

23 March 2015

Immigration DepartmentImmigration Tower,
7 Gloucester Road,
Wan Chai, Hong Kong**Attention: Director of Immigration Mr. Chan Kwok-ki**

Dear Mr. Chan,

“Right to Life” claims under Article 2 of the Bill of Rights

In the light of absolute and non-derogable rights protected in Hong Kong, we write to request clarification regarding the determination of claims for non-refoulement relating to the “Right to Life” under **Article 2** of the **Bill of Rights** as enshrined in the **Hong Kong Bill of Rights Ordinance (Cap. 383 of the Laws of Hong Kong)**. We shall refer to this claim as “**Right to Life**”.

This request for clarification is prompted to a large extent by the decisions of the Court of Final Appeal in **Ubamaka Edward Wilson v Secretary for Security and Director of Immigration** [FACV 15 of 2011] and **C, KMF, BF v Director of Immigration, Secretary for Security and United Nations High Commissioner for Refugees (Intervener)** [FACV No 18, 19 & 20 of 2011].

Ubamaka Judgment

The relevant passages from the **Ubamaka** judgment are as follows.

The Court of Final Appeal held that the right to freedom from “cruel, inhuman or degrading treatment or punishment” [CIDTP] as enshrined in Article 3 of the Bill of Rights contained in **the Hong Kong Bill of Rights Ordinance (Cap. 383 of the Laws of Hong Kong)** is an absolute and non-derogable right to which there are no exceptions.

Chief Justice Ma held as follows:

“It is also consistent with an approach that recognizes the importance placed in Hong Kong on non-derogable and absolute rights. The approach of the respondents that a person (not having the right to be in Hong Kong) was liable to be deported to a place even where it could manifestly be demonstrated that he would be subject to cruel, inhuman or degrading treatment or punishment in that place, was a deeply unattractive submission.” [Par. 2]

C Judgment

C concerns the **United Nations Convention Relating to the Status of Refugees** (1951) as amended by the **Protocol relating to the Status of Refugees** (1967) (collectively the “**Convention**”).

Article 33 of the Convention provides that “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion.”

The relevant passage from the **C** decision is as follows:

“There is, of course, no basis for saying that the Director has failed to exercise his statutory power of removal, but there are very strong grounds for concluding that the Director has either failed to apply his mind independently to the correctness of the determinations made by the UNHCR or, if he has done so, he has done so in a way that falls short of the anxious scrutiny and high standards of fairness required by *Prabakar*. It is not sufficient for the Director simply to rely on UNHCR determinations, as his counsel contended. It is, of course, legitimate for the Director to give weight to the UNHCR determination but not simply to rely on it.” [Par. 97]

“It is no answer to the Director’s failure to make an independent assessment to say that the power of removal is broad and unqualified and that it imposes upon him no duty to make an RSD (Refugee Status Determination). The fact is that the Director has, under statutory authority, adopted a policy the object of which is to exercise his power of removal according to a determination of the refugee status of a claimant to that status. Indeed, the HKSARG asserts publicly that, although not bound by the Convention, it nonetheless voluntarily complies with its requirements. Having adopted that policy in these circumstances, no doubt by reason of the powerful humanitarian considerations which are involved in RSD determinations and the consequences they may entail, the requirement of fairness, arising from the adoption by the Director of a policy under the authority of the statute, calls for him to make an independent assessment of the UNHCR determination, especially in those cases where the UNHCR determination is adverse to the claimant. In making the assessment, the Director must observe high standards of fairness.” [Par. 98]

Questions

Both **Ubamaka** and **C** give rise to a series of questions which we now ask of the Director of Immigration in connection with Right to Life claims. The essence of our questions is:

In the light of the judgment in **Ubamaka**, we shall be pleased to receive your confirmation as to the following matters as they relate to Right to Life claims by individuals seeking the protection of Hong Kong Government.

1. The extent, nature and scope of the mechanisms and procedures implemented by the Director of Immigration to assess and determine Right to Life claims against the removal of claimants to their country of origin.
2. As an integral part of these procedures, whether you will permit and invite claimants to (i) make written representations and submissions, (ii) attend a Hearing, and (iii) have [publicly funded] legal representation in relation to both the afore-mentioned stages in the procedures.
3. Whether the Director of Immigration will take into account the Questionnaire and Screening records which have been obtained in respect of claims under **Part 7C of the Immigration Ordinance (Cap. 115 of the Laws of Hong Kong)** and, where applicable, **Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (as enshrined in the Hong Kong Bill of Rights Ordinance Cap. 383 of the Laws of Hong Kong) in the assessment and determination of Right to Life claims.
4. The confirmation in 3 above is also requested in relation to any Questionnaire and Screening records obtained by the Director of Immigration prior to the decision of the Court of First Instance in **FB v Director of Immigration** [2009] 2 HKLRD 346.
5. Details and particulars of the training of the relevant officers appointed by the Director of Immigration and/or any other department of the Government of the Hong Kong Special Administrative Region who will be charged with the assessment and determination of Right to Life claims.
6. Will claimants have a right of appeal against the rejection of Right to Life claims and, if so, which body will be empowered to hear such appeals.
7. As part of the procedures adopted by such appellate body, will claimants be accorded a Hearing and likewise, will they have the right to [publicly funded] legal representation.
8. Will the Director of Immigration undertake not to seek to detain and/or remove claimants from Hong Kong in the light of their outstanding Right to Life claims.

We look forward to receiving complete and full replies to all of the above matters.

Sincerely yours,

Cosmo Beatson

Cosmo Beatson
Executive Director