law, derogation from a peremptory norm is not permissible[17], there is arguably a distinction between, on the one hand, such a derogation (which is impermissible) and, on the other hand, the act of choosing not to enter into a treaty which incorporates the peremptory norm itself (which must be permissible) or of choosing to enter into the treaty but with a reservation regarding the relevant provisions incorporating the peremptory norm (which, as a matter of principle and logic, ought to be permissible). In any event, it is not necessary here to address and resolve the question of

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15 See the Communication from the PRC to the United Nations dated 20.6.97.

16 See *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117 at §45.

17 See General Comment No.24 of the UN Human Rights Committee at §8, quoted above.

whether that distinction in international law is valid, since no such argument can arise at the domestic level, with which this Judgment is concerned, since the courts of Hong Kong are required to apply article 39 of the Basic Law and section 11 of the HKBORO.

137. I would add that if reliance is to be placed on a rule of customary international law, it is clear that this needs to be proved by showing that the rule in question is a rule of universal international practice. In the present case there is no evidence that States have applied a universal practice of prohibiting deportation where there is a risk of inhuman or degrading treatment. Indeed, the Supreme Court of New Zealand observed in *Zaoui v Attorney-General (No. 2)* [2006] 1 NZLR 289 at §51 that :

> "While there is overwhelming support for the proposition that the prohibition on torture in itself is *jus cogens*, there is no support in the state practice, judicial decisions or commentaries to which we were referred for the proposition that the prohibition on refoulement to torture has that status. So far as state practice and the commentators are concerned the position appears clearly in the legislation mentioned earlier and the papers prepared for, and the statements emerging from, the 2001 UNHCR consultation. They set out the absolute propositions about torture and arbitrary death distinctly from the requirements of art 33: the obligations are successive, not merged."

A fortiori, there is no evidence that the prohibition against inhuman and degrading treatment, and still less, the injunction against refoulement to inhuman and degrading treatment, have become *jus cogens*.

138. For these reasons, I would hold that the concession made to the Judge as regards the application of section 11 of the HKBORO and the immigration reservation to the ICCPR was wrong and should not have been accepted by him.

F3.3 Is there some other basis for challenging the Judge's conclusion that the immigration reservation and section 11 of the HKBORO precluded reliance by the applicant on article 14(7) of the ICCPR and article 11(6) of the BOR?

139. Mr Pun's arguments in this respect have been summarised in paragraphs 128 to 130 above.

140. In support of his submissions in support of those arguments, Mr Pun referred to the following passages in the General Comment No. 24 of the Human Rights Committee :

> "6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty.
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> …
>
> 18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the covenant. … Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.
>
> 19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. …"

141. As to his argument that the reservation should be given a very narrow construction, Mr Pun referred in this context to the Sixth Periodic Report of the UK to the United Nations Human Rights Committee in respect of the ICCPR, dated 1 November 2006, in which the reasons for the maintenance of the reservation were explained in the following terms :

> "There is uncertainty concerning the correct interpretation of 'territory of a State' and 'own country'. The purpose of the Immigration Act 1971 and related legislation is to control immigration into the United Kingdom, including immigration from the British overseas territories (which, in general, are responsible for their own immigration controls). The right to enter and reside in the United Kingdom is restricted, in the main, to British citizens. British Nationals (Overseas), British Overseas Territories citizens, British Overseas citizens, British protected persons and (for the most part) British subjects are eligible for British passports and consular protection but, unless they concurrently hold British citizenship, have no right of abode here. The reservation protects these arrangements."

142. I do not think Mr Pun's argument as to the narrowness of the construction of the immigration reservation is correct. As this Court held in *HaI Ho Tak (a minor) v Director of Immigration* [1994] 2 HKLRD 202, there is nothing ambiguous about section 11 of the HKBORO or the immigration reservation : see pp. 207, 208-9 and 210. The reservation itself is very clear: persons not having the right to enter and remain in Hong Kong are subject to the domestic immigration legislation. The immigration reservation entered by the UK Government referred to article 12(4) of the ICCPR "and other provisions". One cannot simply ignore those words in order to read the reservation as if it applies only to article 12(4). Furthermore, article 12(4) of the ICCPR simply protects against arbitrary deprivation of the right to enter a person's own country. If the immigration reservation applies only to that right, it would be

stripped of virtually all effect and meaning and I do not think that is a correct interpretation of the immigration reservation.

143. If, as a matter of language, the immigration restriction is not restricted only to article 12(4) of the ICCPR, one must consider if there is any basis to exclude from its ambit only some but not all of the other provisions of the ICCPR. In my view, there is not. So far as reliance on General Comment No. 24 is concerned, the views of the Human Rights Committee received considerable criticism from the Governments of both the UK and the United States : Observations by the Governments of the United States and United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations. As to the criteria for assessing compatibility with the object and purpose of the Covenant, the observations of the UK were as follows :

> "6. The United Kingdom shares the Committee's view that an automatic identification between non-derogability and compatibility with the object and purpose is too simplistic. Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing. The United Kingdom is likewise of one mind with the Committee that multifaceted treaties like the Covenants pose considerable problems over the ascertainment of their object and purpose. The problem is one common to all lengthy treaties containing numerous provisions of coordinate status with one another.
>
> 7. The United Kingdom is however less convinced by the argument that, because human rights treaties are for the benefit of individuals, provisions in the Covenant that represent customary international law may not be the subject of reservations. It is doubtful whether such a proposition represents existing customary international law; it is not a view shared by most commentators, and States have not expressly objected to reservations on this ground. In the United Kingdom's view, there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law. Such a distinction is inherent in the Committee's recognition that reservations to articles that

guarantee customary international law rights are permitted provided that the right is not deprived of its basic purpose.

8. For broadly similar reasons, the United Kingdom does not wholly share the Committee's concern over reservations which exclude the acceptance of obligations which would require changes in national law to ensure compliance with them. The Committee's comments that 'no real international rights or obligations have thus been accepted' and that 'all the essential elements of the Covenant guarantees have been removed' miss the fact that States Parties, even while entering such reservations, do at least accept the Committee's supervision, through the reporting system, of those Covenant rights guaranteed by their national law."

144. And as regards the legal effect of an incompatible reservation, the UK observed :

"13. The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection … it is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*. For example, it seems highly improbable that a reservation expressly *prohibited* by the treaty (the case in article 19(a) of the Vienna Convention) is open to acceptance by another Contracting State. And if so, there is no clear reason why the same should not apply to the other cases enumerated in article 19, including incompatibility with the object and purpose under 19(c). The *Genocide Convention* Advisory Opinion did indeed deal directly with the matter, by stating that acceptance of a reservation as being *compatible* with the object and purpose entitles a party to consider the reserving State to be party to the treaty. In the converse case (i.e. the case where the reservation is *not* compatible with the object and purpose) the Court states plainly, 'that State cannot be regarded as being a party to the Convention'. This is the approach which the United Kingdom has consistently followed in its own treaty practice.

14. The General Comment suggests, *per contra*, that an 'unacceptable' reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party

> as if the reservation had not been entered. The United Kingdom agrees that severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However the United Kingdom is absolutely clear that severability would entail excising both the reservation *and* the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in article 38(1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognised by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognised' but rather has indicated its express unwillingness to accept. The United Kingdom fears that, questions of principle aside, an approach as outlined in paragraph 20 of the General Comment would risk discouraging States from ratifying human rights conventions (since they would not be in a position to reassure their national Parliaments as to the status of treaty provisions on which it was felt necessary to reserve) or might even lead to denunciations by existing Parties who ratified against a set of assumptions different from those now enunciated in the General Comment.
>
> 15. The United Kingdom believes that the only sound approach is accordingly that adopted by the International Court of Justice: a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all – unless it withdraws the reservation. The test of incompatibility is and should be an objective one, in which the views of competent third parties would carry weight. Ultimately however it is a matter for the treaty Parties themselves and, while the presence or absence of individual State 'objections' should not be decisive in relation to an objective standard, it would be surprising to find a reservation validly stigmatised as incompatible with the object and purpose of the Covenant if none of the Parties had taken exception to it on that ground. For all other reservations the rules laid down in the Vienna Convention do and should apply – except to the extent that the treaty regulate such matters by its own terms."

145. The thrust of these comments by the UK Government is four-fold. First, there is a clear distinction between opting out of a rule of customary international law and a reservation to a treaty that guarantees

the relevant rights under that same rule of customary international law. Secondly, the UK Government did not accept that a norm which represents customary international law may not be subject to a reservation. Thirdly, the UK Government did not accept that a reservation to permit the continuation of domestic legislation was not proper. Fourthly, the UK Government did not accept that, if a reservation were incompatible with the object and purpose of the treaty, the signatory is nonetheless bound by the treaty.

146. More importantly, whether those particular arguments put forward by the UK Government are correct or not (and, for my part, I think they are), there is a further reason, in any event, why Mr Pun's challenge to the immigration reservation and section 11 of the HKBORO must fail and that is the analysis set out in paragraphs 134 and 135 above demonstrating that, so far as the courts of Hong Kong are concerned as a matter of domestic law, the immigration reservation and section 11 of the HKBORO are valid and binding.

147. Finally, in this context, Mr Pun ran a fallback argument to the effect that the phrase "as applied to Hong Kong" should be read as meaning "as lawfully applied to Hong Kong" since, he submitted, in applying the ICCPR to Hong Kong, the UK cannot have intended its reservations to apply regardless of their legality as a matter of international law. This argument is, in my opinion, wholly fallacious since it would mean that a party acceding to the ICCPR with a reservation was binding itself to whatever interpretation of legality the Human Rights Committee might thereafter, or from time to time, pronounce. That simply cannot be right. A party making a reservation does so on the basis that the

reservation is lawful and that, but for the reservation, it would not have acceded to the treaty at all. This is amply reflected in §14 of the observations of the UK Government on General Comment No. 24 (quoted in paragraph 144 above).

148. Like the Judge, therefore, I have no hesitation in concluding that the ICCPR as applied in Hong Kong is subject to the immigration reservation and that section 11 of the HKBORO is therefore not inconsistent with the Basic Law. However, since the Judge did not accept that the immigration reservation or section 11 of the HKBORO was valid as regards the injunction against inflicting inhuman or degrading treatment (§94), it has been necessary to address the question of the validity of the immigration reservation and section 11 of the HKBORO generally.

F3.4 Has the rule of customary international law against torture or other forms of inhuman or degrading treatment become, by the doctrine of incorporation, part of Hong Kong's common law independently of the ICCPR and the BOR?

149. This was a further alternative argument advanced by Mr Pun. Its effect was that, by reason of the incorporation of this rule of customary international law into Hong Kong's common law, the immigration reservation and section 11 of the HKBORO, being not sufficiently specific to exclude the incorporation, do not prevent the Deportation Order being unlawful.

150. I do not accept this argument. First, even if a prohibition against inhuman treatment were a rule of customary international law, it would only be incorporated into the common law of Hong Kong to the extent that it is not inconsistent with the provisions of a domestic statute.

This is clear from the passage in the speech of Lord Atkin in *Chung Chi Cheung v The King* [1939] AC 160 at 167-168 where he held :

> "It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body or rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, *so far as it is not inconsistent with rules enacted by statutes* or finally declared by their tribunals." (*emphasis added*)

In the present case, the incorporation of the rule of customary international law is precluded to the extent that it is inconsistent with the immigration reservation to the ICCPR and section 11 of the HKBORO.

151. Secondly, in my opinion, insofar as Mr Pun argued that the immigration reservation and section 11 of the HKBORO are not sufficiently specific to exclude the incorporation of the rule of customary international law in question, I agree with Mr Chow that the correct approach is to look at the substance of the obligation under customary international law and see if that has been displaced by statute. Here, the relevant rule is the prohibition of torture and other forms of inhuman or degrading treatment. This is addressed domestically by article 39 of the Basic Law and article 3 of the HKBOR, albeit subject to the immigration reservation and section 11 respectively and I do not consider that these are insufficiently specific to preclude the incorporation of the rule of international law relied upon. On the contrary, the preservation of any rule of international law not embraced in a domestic statutory code dealing with the same subject matter would require express reference to the rule in

question : see, by way of example, *R v Immigration Officer, ex parte Thakrar* [1974] 1 QB 684 esp. *per* Orr LJ at 708A-E.

F4 Issue 4: Can the common law principle of double jeopardy be relied upon to resist a deportation order?

152. The Judge rejected the submission by Mr Pun that he should quash the Deportation Order on the grounds that the common law itself was against a person being placed in double jeopardy. He held (§86) :

> "… that the common law prohibition does not prevent deportation. It is simply available as a defence against a second prosecution in the Hong Kong court."

153. It was submitted on behalf of the applicant that, despite the absence of any decision in which the common law principle against double jeopardy has been applied as a basis for resisting deportation, such conclusion would simply be a further iteration of the established principle that a man should not be tried twice for the same conduct.

154. I have no hesitation in rejecting that submission. The common law principle of double jeopardy is directed at the competence or fairness of the subsequent criminal proceedings, a matter exclusively for the domestic court, and does not relate to any issue of deportation. In the circumstances, it is not surprising that counsel for the applicant have been unable to locate any authority to support this proposition. In this context, it is noteworthy that there is no suggestion in *ARJ v Australia*, a case before the Human Rights Committee originating from a common law jurisdiction, that the common law principle against double jeopardy would apply to preclude deportation. If it were thought that this was the ambit

of the common law, one might have expected it to have been raised in the context of the arguments in that case.

155. Further, it is well-established that the principle of double jeopardy is not relevant to extradition proceedings and is instead a matter to be raised at trial in the foreign court : see *Chen Chong Gui v Senior Superintendent of Lai Chi Kok Reception Centre* [1998] 1 HKC 522 at 529I-530C and 533D-I, and *Cheng Chui Ping v The Chief Executive of the SHKSAR and the United States of America*, unrep., HCAL1366/2001, 7 January 2002 at §§58-60. Although deportation and extradition are different, I consider that the approach in extradition cases provides a relevant and applicable analogy for present purposes.

156. For these reasons, I agree with the conclusion of the Judge on this point and, in my opinion, it would be wrong in principle to extend the common law principle in the manner suggested by the applicant.

F5 Issue 5 : Was the decision of the respondents to remove the applicant from Hong Kong to Nigeria irrational in the public law sense?

157. This issue was raised by the applicant in an Amended Supplemental Respondent's Notice filed on 16 September 2010. The argument is based on the Fugitive Offenders Ordinance, Cap. 503 ("the FOO"), and runs as follows.

158. In extradition cases, section 5(1)(e) of the FOO prohibits the extradition of a person to another jurisdiction in circumstances where the offence in respect of which extradition is sought is such that, if the offence had occurred in Hong Kong, the laws of Hong Kong relating to previous

acquittals or convictions would preclude the prosecution or the imposition or the enforcement of a sentence in respect of that offence. Extradition in narcotics cases is governed by the Fugitive Offenders (Drugs) Order, Cap. 503J, giving effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Under that Convention, to which both the HKSAR and Nigeria are parties, extradition in narcotics cases is "subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition" (article 6(5) of that Convention). Thus, extradition in the face of double jeopardy and/or double punishment is specifically outlawed.

159. Thus, it was contended on behalf of the applicant, that although the present case is not a case of extradition under the FOO or the relevant Convention, the practical result is identical, namely that a person would be sent, against his will, to another jurisdiction where he would potentially face a criminal trial for the same offence or conduct. It was submitted that, given that clear legislative policy prohibits extraditing a person to face double jeopardy and/or double punishment, the making of a deportation order that would achieve an identical result is irrational in the public law sense.

160. The appellants objected to this argument on the ground that it was an entirely new point not raised in the court below and in respect of which leave to apply for judicial review was never sought or granted. In the Form 86A Notice, the ground of irrationality as a basis of challenge to the Deportation Order was raised but not in the terms in which it is now

sought to be argued. In paragraph 74 of the Form 86A Notice, it was pleaded :

> "Further or alternatively, assuming the decision of the Secretary for Security/Director of Immigration to deport the Applicant to Nigeria did not violate the Article 11(6) of the HKBOR (which is denied), the decision of the Secretary for Security and/or Director of Immigration to remove the Applicant to Nigeria was, for the reasons stated above, irrational in the public law sense."

161. The words "for the reasons stated above" clearly tie the applicant's irrationality ground of challenge to the two earlier grounds of challenge identified in the Form 86A Notice, namely illegality by reason of violation of article 14(7) of the ICCPR and article 11(6) of the BOR and illegality by reason of violation of article 3 of the BOR, article 7 of the ICCPR and article 3 of the CAT.

162. Even if this Court were to permit this argument to be advanced on behalf of the applicant, I would reject it. The concepts of extradition and deportation are two separate and distinct concepts and the applicant cannot derive assistance for his argument of irrationality from the different treatment of the concept of double jeopardy in extradition cases.

163. The long title to the FOO reads :

> "An Ordinance to make provision for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the laws of those places; for the treatment of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the law of Hong Kong who are surrendered from such places; and for matters incidental thereto or connected therewith."

164. Unlike an extradition situation, deportation is simply a matter within the immigration control of one state, in this case Hong Kong, and is concerned with the removal from Hong Kong of persons who are considered to be undesirable. This is a completely different context to that of extradition, which is governed by the terms of international extradition treaties, the safeguards of which are primarily designed to ensure that citizens of the requested jurisdiction are protected against injustice in the requesting jurisdiction. Furthermore, deportation is limited, necessarily, to non-permanent residents of Hong Kong, since permanent residents are not liable to deportation, whilst the FOO applies equally to permanent and non-permanent residents of Hong Kong.

165. A further difference is that, a request for extradition will have been made in the context of treaties under which both parties will have subjected their criminal laws and procedures to the scrutiny of the other jurisdiction. It is therefore perfectly understandable that there will be a need to look at the reciprocity of treatment and, in this context, a consideration of the risk of double jeopardy will be material.

166. Finally, in an extradition situation, the requesting state will have already formed the intention and desire to prosecute the person intended to be extradited. In that context, it is perfectly understandable that the FOO should contain restrictions on the surrender of such a person where acceding to the extradition request would render the alleged offender liable to double punishment.

167. Mr Pun faintly suggested in his oral submissions that other factors to be taken into account in support of the irrationality argument

were (i) the institutional behavioural report showing that the applicant had exerted efforts in reforming himself and turned over a new leaf in the course of his imprisonment, (ii) the letter from the Legislative Council Secretariat dated 23 April 2002 to another Nigerian national serving a prison sentence in Hong Kong explaining why his request to serve the remainder of his sentence in Nigeria could not be acceded to, and (iii) a letter from the applicant to the UNHCR dated 7 September 2006 claiming asylum under the UN Human Rights Convention.

168. In my view, none of these other factors lead to the conclusion that the decision to issue the Deportation Order was irrational. The context of each of the three factors identified was wholly different. The institutional behavioural report was written in the context of determining whether the applicant should be entitled to early release from prison for good behaviour. The letter from the Legislative Council Secretariat proceeded on the basis of a mistaken understanding of the risk to which a deportee to Nigeria would face and, in any event, it was written in the context of a request to be repatriated to Nigeria to serve the remainder of a current sentence of imprisonment being served in Hong Kong. Finally, the applicant's letter to the UNHCR, in the context of a request for asylum, adds nothing to the challenge to the legality of the Deportation Order by reason of the risk of double jeopardy.

169. In the circumstances, the ground of irrationality must be rejected.

F6 Issue 6 : Was the detention of the applicant unlawful?

170. The Judge concluded that the applicant's detention between his release from prison on 29 December 2007 and his release on recognizance on 23 August 2008 was unlawful. He did so on two distinct bases. First, he concluded that the detention was not for a reasonable period and was not supported by adequate reasons. Secondly, he held, following the decision of this Court in *A v Director of Immigration* [2008] 4 HKLRD 752 by which he was bound, that the grounds and procedures for such detention must be certain and accessible to a detainee and that, since they were not, the detention must be unlawful.

171. Mr Chow accepted, in relation to the Judge's second ground, that there were at the material time no such grounds and procedures set out and that, accordingly, the declaration of unlawfulness in respect of the detention was one the Judge was bound to make. However, Mr Chow expressly reserved the right to argue before a higher court that the power to detain is sufficiently circumscribed by administrative law and/or the principles laid down in *ex parte Hardial Singh* [1984] 1 WLR 74, and that *A v Director of Immigration* was wrongly decided. As has been noted elsewhere[18], there have been recent decisions in England which have held that a failure to comply with stated policy would not necessarily turn a detention, which otherwise complied with *Hardial Singh* principles, into a false imprisonment. Mr Chow informed us that one of those cases, namely *SK (Zimbabwe) v Secertary of State for the Home Department* [2009] 2 All ER 365, is under appeal to the Supreme Court in the United Kingdom.

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[18] *Raju Gurung v Secretary for Security*, unrep., HCAL 5/2009, 21.8.09 at §54.

172. Notwithstanding his acceptance that the declaration of unlawfulness was correct and could not be overturned, Mr Chow nevertheless sought to challenge the Judge's decision that the detention was unlawful on the additional ground that the reasons given by the Director for refusal to release the applicant were invalid (§122).

173. It is well-established that an appeal lies against the order made by the judge, not against the reasons he gave for his decision see *Lake v Lake* [1955] P 336, cited in *Hong Kong Civil Procedure 2010* (Vol.1) at Note 59/0/9 on p. 993. On a strict application of this principle, there is no basis for entertaining this part of the appellants' appeal.

174. However, as the Note cited indicates, the thrust of the rule is directed towards the situation where a party has succeeded in obtaining, or, as the case may be, resisting, all relief sought. Such a party cannot appeal even though he disagrees with the reasons which the judge has given for deciding all points in his favour. But this says nothing of a party who has lost below and who, on the basis of that decision and its particular reasoning, may face further consequences.

175. I do not think it is contrary to principle for this Court to express a view as to the correctness of the reasoning by a judge for a particular decision (particularly a decision in the field of public law), if that view is for the purpose of providing guidance of general application in future cases. This seems to me to apply particularly in the present case where the Director has expressly reserved the right to challenge *A v Director of Immigration* on a future occasion. If that challenge is made and is successful, the further reason given by the Judge in this case for

declaring the detention to be unlawful, if wrong and if not corrected, should not be allowed to stand since it may form the basis of further declarations of unlawfulness of detention.

176. In any event, there is a further reason, in my view, why this part of the appeal should be entertained. As the Judge noted (§120), the applicant may be entitled to make a civil claim against the Government for false imprisonment if the detention was unlawful. In the event of such a claim, and assuming the Director does successfully challenge *A v Director of Immigration* on some future occasion, the further reason given by the judge for declaring the applicant's detention to be unlawful will be highly material to any such civil claim.

177. The Judge held there was no evidence that, upon release from prison, the applicant continued to pose a threat to law and order in Hong Kong (§123) and no evidence of a real risk of the applicant absconding (§124). Furthermore, the Judge said that no grounds were stated for the Director's belief that deportation could be effected within a reasonable time and that no particular time period in which deportation was expected to be effected was stated (§125).

178. As regards the assessment of the risk of the applicant absconding, I consider that there is merit in the Director's contention that the Judge strayed unacceptably into the shoes of the decision-maker. In my view, the Director was entitled to reach the view that there was a risk of the applicant absconding. The Judge thought that it would be odd if the applicant were to abscond, in the light of his requesting to be allowed to stay in Hong Kong (§124). I agree with Mr Chow that this overlooks

the fact that, at the material time, the applicant's application not to be deported had not been accepted so that any fear on his part of being returned to Nigeria to face another trial and possible punishment would provide a powerful incentive for his going to ground and, thereby, absconding. All these considerations are matters to be assessed by the Director and, unless shown to be unreasonable in a public law sense, should not be interfered with on a judicial review.

179. The Judge's conclusions that no grounds were stated for the Director's belief that deportation could be effected within a reasonable time and no particular time period in which the deportation was expected to be effected was stated (§125) seem to me to be contrary to the evidence filed on behalf of the Director and Secretary respectively. At the time of the Secretary's decision to continue the detention of the applicant and the Director's decision to refuse to release the applicant on recognizance, the applicant's refugee claim had been rejected by the UNHCR and the assessment of his claim under the CAT was being actively processed by the Director. Put shortly, I do not see any basis for the court to interfere with the assessments of the Secretary and the Director that there was no indication that the applicant's deportation could not be effected within a reasonable period of time. These are properly assessments to be made by the Secretary and the Director respectively and, unless shown to be unreasonable in a public law sense (which I do not think has been demonstrated), the Court should not interfere with them.

180. Further, the Judge's holding that there was no transparency about the likely length of the applicant's detention (§126) is at odds with the approach approved in *A v Director of Immigration*. There, this Court

held (at §31) 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".

181. For these reasons, I do not consider that the Judge's additional reason for declaring the detention to be unlawful is supportable. However, for the reasons explained, this conclusion does not affect the declaration of unlawfulness in respect of the detention.

F7 Issue 7: Was the Judge correct not to exercise his discretion against the applicant on the ground of delay?

182. Although addressed in the Notice of Appeal, this issue was not addressed by the appellants in their skeleton or oral submissions. Thus, it was not the appellants' contention that, if good substantive grounds were made out for setting aside the Deportation Order and declaring the applicant's detention unlawful, delay was a proper reason for the court to refuse to grant the relief sought in this judicial review.

183. In the circumstances, it is not strictly necessary to deal with this issue. Were it necessary to do so, however, I would agree with the applicant's contention that there is no need for a judge to revisit the question of whether there are good reasons for extending the period within which to bring the judicial review application, i.e. the question of leave to apply, at the substantive hearing.

184. The relevant time limit for an application for judicial review is governed by RHC Order 53, rule 4 and section 21K(6) and (7) of the High Court Ordinance, Cap. 4. RHC Order 53, rule 4 provides :

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

And the High Court Ordinance provides, by section 21K(6) and (7) :

> "(6) Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant –
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

185. In *R v Dairy Tribunal, ex parte Caswell* [1990] 2 AC 738, the House of Lords considered the equivalent English provisions governing the time limit for an application for leave to apply for judicial review. Lord Goff stated the general principle in the following terms at p.747B-C :

> "It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration."

186. It is thus clear, in my view, that when a judge has, in granting leave to apply for judicial review, exercised his discretion to extend time for such an application and there is no application to the judge to set aside that leave on the ground of delay, the question of whether leave should have been granted is no longer live at the substantive hearing. Instead, at that hearing, the judge will have to consider whether, in the exercise of his discretion, any substantive relief that might be warranted on the merits of the case should nevertheless be refused on the grounds that the granting of such relief would be likely to cause hardship or prejudice or would be detrimental to good administration. For these propositions, see the passage in the speech of Lord Slynn in *R v Criminal Injuries Board, ex parte A* [1999] 2 AC 330 at 341B-F.

187. In the present case the applicant explained the reasons for his delay in the Form 86A Notice and the Judge granted leave to apply for judicial review on 21 August 2008. No application was made by the appellants to set aside the leave granted on the ground of delay. There was therefore no need, or basis on which, to re-open the question of leave at the substantive hearing. So far as the Judge's comment at paragraph 51 of the Judgment is concerned, it is right to observe that he expressed himself in qualified terms. It was only "insofar as necessary" that the Judge said he would extend the time for the bringing of the judicial review.

Since this was not necessary, there was in fact no exercise of discretion by him in that regard.

188. The substantive question, which was before the Judge, was whether any substantive relief that might be warranted on the merits of the case should nevertheless be refused on the grounds that the granting of such relief would be likely to cause hardship or prejudice or would be detrimental to good administration. In this regard, there does not appear to be any suggestion that substantial hardship or substantial prejudice would be caused by the grant of the relief sought. No evidence has been filed to support the contention that the grant of relief notwithstanding the delay would be detrimental to good administration. In the circumstances, the Judge was correct, in my view, not to exercise his discretion against the applicant on the ground of delay.

G. Conclusion, disposition and costs

189. For the reasons set out above, I would allow the appeal to the extent of setting aside the Judge's order quashing the Deportation Order. The declaration made by the Judge in respect of the lawfulness of the applicant's detention between 29 December 2007 and 23 August 2008 must stand, but on the basis of the binding effect of *A v Director of Immigration* and not for the additional reason given by the Judge.

190. I see no reason why costs should not follow the event and I would therefore make an order *nisi* that the costs of the appeal be paid by the applicant to the appellants, to be taxed if not agreed, and that the applicant's own costs be taxed in accordance with the legal aid regulations.

Hon Stock VP :

191. Accordingly this appeal is allowed to the extent that we set aside the order of Reyes J that the Deportation Order be quashed. There will be a costs order *nisi* that the costs of the appeal be paid by the applicant to the appellants, to be taxed if not agreed and an order that the applicant's own costs be taxed in accordance with the Legal Aid Regulations.

(Frank Stock) Vice-President	(Andrew Cheung) Judge of the Court of First Instance	(Joseph Fok) Judge of the Court of First Instance

Mr Anderson Chow S.C. and Ms Grace Chow, instructed by Department of Justice, for the Respondents (Appellants)

Mr Hectar Pun and Mr Timothy Parker, instructed by Messrs Tso Au Yim & Yeung, for the Applicant (Respondent)