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HCAL 24/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 24 OF 2009

BETWEEN

BK	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
CHIEF EXECUTIVE IN COUNCIL	2nd Respondent

AND

HCAL 31/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 31 OF 2009

BETWEEN

CH	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

(Heard Together)

Before: Hon Andrew Cheung J in Court

Date of Hearing: 1 December 2009

Date of Judgment: 5 January 2010

J U D G M E N T

Issues

1. The Court has heard these two applications for judicial review together. They both challenge, in substance, the policy of the Director of Immigration not to process or otherwise entertain a torture claim made under the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment 1984 ("the Convention") by a torture claimant, until after his permission to stay in Hong Kong as a visitor has expired. They also challenge the policy of the Director not to extend the torture claimant's permission to stay after its expiry despite knowledge of his intentions to make a torture claim, so that if the latter wishes to pursue his torture claim in Hong Kong, he will have to break the law and overstay here, in order to make his claim and to await the outcome of the Director's investigation into his claim. As an overstayer, the torture claimant is liable to be arrested, detained and prosecuted for overstaying.

Case of BK

2. BK, the applicant in HCAL 24/2009, came from Congo. On 9 May 2006, on the strength of a Congolese passport, he arrived in Hong Kong and was permitted to remain as a visitor for 14 days up to and including 23 May 2006. He told the immigration officer on arrival that he came to Hong Kong for business. That turned out to be a

misrepresentation. On 12 May 2009, he made a claim for verification of his status as a refugee to the United Nations High Commissioner for Refugees ("UNHCR"). On 17 May 2006, he attended the Special Assessment Section of the Immigration Department. According to him, BK lodged a torture claim under the Convention, claiming that for some political reasons, he would be tortured if he were ever to return to his home country. According to the evidence filed on behalf of the Director, on that occasion, he merely made an inquiry about lodging a torture claim, but no actual claim was lodged.

3. In any event, it is not denied that even if he really had made a torture claim on that day, his claim would not have been entertained because of the Director's policy not to process a torture claim until after the expiry of his permission to stay. What is also not disputed is that BK was told to approach the Extension Section of the Immigration Department to apply for an extension of stay, which he did through his lawyers on 22 May 2006.

4. On the same day, the Director refused the application for an extension of stay. In his short letter of refusal, the Director indicated that he was not satisfied that BK's application fell within the policy criteria for admitting visitors to Hong Kong (in that his continued stay was for the purpose of a genuine visit of a visitor).

5. Following further correspondence, on 5 June 2006, BK through his lawyers lodged an objection under section 53 of the Immigration Ordinance (Cap 115) with the Chief Secretary for Administration, against the refusal of the Director to grant him an extension of stay.

6. Following further correspondence and paper work, eventually on 30 January 2008, the Secretary for Security informed BK's lawyers that the Chief Executive in Council had considered BK's objection and had confirmed the Director's refusal of BK's application for an extension of stay in Hong Kong. No reasons were given for the decision.

7. On 22 May 2008, BK was arrested by the police for overstaying in Hong Kong. He was transferred to the Immigration Department on 23 May 2008. After correspondence between BK's lawyers and the Director, BK was released on 2 June 2008 on recognizance under section 36 of the Immigration Ordinance.

8. In the meantime, BK's application for refugee status had been rejected by the UNHCR. As regards his torture claim, the Director rejected BK's claim by a letter dated 17 September 2008. From the refusal, BK lodged an appeal by a letter dated 30 October 2008.

9. Following Saunders J's judgment in *FB v Director of Immigration* [2009] 2 HKLRD 346, which held that in several respects, the policy of the Director and the Secretary for Security in administration of the screening process for torture claims was unlawful and in breach of the duty of the Government to assess those claims in accordance with high standards of fairness, BK and other applicants commenced HCAL 120/2007, seeking substantially the same relief as the applicants in *FB*. The proceedings have been adjourned *sine dine* with liberty to restore on notice.

Case of CH

10. CH, the applicant in HCAL 31/2009, came from Cameroon. On 12 July 2008, CH entered Hong Kong from the Mainland as a visitor on the strength of a Cameroonian passport. He had obtained his visa under the pretext that he wished to come to Hong Kong to buy electronic appliances. He was permitted to remain in Hong Kong as a visitor for 14 days until 26 July 2008. On 25 July 2008, CH lodged a claim for verification of his status as a refugee with the UNHCR. On the following day, with the help of lawyers and the assistance of a French interpreter, he approached the Extension Section of the Immigration Department to apply for an extension of stay. He claimed that he feared torture in his home country for religious reasons. His application was refused on the same day. He was given a sealed letter from the Immigration Department to hand to the immigration checkpoint upon his departure from Hong Kong. The sealed letter stated, amongst other things, that the Director had no objection to the departure of CH "by any means" on or about 29 July 2008 "for any destination". However, CH did not leave.

11. On 7 August 2008, CH was arrested by the police and detained for overstaying. He was transferred to the Immigration Department for further investigation. Following correspondence between his lawyers and the Director, CH was released by the Director on recognizance pursuant to section 36 of the Immigration Ordinance on 15 August 2008.

12. Thus far, CH's torture claim is still pending.

Applicant's contentions

13. Both BK and CH challenge the respective decisions of the Director not to process or otherwise entertain their torture claims until after the expiry of their permissions to stay, and the Director's subsequent decisions not to extend their respective permissions to stay. Mr Hectar Pun, for both applicants, argues that the policy of the Director not to process or entertain torture claims, before the expiry of the permission to stay of the torture claimant, amounts to a failure on the part of the Director to perform his legal duty to assess the claim under the Convention, and is therefore illegal. Counsel also submits that it amounts to a failure to meet the demand of high standards of fairness required in assessing torture claims, and is irrational. Mr Pun further submits that the resulting decision in each case not to process or entertain the torture claim was illegal because the Director had taken into account an irrelevant consideration, namely, that the torture claimant was still lawfully in Hong Kong when he made the claim.

14. As regards the Director's decisions to refuse an extension of stay after learning of the applicants' torture claims, and the underlying policy of the decisions, Mr Pun argues that the decisions represented a misinterpretation or misapplication by the Director of his existing policies regarding granting and extending permission to stay. He also submits that the decisions were irrational; that they failed to meet the demand of high standards of fairness; and that the Director's rigid adherence to his policies amounted to a fettering of his discretion.

15. In the case of BK, he also challenges the decision of the Chief Executive in Council, upholding the Director's refusal to extend his permission to stay. Apart from those grounds already mentioned, Mr Pun

also argues that the Chief Executive in Council has failed to give reasons for his decision.

Basic approach in immigration matters

16. Before going to these issues in greater detail, it is necessary to remind oneself of some basic matters.

17. As has been mentioned in many cases[1] concerning challenges against immigration decisions of the Director of Immigration (and his officers), the legislature has chosen to entrust the responsibility for and discretions on immigration matters to the Director of Immigration. It is an important responsibility, given Hong Kong's unique circumstances, and the discretions given are wide. As is expected from any good administrator who is vested with wide discretions, the Director has formulated many policies and guidelines regarding the exercise of his discretions. The courts have therefore said repeatedly that they will not lightly interfere with the Director's policies or exercise of discretion. It represents not only a specific application of the general principle of public law that the courts in their public law jurisdiction only exercise a supervisory jurisdiction, but do not sit as an appellate court from the decision of the decision-maker. But it represents also an acknowledgment on the part of the courts that the legislature, in its wisdom, has entrusted the Director with the unenviable task of manning Hong Kong's immigration controls.

18. On a more general plane, the courts' consistent approach also demonstrates their recognition that under the Basic Law, it is the Executive

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[1] See, for instance, *Aita Bahadur Limbu v Director of Immigration* HCAL 133/1999, 10 December 1999, Stock J; *Bhupendra Pun v Director of Immigration* HCAL 1541/2001, 22 January 2002, Hartmann J; *Durga Maya Gurung v Director of Immigration* CACV 1077/2001, 19 April 2002; *Re Singh Sukhmander* HCAL 89/2008, 18 September 2008, Andrew Cheung J.

which has been given the right and responsibility to administer the affairs in Hong Kong generally. Indeed article 154(2) of the Basic Law specifically authorises the Government of the Hong Kong Special Administrative Region to apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions. The role played by the courts is essentially supervisory.

19. That being the case, the courts do not lightly interfere with the Director's exercise of discretion in relation to the giving or refusal of permission to aliens to land or to remain in Hong Kong or the grant or refusal of an extension of permission to stay. Part II of the Immigration Ordinance essentially gives the Director and his officers wide discretions on these matters. By definition, if no extension of stay is granted and the alien chooses to overstay for reasons of his own, he commits an offence under the law. He renders himself liable to be arrested, detained and prosecuted as a result. That, by itself, cannot be a good reason for interfering with the Director's wide discretion on granting or refusing an extension of stay.

20. The Director is quite free to determine for himself, at least as a matter of policy, which categories of aliens should be allowed to visit Hong Kong, and how long, generally, they may lawfully remain here.

21. In my view, that must be the starting point.

Nature of torture claim

22. To what extent does the fact that the alien is a torture claimant make a difference to the above approach? It is necessary to remind

oneself of the relevant law regarding the Convention and torture claimants. The matter has received extensive discussion by the Court of Final Appeal in the well-known case of *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187. As has been pointed out by Li CJ (at p 195, para 1), the right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment is a fundamental human right. The Convention has been concluded for the effective protection of the right. It applies to the Hong Kong Special Administrative Region. Article 3(1) of the Convention contains the central safeguard:

> "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."

23. As is common ground, in relation to the power to deport (or remove), both the Secretary for Security and the Director of Immigration have adopted the policy of not deporting or removing a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well founded. This policy has been stated in the report submitted by the People's Republic of China in 1999 under the Convention. In *Prabakar*, the Court of Final Appeal left open the question of whether as a matter of Hong Kong domestic law, the Secretary and the Director have the legal duty to follow the policy, by reason of the Basic Law, the Bill of Rights, customary international law and/or legitimate expectation. The judgment of the Court of Final Appeal proceeded on the assumption that the Secretary was under a legal duty to follow the policy as a matter of domestic law (pp 195 – 196, para 4). The Court went on to hold that in assessing a torture claim, the Government must meet high standards of fairness.

24. In the subsequent case of *FB, supra*, Saunders J came to the conclusion that in some respects, the Director's administration of the screening process of torture claims failed to meet the high standards of fairness required.

25. Further, it is common ground that whilst a torture claim is being examined by the Director, the torture claimant will not be removed or deported from Hong Kong.

Two crucial questions

26. It is important to note that none of these and other cases were concerned with the questions of:

(1) at what point of time must the Director start "processing" or otherwise entertaining a torture claim; and

(2) whether the Director should grant a torture claimant or potential torture claimant an extension of his permission to stay once he has made such a claim or has indicated an intention to make such a claim, so that the torture claimant would not become a lawbreaker in Hong Kong by overstaying here pending the outcome of the Director's screening of his torture claim.

27. That being the case, the answers must be obtained elsewhere.

28. Despite the efforts of the parties, no domestic or foreign/international cases or academic writings can be found that may throw light directly on these questions. One must therefore start from principles. Importantly, it must be remembered that article 3(1) of the

Convention imposes a negative duty not to deport (etc) a torture claimant to the place where he justifiably fears torture. It is a negative duty not to deport to a specific place. However, as the Court of Final Appeal has pointed out, it carries with it a positive duty to screen the claim of a torture claimant with high standards of fairness. By necessary implication, there is also the duty not to deport the claimant to the place where torture is (allegedly) feared pending the outcome of the screening process.

29. In my view, that is the sum total of the duties of a signatory to the Convention. That, in my view, also provides the answers to the two questions I posed earlier.

30. In my judgment, the negative and positive duties, which go hand in hand with each other, do not require the State Party to start processing or otherwise entertaining a torture claim at any particular point of time, provided that the torture claimant is not deported (etc) to the place where he claims he would be in danger of being subjected to torture, until after the completion of the screening process (which must meet high standards of fairness) of his torture claim, and, needless to say, an unfavourable determination of his claim has been reached.

31. Put another way, all that the Convention is concerned with, so far as time is concerned, is about when a torture claimant may be deported (etc), if at all, to the place which he says he fears torture. It has no requirement, in terms of time, regarding the starting end of the process, namely, when the State Party should begin processing or otherwise entertaining the torture claim.

32. It makes perfect sense. When a State Party chooses to start processing or otherwise entertaining a torture claim should really be an internal matter to be governed by national law. There may be many reasons and considerations governing when a State Party may wish to start processing a torture claim. Moreover, depending on the circumstances of an individual torture claimant, it may or may not be necessary to start processing his claim immediately after it was made. Provided, and this is the crucial proviso, that the torture claimant is not deported (etc) to the place where he says he fears torture until after an unfavourable determination of his claim has been made by the State Party, following a screening process which (at least in Hong Kong) satisfies high standards of fairness, it is really the business of a State Party to decide for itself when it may wish to start processing a torture claim.

33. Furthermore, in the context of Hong Kong's domestic immigration law, the Director's power to remove a person from Hong Kong does not even arise until after a person has become an overstayer. In other words, the person is not at risk of removal until after his permission to stay has expired. Without an immediate risk of removal, there is simply no question of the immediate realisation of the claimed risk of torture. Therefore in terms of time, and in terms of the ultimate and only goal under the Convention of preventing torture, there is simply no basis for saying that the Director must start processing a torture claim whilst the permission to stay is still current.

34. The same analysis also provides the answer to the further question of whether a torture claimant may be made an overstayer, and for that reason, a lawbreaker as per the national law of a State, pending the screening and determination of his torture claim. In my view, the purpose

and ultimate aim of the Convention do not require a prohibition against making the torture claimant an overstayer and for that reason a lawbreaker, provided that:

(1) the torture claimant is not deported (etc) until after an unfavourable determination has been made following a screening process that has met high standards of fairness;

(2) the legal or practical consequences of making the torture claimant an overstayer and for that reason a lawbreaker are not such that it would materially inhibit the making or maintaining of a torture claim; and

(3) it would not affect in any way the meeting by the screening process of the high standards of fairness required.

35. Subject to these important provisos, in my view, whether a State Party chooses to make a torture claimant an overstayer in the process, and for that reason, a lawbreaker, is really an internal matter for the domestic law of that State Party, with which the Convention has no business to interfere. After all, its ultimate aim is to prevent torture, which would likely result from deporting a genuine torture claimant to the place where torture is justifiably apprehended.

Position summarised

36. Drawing the threads together:

(1) Generally speaking, in matters about permission to land and stay in Hong Kong and any extension of such permission to stay, the Director enjoys a high degree of freedom, free from intervention by the courts. Turning a person into an

overstayer, and thus a lawbreaker according to the provisions in the Immigration Ordinance (and hence liable to be arrested, detained and prosecuted), is just another way of saying that his permission to stay is not extended by the Director and that notwithstanding, the person chooses to remain in Hong Kong after the expiry of the permission to stay. It does not add anything to the discussion.

(2) The freedom enjoyed by the Director extends to matters concerning removal of overstayers. The Director enjoys a high degree of freedom in terms of whether to remove an overstayer from Hong Kong, the destination to which the overstayer is to be removed, and to some extent the time for executing the removal order. As regards detention pending removal, it is a matter governed by law: see *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752; *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.

(3) As regards prosecution of overstayers, it lies within the exclusive province of the Secretary for Justice and the Department of Justice he heads (article 63 of the Basic Law). His department has published guidelines on the same. Put in a simplified way, a torture claimant will not be prosecuted for overstaying, and any prosecution already commenced will be adjourned, pending the outcome of the screening process of his torture claim. If the determination is in his favour, he will not be prosecuted for overstaying. If the determination is against him, whether he will be prosecuted is in the discretion of the Secretary for Justice, and his individual circumstances

will be taken into account. (The policy does not apply if other offences are involved.)

(4) The Director is not at liberty to remove a torture claimant (as an overstayer) pending the determination of his torture claim.

(5) The assessment of a torture claim must meet high standards of fairness.

(6) The Convention does not require the Director to start processing a torture claim at any particular point of time, so long as no torture claimant is deported (etc) until after an unfavourable determination of his torture claim has been made, following a screening process which has met the high standards of fairness required. It is, therefore, for the Director to devise a policy or guidelines regarding when he may wish to start processing torture claims, subject to the proviso described.

(7) Likewise, the Convention does not prevent the Director from refusing an extension of a torture claimant's permission to stay after he has made, or has made known his intentions to make, a torture claim to the Director, thereby rendering him an overstayer and a lawbreaker in due course, provided that:

(a) the torture claimant is not deported (etc) until after an unfavourable determination has been made regarding his claim, following a screening process that has met high standards of fairness;

(b) it does not have the effect of materially inhibiting the torture claimant from making or maintaining his torture claim; and

(c) it does not affect the meeting by the screening process of the high standards of fairness required.

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

(9) Of course, policies and decisions made by the Director are subject to scrutiny and supervision by the courts in their public law jurisdiction, based on general principles of public law. But as explained, in this regard, the courts generally accord great latitude to the Director in the exercise of his discretions.

Only second policy/decision of real significance

37. As mentioned, the two applicants challenge both the decisions not to process their torture claims before the expiration of their permissions to stay and the decisions not to extend them, as well as the underlying policies of the Director. As Mr Anderson Chow SC, for the respondents, has submitted, the crux of the matter in each case lies in the second decision not to extend the permission to stay. On the facts, given the relatively short permission to stay, a delay of several days or weeks in starting the processing of the torture claim can hardly make any difference to the torture claimant or his claim, which takes years to screen (at the current rate).

38. It only assumes significance when one takes into account the second decision under challenge, namely, the refusal of the Director to extend the permission to stay, thereby rendering the torture claimant an overstayer and therefore a lawbreaker in the natural course of events. Given that the Director will not start processing a torture claim until after the expiry of the permission to stay, and given that processing takes time, the torture claimant is bound to become an overstayer and a lawbreaker in due course.

39. In my view, therefore, the two decisions and their effect on a torture claimant and his claim must be considered together.

40. When they are viewed together, the applicants' case boils down simply to this: that they should be given an extension of stay pending the outcome of investigation of their torture claims.

41. That the first decision does not have significance *on its own* may be illustrated by considering what the position would be if the Director were to start processing a torture claim immediately after it was received and while the permission to stay was still current. Given the inevitable time required to properly process it in accordance with the high standards of fairness required, there is no question of the Director being able to finish investigating it before the expiration of the permission to stay. In that event, unless the Director were to grant an extension, the torture claimant would unavoidably become an overstayer and lawbreaker. Thus analysed, the first decision on its own does not have any real significance.

Does the Convention require an extension of stay?

42. On what basis can a torture claimant say that he should be given an extension of stay whilst he is pursuing his torture claim in Hong Kong? In the above discussion, I have come to the conclusion that the Convention does not require an extension of stay to be given. However, I have also mentioned three provisos. The first one does not have any significance here. There is no suggestion whatsoever that the torture claimant will be removed from Hong Kong pending the outcome of the investigation of his torture claim.

43. The second proviso is to the effect that the policy of not extending a permission to stay, thereby making the torture claimant an overstayer and a lawbreaker in due course, must not have the effect of deterring or preventing torture claimants from making or maintaining a torture claim.

44. In my view, it is not infringed in the present case. There is simply no evidence, whether generally or specifically in relation to the two applicants, that it has been the case. Speaking generally, there is no evidence to suggest that the Director's policies of not processing a torture claim before the permission to stay has expired and of not extending the permission to stay after expiry, has had the effect of inhibiting people from making or maintaining a torture claim. There is no evidence whatsoever that any torture claimant has been deterred from making a claim which he would have otherwise made but for the Director's policies, for fear of breaking the law as an overstayer.

45. This is not surprising at all. I have already described the relevant prosecution policy. Essentially, a successful torture claimant will

not be prosecuted at all. Even for a torture claimant who has failed to make out a case in the assessment process, prosecution for overstaying is still not automatic, and depends on individual circumstances. Mr Pun, at the hearing, has placed very little emphasis on this aspect of the case.

46. As regards detention, it is true that as an overstayer, the torture claimant is liable to be arrested by the police and detained. On the other hand, save for exceptional cases, most arrested torture claimants would be released on recognizance after a brief period of detention. The exceptional cases are, generally speaking, those involving a security risk to the society, a risk of absconding or a risk of re-offending (of offences other than overstaying).

47. I would not understate the significance of the loss of liberty of a person even for a very brief period of time. However, that is not the issue under consideration here.[2] For, as mentioned, the Convention is wholly silent on whether a torture claimant may be detained pending the screening process. That is not surprising. So far as the Convention is concerned, prevention of detention is not its object; rather, prevention of torture is its ultimate and only goal. Therefore, as regards the Convention, the bottom line is whether the risk of detention for a brief period of time would have the effect of inhibiting people from making or maintaining a torture claim in Hong Kong, thereby compromising the aim of the Convention. In my view, on the evidence, the answer is in the negative. The burden is simply on those challenging the Director's policies to come up with relevant evidence.

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[2] I will return to the significance of detention when I consider the matter from the perspective of general public law.

48. The third proviso is that the policies must not lead to any compromise of the high standards of fairness required of the assessment process.

49. In my view, the answer must be in the negative. There is simply nothing in the evidence that can legitimately support the suggestion that the high standards of fairness required of the assessment process have been compromised. At one stage, it was suggested that the detention of overstaying torture claimants would have the effect of hindering their efforts to collect evidence. But whether speaking generally or with specific reference to the cases of the two applicants, such a suggestion cannot stand up to scrutiny. For, as mentioned, the period of detention is generally extremely brief, when compared with the time that is, generally speaking, required to carry out and complete the screening process, which has to meet high standards of fairness. This suggestion was not pursued by Mr Pun at the hearing.

A matter of discretion – general public law considerations

50. Thus analysed, the fact that an alien, whom the Director has to deal with by exercising his powers and discretions conferred upon him and his officers under the Immigration Ordinance, happens to be a torture claimant, is really neither here nor there. In other words, one is simply back to square one, and the present case is, on final analysis, no different from an ordinary case where an alien seeks to challenge the exercise of discretion by the Director or the policy guiding his exercise of discretion in immigration matters. As I set out at the outset in the discussion, such matters are, save in exceptional cases, to be dealt with by the Director, free from any interference by a court. It is not the function of the court to

substitute its own view of the matter for that of the Director's. Subject to the established public law grounds for challenging a public authority's decision, the court will simply not interfere with the exercise of discretion of the Director, or question his policy for exercising his wide discretion.

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

52. I do not accept Mr Pun's contention that the policies under challenge are irrational. In setting the policies, the Director has to, and is, in fact, duty-bound to, take into account a host of considerations. Besides the claim and interest of torture claimants, the Director has to bear in mind the society's interests in general and the question of effective immigration

controls in particular. Thus, for instance, it would be wholly legitimate for the Director to take into account the possibility of abuse, if he were to adopt another policy whereby extensions of stay pending the screening process are to be had for the asking. At one stage, Mr Pun has argued that such extensions should only be granted to those who can establish a *prima facie* case. But that immediately leads to problems of its own, in terms of resources, priorities, and the criteria to be applied. The present policies, in spite all the criticisms made against them, at least have the virtues of certainty, consistency as well as simplicity.

53. The Director may also take into account the message that any contrary policies may send to potential torture claimants abroad – whether they be in genuine fear of torture or not. Whilst Hong Kong has an obligation not to deport a genuine torture claimant to the place where he justifiably fears torture, it does not have any obligation to invite potential torture claimants overseas to come to Hong Kong, as opposed to any other State Parties to the Convention, to make a torture claim. The Director could have adopted a more lenient or generous approach towards torture claimants. But that is not the issue. It is not for the Court to interfere with the Director's normal exercise of discretion in formulating relevant policies and guidelines and in making decisions in accordance with his policies and guidelines.

54. The Director should of course bear in mind that his present policies could or would, in many cases, lead to the arrest and detention, at least for a short period of time, of torture claimants as being an overstayer. However, he is perfectly entitled to remember that even the Convention itself does not, as explained, say that torture claimants cannot be detained pending the screening process (subject to the provisos discussed above).

The Director is also entitled to balance that consideration against the risks, no matter how remote, of granting torture claimants an extension of stay generally, under the existing state of law. One potential risk, and I put it no higher than that and certainly do not intend to pronounce any definite ruling on it, is that if he or she remains (lawfully) in Hong Kong for long enough, the torture claimant may be entitled to apply for the status of permanent resident of the Hong Kong Special Administrative Region. This is not a far-fetched fear given the very slow pace that torture claims are being screened (in accordance with high standards of fairness). Mr Pun argues that such a torture claimant would not be regarded as being "ordinarily resident" in Hong Kong and there is no risk of his or her becoming a permanent resident of Hong Kong. Not having had the benefit of well-researched arguments by counsel, I am not prepared to accept what Mr Pun boldly asserts as necessarily representing the true legal position in Hong Kong. As I have said, I do not wish to pronounce any definite view on this matter.

55. True it is that detention means a loss of liberty. However, it does not follow that, therefore, the Director's policies should be vigorously scrutinised.[3] As explained, in the day to day work of the Director and his officers, many decisions that are made and discretions exercised have the potential of turning the visitors/aliens with whom the Director or his officers are dealing with into an overstayer and therefore a lawbreaker in due course if they, for reasons of their own, refuse or fail to depart Hong Kong, and instead choose to remain here after expiry of their permissions to stay. Refusal of an extension of stay is a prime example. The alien need not be a torture claimant but may be someone claiming the status of a

[3] Indeed Mr Pun has not put his argument this way; however, for the sake of completeness, I believe I should deal with this possible argument here.

refugee, or, a right of abode seeker, who may have very understandable reasons for not wanting to leave Hong Kong even after expiry of his permission to stay. Or, for instance, the alien may simply be someone who believes that he has a reason to remain in Hong Kong and therefore stays here beyond his permission to stay in order to commence and prosecute proceedings to challenge the Director's relevant decision. One can easily think of other real examples. In all these cases, I am not aware of any suggestion – and Mr Pun has not advised the Court of any – that because the Director's decision or underlying policy of denying an extension of stay could or would render the alien in question an overstayer and therefore liable to be arrested and detained in due course, the decision or policy should for that reason be scrutinised vigorously.

56. Furthermore, as was mentioned during the hearing, in many cases and the present ones are good illustrations, things simply started off on the wrong foot. Instead of informing the immigration officer upon arrival of his fear of torture and intentions to seek asylum here, very often the torture claimant-to-be simply lied to the officer of his real intentions of coming here. A permission to stay would be obtained on a false reason. (Thus in the present case, BK did not come here for any "business"; and certainly on the evidence, CH did not come to Hong Kong for the purposes of buying electrical appliances.) After entry and in due course, the alien would make a torture claim and an application for an extension of stay. Yet all this would not, and indeed should not, have happened if the alien had been straightforward with the immigration officer upon arrival about his true intentions of coming here.

57. I accept that at the initial stage of arrival, the alien might be in need of legal advice or help before he could decide whether he could or

should make a torture claim here – and I appreciate all the *pro bono* and voluntary help that many people and religious/charitable organisations have been offering to refugees, asylum seekers and torture claimants. However, and I consider this important, it does not by itself provide any lawful excuse to the alien for lying to the immigration officer about his true intentions or circumstances.

58. However, most importantly for present purposes, if the alien had told the immigration officer the truth on arrival, no one would have doubted the officer's or the Director's power to refuse permission to enter. If the alien were to insist on not being removed to the particular place where the Director intends to remove him to on the ground of a fear of torture, and the Director cannot immediately find another place to remove the alien to, the Director is duty bound under the Convention not to so remove the alien. In that case, no one can possibly doubt the power and discretion of the Director to detain the alien pending further investigation of his circumstances. That being the case, it is simply difficult to see why an alien can have his position improved by lying to the immigration officer about his real intentions of coming here or his personal circumstances, and thereby obtaining a permission to stay.

59. Mr Pun vaguely argues that in the present cases, one must proceed on the footing that the applicants were already "lawfully" in Hong Kong, and all one is concerned with is whether the Director was wrong to refuse them an extension of stay. I disagree.

60. The question of whether the Director should have granted the applicants an extension of stay would not have arisen at all if the applicants had not misrepresented to the immigration officers concerned their true

intentions of coming to Hong Kong in the first place. They cannot have their positions improved by their own misrepresentations. Indeed, as was also pointed out during the hearing, the Director could have lawfully revoked their permissions to stay on the ground of misrepresentation immediately upon learning of their true intentions for coming here, without waiting for the expiry of the permissions. In that event, it is difficult to see how the applicants could have challenged the Director's power to detain them there and then pending further investigation of their cases.

61. All these considerations lead me to the conclusion that although arrest and detention (and thus a brief period of loss of liberty) are the likely consequences of the Director's policies under challenge, the Court is not justified in scrutinising the Director's policies or exercise of discretion with the sort of heightened intensity that is often found in cases involving interference with fundamental rights (see *de Smith's Judicial Review* (6th ed) para 11-093 *et seq*).

62. That being the case, the bottom line remains that it is not for the Court, but for the Director, to bear in mind all relevant considerations and devise his policies accordingly. As indicated, I do not regard his existing policies as being irrational or otherwise challengeable under general public law.

Misinterpreting/misapplying policies

63. Mr Pun argues that the Director has misinterpreted and misapplied his policies relating to applications for entry to Hong Kong and to granting an extension of stay to those who have already entered Hong Kong lawfully as visitors. He argues that the first policy does not apply to

an application for an extension of stay, and the second policy does not apply to torture claimants (as opposed to refugees).

64. There is simply no substance in the complaint. According to the evidence, the same policy for determining applications for entry is applied for determining applications for an extension of stay. That makes perfect sense. Furthermore, the evidence is that the Director does not differentiate, for the purpose of determining an application for an extension of stay, between an alien who claims himself to be a refugee and one who claims he is in fear of torture. In either case, no extension of stay will be granted. That is simply another way of saying that the Director has a similar non-extension policy relating to torture claimants.

65. In any event, I simply fail to see how this ground can take the two applicants' cases anywhere. If their cases were not covered by any existing policies, they would simply be dealt with by the Director in accordance with his discretion and the individual circumstances of their cases. For the reasons explained, it is simply impossible to fault the Director's exercise of discretion in relation to their respective cases.

Fettering discretion

66. As regards the suggestion that the Director has fettered his discretion, again, there is no merit in the complaint. There are simply no exceptional circumstances in the respective cases of the two applicants. I appreciate that the applicants maintain that they have a strong torture claim. However, I do not think the Director can be criticised for applying his policies despite the assertions. As mentioned, whether a claim is meritorious requires investigation. The Director has his own

considerations, such as resources and priorities, to name just a few, to take into account. It is simply impossible to challenge the Director's exercise of discretion in accordance with his own policies.

Conclusion

67. For all these reasons, the present challenges against the Director's decisions and underlying policies must fail. I do not find it necessary to deal with each and every argument raised by Mr Pun in support of the challenges. I have very briefly mentioned counsel's arguments in the earlier part of this judgment. I believe they have all been covered by the discussion above. For reasons explained, I do not find it helpful at all to deal with the two decisions and the policies behind in a compartmentalised manner.

Failure to give reasons

68. As regards the challenge against the decision of the Chief Executive in Council, rejecting BK's objection to the Director's refusal to extend his permission to stay, Mr Pun relies on *FB, supra*, at pp 394 to 396, paras 218-227, and contends that there is a duty to give reasons on the part of the Chief Executive in Council.

69. What counsel has ignored or overlooked in his submission is the fact that there, the Court was dealing with the decisions of the Secretary for Security (exercising the delegated authority from the Chief Executive in Council) to refuse certain petitions against the rejection of the petitioners' torture claims. However, here, the Chief Executive in Council was dealing with an objection to the Director's decision not to extend a permission to stay. In *FB*, the petitions related directly to the basic human

rights of the petitioners not to be tortured. Here, the objection was about an alien's application for staying in Hong Kong for a longer period of time than he was originally allowed to come in and stay. Although a torture claim formed part of the background, the nature of the decision was fundamentally different from that in the petitions involved in *FB*. In the present case, given Hong Kong's obligations under the Convention, there is no question of the Director removing BK to Congo before proper screening of his torture claim, despite the refusal to grant him an extension of stay.

70. Mr Pun has cited no other authorities to the Court to the effect that the Chief Executive in Council is under a general or specific duty to give reasons in hearing an objection against the Director's refusal of an extension of stay. In any event, in the circumstances of the present case, it is obvious that the Chief Executive in Council agreed with the reasons given by the Director of Immigration and Secretary for Security. Furthermore, and in any event, no prejudice has been suffered by BK, for the substantive reasons explained above.

71. Again, there is no merit in the submission.

Outcome

72. For the above reasons, the applications for judicial review are dismissed.

73. I make an order *nisi* that in each of the applications, the applicant pay to the respondent(s) the costs of the proceedings (including any costs previously reserved) to be taxed if not agreed. I further order legal aid taxation of the applicant's own costs.

74. I thank counsel for their assistance.

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

Mr Hectar Pun, instructed by Barnes & Daly, for the applicants in HCAL 24/2009 & HCAL 31/2009

Mr Anderson Chow SC, instructed by the Department of Justice, for the 1st and 2nd respondents in HCAL 24/2009 & for the respondent in HCAL 31/2009