FACV No. 16 of 2003

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 16 OF 2003 (CIVIL)
(ON APPEAL FROM CACV NO. 211 OF 2002)

Between:

SECRETARY FOR SECURITY	**Appellant (Respondent)**
- and -	
SAKTHEVEL PRABAKAR	**Respondent (Applicant)**

Court:	Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Millett NPJ
Dates of Hearing:	17-19 May 2004
Date of Judgment:	8 June 2004

J U D G M E N T

Chief Justice Li:

1. The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment is a fundamental human right. For its more effective protection, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was concluded ("the Convention Against Torture"). The Convention applies to the Hong Kong Special Administrative Region.

2. A central safeguard of the Convention is that "no State Party shall return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture": Art. 3(1).

3. In exercising the power to deport, the appellant, the Secretary for Security ("the Secretary") has adopted the policy of not deporting a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well-founded. This policy in Hong Kong was stated in the report submitted by the People's Republic of China in 1999 under the Convention ("the policy").

4. The policy provides for the safeguard contained in art. 3(1) of the Convention Against Torture. Mr Pannick QC for the Secretary maintains that as a matter of Hong Kong domestic law, the Secretary has no legal duty to follow the policy. This is disputed by Mr Blake QC for the respondent. He argues that the Secretary is under such a duty on one of the following bases: the Basic Law, the Bill of Rights, customary international law and legitimate expectation. As the Court indicated at the outset of the hearing, it is unnecessary to decide this issue. For the

purposes of this appeal, the Court will assume without deciding that the Secretary is under a legal duty to follow the policy as a matter of domestic law. In proceeding on the basis of such an assumption, the Court must not be taken to be agreeing with the views expressed in the judgments below that such a legal duty exists.

5. The determination by the Secretary, in accordance with the policy, of a potential deportee's claim that he would be in danger of being subjected to torture if deported to the country concerned must be made fairly. If not, the Secretary would have acted unlawfully. This is not disputed by the Secretary. This appeal raises the important question of what, in this context, the standards of fairness should be. The issue arises as to whether and if so, to what extent the Secretary can properly rely on a determination as to refugee status for the individual concerned made by the United Nations High Commissioner for Refugees ("UNHCR") under its mandate. Refugee status is laid down in the Convention and Protocol relating to the status of Refugees ("the Refugee Convention").

6. Before turning to the facts, the two Conventions should first be referred to.

The Convention Against Torture

7. Article 3 of the Convention should be set out in full.

> "Article 3
>
> 1. 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.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

8. Article 1(1) of the Convention 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 of 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."

9. The Convention established a Committee against Torture and State Parties are obliged to submit periodic reports to it: Arts. 17 and 19.

China's report to the Committee against Torture

10. The report submitted by China to the Committee against Torture in 1999 included a part relating to the Hong Kong SAR which contained the following statement:

> "27. Should potential removees or deportees claim that they would be subjected to torture in the country to which they are to be returned, the claim would be carefully assessed, by both the Director of Immigration and the Secretary for Security or, where the subject has appealed to the Chief Executive, by the Chief Executive in Council. Where such a claim was considered to be well-founded, the subject's return would not be ordered. In considering such a claim, the Government would take into account all relevant considerations, including the human rights situation in the state concerned, as required by Article 3.2 of the Convention. However, there have been no cases so far where the question of torture has been an issue. Thus Article 3.2 has not been applied in any particular case."

As has been noted, the policy referred to in this statement provides for the safeguard contained in art. 3(1) of the Convention. What has to be assessed relates to the future consequences if the person is to be returned to the country concerned. As required by art. 3(2), the policy recognises that the human rights situation in the country concerned should be taken into account.

The Refugee Convention

11. The Refugee Convention provides for the protection of refugees. It does not apply to Hong Kong. The term “refugee” is defined to apply to any person who:

> “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …”

These five reasons will be referred to as “the Refugee Convention reasons”.

12. The Contracting States must not expel a refugee lawfully in their territory save on grounds of national security or public order: Art. 32(1). They must not expel or return (‘refouler’) a refugee to the frontiers or territories where his life or freedom would be threatened on account of one of the Refugee Convention reasons: Art. 33(1). The benefit of this provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country: Art. 33(2).

13. However, the Refugee Convention does not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the relevant international instruments; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United

Nations: Art. 1(F). The crimes in (a) and (b) will be referred to as "art. 1(F) crimes" and the acts in (c) will be referred to as "art. 1(F) acts".

Comparison of the two Conventions

14. A person could of course come within the protection of both Conventions. It could also be that a person is protected by the Refugee Convention but not the Convention Against Torture since a person could be persecuted, the test in the former Convention, in a manner which does not amount to torture as defined in the latter. But more importantly, for the purposes of this appeal, it must be noted that, having regard to their different provisions, a person who is outside the protection of the Refugee Convention may nevertheless be protected by the Convention Against Torture.

15. First, where there are substantial grounds for believing that the person concerned would be in danger of being subjected to torture if returned to the country concerned for reasons other than one of the Refugee Convention reasons, he would not be within the Refugee Convention. But he would be within the Convention Against Torture.

16. Secondly, the Refugee Convention would not apply where there are serious reasons for considering that the person concerned has committed an art. 1(F) crime or has been guilty of art. 1(F) acts.

17. Thirdly, a refugee who is in a Contracting State could not claim the benefit of the protection against expulsion or return in the Refugee Convention where there are reasonable grounds for regarding him as a danger to the security of the country which he is in or having been convicted of a particularly serious crime, constitutes a danger to the

community of that country: Art. 33. And a refugee who is in a Contracting State could be expelled on grounds of national security or public order: Art. 32. But these grounds which disentitle a refugee from protection by a Contracting State do not apply in the case of the Convention Against Torture.

UNHCR

18. UNHCR is mandated by the United Nations General Assembly under its Statute with responsibility for providing international protection to refugees and for seeking permanent solutions for the problems of refugees.

19. At the Court's request, UNHCR provided comments regarding the exercise of its mandate, its role and function, and principles relating to the international protection of refugees. UNHCR made it clear that this was done as a friend of the court and a non-party maintaining its rights and obligations relating to its privileges and immunities. The comments which were provided at short notice, have been of assistance and the Court is indebted to UNHCR.

20. Although the Refugee Convention does not apply to Hong Kong, UNHCR maintains an office here to conduct refugee status determinations under its mandate for asylum seekers who approach it. Where a person is determined by UNHCR to be a refugee, it undertakes a search for a country for his resettlement.

UNHCR Handbook

21. UNHCR has published a Handbook on Procedures and Criteria for Determining Refugee Status (1979, re-edited 1992). It

provides guidance to Contracting States and would no doubt be followed by UNHCR itself in conducting refugee status determination. It states that the relevant facts will have to be furnished in the first place by the applicant himself. The examiner, that is, the person charged with determining his status, will then have to assess the validity of any evidence and the credibility of the applicant's statements. The Handbook recognises the principle that the burden of proof lies on the person submitting a claim. But it notes that often, the applicant, as a person fleeing from persecution, may have arrived with the barest necessities, even without personal documents. So he may not be able to support his statements by documentary or other proof. The Handbook states that, while the applicant has the burden of proof, the duty to ascertain and evaluate all relevant facts is shared between the applicant and examiner. In appropriate cases, such as where statements are not susceptible of proof, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt: see paras 195 and 196 of the Handbook.

The facts

22. The applicant was born in 1973. He was a fisherman and a member of the Tamil minority from northern Sri Lanka. In 1995, the Liberation Tigers of Tamil Eelam commonly known as "the Tamil Tigers", an armed opposition group fighting for an independent state, forcibly recruited him and put pressure on him to fight for them. But he refused to do so. His refusal resulted in death threats from them. In September 1996, he felt compelled to flee to Colombo.

23. In Colombo, between October 1996 and December 1998, he was detained by the security forces on a number of occasions on

suspicion of being a member of the Tamil Tigers. During these periods of detention, he was subjected to torture which took various forms, often of considerable severity.

24. Realizing that his life was in danger, he decided to leave and go to Canada to seek asylum. His friend arranged a forged Canadian passport which, according to the respondent's affirmation, was "in order to enable him to enter Canada without a visa". It would appear from the chop on his Sri Lankan passport that he used it to leave that country. He took a plane to Hong Kong via Bangkok intending to connect with another flight to Manila. He intended to fly from there to Canada where he would make a claim to refugee status, presumably after entry, and start a new life there. On arrival in Hong Kong on 12 January 1999, immigration officers questioned him in the transit lounge and found the forged Canadian passport on him. He was arrested.

The respondent's conviction

25. On 14 January 1999, on pleading guilty, the respondent was convicted in the Magistrates' Court of the offence of possession of the forged Canadian passport. He was sentenced to six months' imprisonment. Under s. 42(4)(b) of the Immigration Ordinance Cap. 115 ("the Ordinance"), a person found guilty of such an offence is liable, on summary conviction, to imprisonment for two years.

The power to deport

26. If a person, who is not a Hong Kong permanent resident, has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than 2 years, the Chief Executive may make a deportation order against him: s. 20(1) of the Ordinance. The Chief

Executive has authorised the Secretary to act as his delegate under this provision. A deportation order requires the person concerned to leave Hong Kong and prohibits him from being in Hong Kong at any time thereafter or during such period as may be specified in the order: s. 20(5).

27. On 2 March 1999, the Director of Immigration ("the Director") served on the respondent a notice stating that his deportation to Sri Lanka was being considered, in view of his criminal conviction, and invited him to make representations.

28. On 5 March 1999, the respondent sent a letter to the Director. The letter was addressed to the protection officer, UNHCR in Hong Kong, the Swiss Embassy in Hong Kong, Amnesty International ("Amnesty") in Hong Kong and the International Committee of the Red Cross ("the Red Cross") in Hong Kong. The letter, consisting of three pages, was written in English with the assistance of an interpreter. It requested the Director to send a copy to each of these organisations. On 8 March, the Director refused to accede to such request. The respondent wrote further to the Director on 19 March 1999. In this brief letter, he simply requested the Director to consider his case favourably, reiterating that he cannot return to Sri Lanka and stating that he had sought refugee status from UNHCR.

29. The respondent's letters dated 5 and 19 March constituted his response to the Director's notice and claimed protection from return to Sri Lanka. The respondent was not putting forward a bare and flimsy assertion of a fear of torture if returned. On the contrary, he set out the justification for his fear, giving the background and particulars of the past occasions of torture by the security forces. The particulars included the dates of arrest, the places of detention, including the 6th Floor of the

Central Investigation Department Headquarters and the manner of torture on each occasion. With the benefit of his experience of cases concerning Sri Lanka, Mr Blake informed the Court that torture of detainees at the 6th Floor was common. The respondent referred to visits by Red Cross staff on two occasions. He also mentioned that when in Colombo, he had written to the Swiss Embassy enclosing various documents, including a medical report, that they had interviewed him and that he was awaiting their reply when he departed. His letter of 5 March 1999 concluded by stating that he had "proof documents" which could not be forwarded since he could not get them photocopied in prison. He requested help "to get these documents photocopied". But the Director did not at any time ask for the "proof documents" referred to.

30. After the Director had refused to forward his letter dated 5 March 1999, the respondent presumably sent it directly to UNHCR himself. On 24 March 1999, an official from UNHCR, together with an interpreter, interviewed him in prison. On 30 March, they returned to inform him that he was not recognised as a refugee, saying that he would be safe if he returned to Colombo but not the north of Sri Lanka. On the next day, UNHCR wrote to inform the Director that the respondent was not recognized as a refugee. But the letter did not mention that UNHCR had said to the respondent that he would be safe in Colombo but not the north. So, as far as the Director and the Secretary were concerned, the grounds on which UNHCR had rejected refugee status were unexplained.

31. About two weeks later, on 14 April 1999, the Director recommended to the Secretary that the respondent be deported to Sri Lanka after serving his prison sentence. The Director stated that he had taken into account the respondent's representations and the outcome of

his application for refugee status. The respondent's letters dated 5 and 19 March were enclosed with the recommendation.

The deportation order

32. On 29 April 1999, the Secretary made the deportation order requiring the respondent to leave Hong Kong and prohibiting him from being in Hong Kong at any time thereafter. The order recited the fact of his criminal conviction. The destination would be Sri Lanka as recommended, although this was not specified in the order itself. Both the Director and the Secretary had not given any consideration as to whether the respondent's claim that he would be subjected to torture if returned was well-founded. Instead, they relied wholly on UNHCR's refusal of refugee status, which, as far as they were concerned, was unexplained.

33. On 14 May 1999, the respondent wrote to seek assistance from the United Nations High Commissioner for Human Rights, which Office has oversight responsibility for the Convention Against Torture. In reply, they sought further information.

34. In July 1999, the respondent was for the first time legally represented. By this time, he had served his sentence (with remission) and was in detention pending deportation. During July, his solicitors, Messrs Barnes and Daly, were preparing a submission to UNHCR and notified them that it would soon be lodged. They maintained with the Director and the Secretary that the respondent should not be removed in the meanwhile. The Director asked for documentary evidence that an appeal had been made to UNHCR. And the Secretary, in response to a request for reasons, stated that all compassionate and mitigating

circumstances in favour of the respondent, his representations and the outcome of his application for refugee status had been taken into account.

35. On 4 August 1999, the respondent's solicitors forwarded their submission to UNHCR to appeal against the refusal of refugee status, with copies to the Director and the Secretary. Substantial materials were enclosed, including the following:

(1) Photographs of scars and a medical report dated 31 July 1999. The doctor set out his findings and expressed the opinion that the respondent's account of how he got the scars are consistent with the scars he saw. He concluded that the respondent "is likely to have been the victim of torture some years ago".

(2) A certificate dated 7 January 1998 issued by the Red Cross stating that its delegates had visited the respondent in detention on 17 and 21 October 1997, together with a letter dated 3 August 1999 from the Red Cross verifying the authenticity of that certificate. The letter stated that as a matter of policy, the Red Cross cannot disclose information on the treatment or the conditions of detention faced by detainees.

(3) A letter dated 15 June 1998 from an attorney-at-law in Sri Lanka, referring to the respondent's arrest in October 1996 and the Red Cross certificate referred to above and stating that the respondent had suffered lots of hardships and recommended him to leave Sri Lanka "for his future security".

(4) Amnesty's report of June 1999 concerning torture in custody in Sri Lanka. It stated that for years, torture has been among

the most common human rights violations reported in that country and that it continues to be reported "almost (if not) daily in the context of the ongoing armed conflict between the security forces and [the Tamil Tigers] fighting for an independent state".

Recognition as refugee

36. Following the respondent's submission on 4 August 1999, he was interviewed by UNHCR on 24 September 1999 and on two further occasions in November 1999. The sustained efforts by the respondent and his solicitors were eventually successful. On 13 December 1999, UNHCR decided to recognise the respondent as a refugee and he was released from detention. Before this favourable decision, UNHCR had written to inform the Director on 21 July and 27 September 1999 that they were maintaining their original rejection of refugee status. But the respondent and his solicitors were never informed of this.

37. Subsequently, the Director informed the respondent's solicitors that he would not be deported to Sri Lanka but to a place where he would be admitted as a refugee.

Decision not to rescind

38. Following his recognition as a refugee by UNHCR, the respondent's solicitors pressed the Secretary to rescind the deportation order. On 14 June 2000, the Secretary decided not to rescind, stating that there was no sufficient justification for rescinding the order. The Secretary accepted that the order would be stayed until UNHCR had finalised his resettlement to a third country to which the respondent would be deported.

The judicial review proceedings

39. In September 2000, the respondent applied for judicial review of the deportation order made on 29 April 1999 and of the refusal on 14 June 2000 to rescind it.

40. On 20 September 2001, the judge (Hartmann J) dismissed the respondent's application. On appeal, the Court of Appeal (Rogers VP, Le Pichon and Yuen JJA) allowed the appeal and quashed the deportation order.

41. Shortly before the Court of Appeal's judgment on 27 November 2002, the respondent was accepted by Canada for resettlement. In early December 2002, he left for Canada.

Leave to appeal

42. The Appeal Committee granted the Secretary leave to appeal on 3 October 2003. Happily, by this time, the respondent had been re-settled in Canada and he had no interest in the matter. Having regard to the public importance of the matter, leave was granted on the condition that the Secretary pays the respondent's costs of the appeal if he is not granted legal aid for the appeal. In the event, legal aid was not granted.

Standards of fairness

43. The question in this appeal concerns the standards of fairness that must be observed by the Secretary in determining in accordance with the policy the potential deportee's claim that he would be subjected to torture if returned to the country concerned. One is concerned with procedural fairness and there is of course no universal set of standards which are applicable to all situations. What are the appropriate standards

of fairness depends on an examination of all aspects relating to the decision in question, including its context and its nature and subject matter: *R v Home Secretary, Ex parte Doody* [1994] 1 AC 531 at 560 D-G.

44. Here, the context is the exercise of the power to deport. The determination of the potential deportee's torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination.

45. It is for the Secretary to make such a determination. The courts should not usurp that official's responsibility. But having regard to the gravity of what is at stake, the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met. *R v Home Secretary, Ex parte Bugdaycay* [1987] 1 AC 514 at 531 E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully.

Mere reliance on UNHCR's unexplained rejection?

46. The crucial issue of principle in this appeal is whether the Secretary in determining the potential deportee's torture claim in accordance with the policy is entitled to rely merely on UNHCR's unexplained rejection of refugee status for the person concerned, without undertaking any assessment of the claim. UNHCR does not usually give reasons for rejection of refugee status. It enjoys immunity from suit and

legal process and its decisions are not subject to the jurisdiction of the courts in Hong Kong. Mr Pannick QC, for the Secretary, submits that notwithstanding the unavailability of reasons, the Secretary is entitled to rely merely on UNHCR's rejection of refugee status as it has great experience and expertise in these matters and the Secretary is entitled to rely on its integrity and competence.

47. As the only basis for the Secretary's adverse determination is UNHCR's unexplained rejection of refugee status, the Secretary would not be able to inform the potential deportee of the reasons for such determination. Nor would the Secretary be able to offer any reasons to the court in any judicial review challenge. Even so, it is argued that the standards of fairness required in this situation are nevertheless satisfied.

48. This submission cannot be right and must be rejected. As held above, high standards of fairness are required in this situation. Such standards could not possibly be met by the Secretary merely following UNHCR's unexplained rejection of refugee status, with the Secretary being in a state of ignorance of the reasons for such rejection. Determining the potential deportee's torture claim in this way, without undertaking any independent assessment, would fall well below the high standards of fairness required.

49. Unfortunately, this was the approach adopted by the Secretary in making the deportation order on 29 April 1999, rejecting the respondent's torture claim. That decision was based entirely on the decision made by UNHCR on 30 March 1999 rejecting refugee status for the respondent even though the Secretary was unaware of the reasons

why it had done so. Accordingly, the deportation order was invalid and must be quashed.

50. Mr Pannick relied on *Gangadeen v Home Secretary* [1998] Imm AR 106 in support of his submission that the Secretary has a broad discretion under the policy and was entitled within that discretion to rely merely on UNHCR's rejection even though the Secretary was ignorant of the basis of the rejection. That case concerned the Home Secretary's discretion in making a deportation order where the interests of the child of the prospective deportee were affected. The question was the scope of protection under a non-statutory policy which provided guidance, in particular, whether the best interests of the child constituted the paramount consideration. It was held that the Home Secretary has a broad discretion in applying the policy. That authority is of no assistance. It concerned the scope of protection under the policy in question. But here, there is no issue as to the scope of protection under the policy, namely, that the potential deportee would not be returned to the country concerned where there are substantial grounds for believing that he would be in danger of being subjected to torture there.

What high standards of fairness require

51. In considering the potential deportee's torture claim, the necessary high standards of fairness should be approached as follows : (1) The potential deportee, who has the burden of establishing that he would be in danger of being subjected to torture if deported to the country concerned, should be given every reasonable opportunity to establish his claim. (2) The claim must be properly assessed by the Secretary. The question as to what weight the Secretary may properly place on UNHCR's decision in relation to refugee status will be addressed later.

(3) Where the claim is rejected, reasons should be given by the Secretary. The reasons need not be elaborate but must be sufficient to enable the potential deportee to consider the possibilities of administrative review and judicial review.

Matters to be considered

52. In assessing the potential deportee's torture claim in accordance with the policy, all relevant matters should be considered including the following:

(1) The conditions in the country concerned: Is there evidence of a consistent pattern of gross, flagrant or mass violations of human rights in that country? Has the situation changed?

(2) Has the potential deportee been tortured in the past and how recently?

(3) Is there medical or other independent evidence to support the claim of past torture?

(4) Has the potential deportee engaged in political or other activity within or outside the country concerned which would make him vulnerable to the risk of being subjected to torture on return?

(5) Is the claim credible? Are there any material inconsistencies? Is there any evidence as to the credibility of the potential deportee?

See General Comment No. 1 issued by the Committee against Torture on the implementation of art. 3 in the context of art. 22 (21 November 1997): *A/53/44, annex IX, CAT General Comment No. 1*. This Comment is helpful. It relates to claims made by individuals to the Committee concerning a State Party which has declared under art. 22 that it recognises the Committee's competence to deal with claims from

individuals subject to its jurisdiction. No declaration has been made in respect of Hong Kong. But the Comment may provide a useful reference for the Secretary in assessing claims in accordance with the policy.

53. It is for the Secretary to comply with the high standards of fairness when considering individual cases. The following observations may, however, be of assistance. First, the difficulties of proof faced by persons in this situation should be appreciated. The person concerned may have fled from the country concerned with few belongings and documents and his level of education may be relatively low. The situation is analogous to that of persons seeking refugee status under the Refugee Convention. And the guidance provided by UNHCR in its Handbook for the determination of refugee status provides a useful reference for dealing with claims relating to torture.

54. Secondly, it would not be appropriate for the Secretary to adopt an attitude of sitting back and putting the person concerned to strict proof of his claim. It may be appropriate for the Secretary to draw attention to matters that obviously require clarification or elaboration so that they can be addressed by the person concerned. For example, in the present case, the respondent's letter of 5 March 1999 stated that "proof documents" were available but could not be supplied due to the absence of photocopying facilities. The Secretary should obviously have looked into this.

55. Thirdly, an understanding of country conditions at the time of the alleged torture in the past as well as at the present time is usually relevant to the assessment of the claim. This is recognised by the policy. UNHCR may be able to supply relevant information. And published

materials are available from various sources including well-respected non-governmental organizations. The Secretary should obtain any such information and materials and take them into account.

UNHCR determination

56. As has been held, it would not be proper for the Secretary to rely simply on UNHCR's unexplained rejection of refugee status. The question arises as to what weight it is proper for the Secretary to place on a refugee status determination made by UNHCR under the Refugee Convention.

57. The protections afforded by the Refugee Convention and the Convention Against Torture overlap. In many cases, the facts will engage both Conventions. That being so, where a potential deportee has applied for refugee status, it would usually be proper for the Secretary to wait for a determination by UNHCR. Where the determination is favourable to the person concerned, while the task for assessing the torture claim in accordance with the policy remains with the Secretary, it would be proper for the Secretary to give great weight to a favourable determination by UNHCR and to accept the claim.

58. However, where UNHCR rejects the claim for refugee status, the Secretary must conduct a proper independent assessment of the torture claim. In coming to a decision, it is proper for the Secretary to take UNHCR's determination (even though it is unexplained) into account and to give it appropriate weight. What weight is appropriate would depend on the circumstances.

59. In particular, what has to be borne in mind is that UNHCR may have refused refugee status for a reason which is not relevant to the torture claim. For example, where refugee status was refused because the reason relied on was not a Refugee Convention reason; or because the person concerned has committed art. 1(F) crimes or has been guilty of art. 1(F) acts; or because where he was disentitled to protection because of grounds specified in arts. 32 and 33, such as danger to security or the community.

60. It may be possible for the Secretary to obtain some indication from UNHCR, if necessary with the consent of the person concerned, as to whether the reason for rejection is relevant to the torture claim. If it appears from the materials, including such indication as UNHCR may be prepared to give, that the reason for rejection by UNHCR is not relevant to the torture claim, then it would not be appropriate for the Secretary to give any weight to UNHCR's rejection. On the other hand, if it appears from the materials that the reason for UNHCR's rejection is equally applicable to the torture claim, such as the credibility of the claim or the improvement in the human rights conditions in the country concerned, then the Secretary may give weight to UNHCR's rejection. It is however important to remember that ultimately, it is for the Secretary to assess the materials and to come to an independent judgment, giving such weight to UNHCR's adverse determination as may be appropriate in the circumstances.

Result

61. Accordingly, the appeal is dismissed. With the deportation order quashed, it is unnecessary to consider the question whether the Secretary's decision not to rescind the deportation order was lawful.

Costs

62. Costs of the appeal should be awarded to the respondent. Indeed the Secretary had undertaken to pay such costs when leave to appeal was granted. The respondent has applied for an order that costs be taxed on an indemnity basis, with a certificate for three counsel. Having considered the submissions made, a certificate for three counsel is granted but the indemnity basis sought is refused.

Mr Justice Bokhary PJ:

63. I respectfully agree with the Chief Justice that this deportation is invalid for the reasons which he has given. What I add is essentially by way of emphasis in my own words.

64. The graver the detriment that a person would suffer if wrongly returned to the place from which he has fled, the greater the procedural safeguards to be observed when deciding whether to order his return. In the present case, the detriment involved was exposure to physical danger. And it was physical danger of the gravest kind.

65. Mr Prabakar sought to dissuade the then Secretary for Security from deporting him to Sri Lanka. He told her that he had been tortured there. We now know that to be true. He had been tortured there. At the time the Secretary did not know one way or the other. But Mr Prabakar's account of the torture which he had undergone in Sri Lanka was a highly particularised one. It was matched by the visible scars which he bore. And it obviously called for the most anxious consideration. Mr Prabakar expressed the fear that he would be tortured again if he were returned to Sri Lanka. And it was in reliance on a

weighty account of past torture that he asked the Secretary to treat his fear of future torture as well-founded.

66. So the physical danger involved in this case was the violation of a person's right not to be tortured. Some rights are non-derogable under any circumstances. They form the irreducible core of human rights. The right not to be tortured is one of these non-derogable rights. Great indeed, therefore, were the demands of procedural fairness in this case.

67. Disagreeing with Mr Prabakar on the point, the Secretary does not accept that our domestic law prohibits deportation that would put a person in peril of being tortured. She does not accept that any such prohibition has become part of our domestic law — whether via the Basic Law, the Bill of Rights, statute law, the common law, the application to us of the Convention Against Torture, customary international law, any combination of the foregoing or anything else. But, very properly, her policy was not to make a deportation order that would put a person in peril of being tortured. This policy provides a sufficient basis for classic judicial review of this deportation order without having to resolve the difference between the parties in regard to the Secretary's legal obligations. That difference may have to be resolved one day, but not today.

68. Did the process by which the Secretary made an order that Mr Prabakar be deported to Sri Lanka satisfy the demands of procedural fairness? Plainly it did not. It did not begin to satisfy those demands. The Secretary went beyond the permissible course of looking to the Office of the United Nations High Commissioner for Refugees ("the

UNHCR") as a source of information on country conditions and taking informed account of the UNHCR's view of the asylum seeker's status under its mandate. She relied on the UNHCR's refusal to recognise Mr Prabakar as a refugee without knowing why the UNHCR had refused to do so. And she omitted to make any assessment of her own on the question of whether Mr Prabakar would be in peril of being tortured if he were returned to Sri Lanka.

69. The course which the Secretary followed was well-intentioned of course. But her omission to make an assessment of her own is plainly fatal for the following reasons. A person's recognition by the UNHCR as a refugee is of itself a good reason not to order his return. But his non-recognition by the UNHCR as a refugee is not of itself a good reason to order his return. There are circumstances in which recognition as a refugee can be withheld from a person even though he can resist return on the ground that it would put him in peril of being tortured. And the Secretary did not know whether the UNHCR's refusal to recognise Mr Prabakar as a refugee was based on the existence of such circumstances or on something else. She did not give reasons on the issue crucial to her decision, for she had put herself in the position of a decision-maker who was incapable of giving reasons for her decision. This was because she did not know why the issue crucial to her decision had been resolved against the person affected.

70. So extraordinary is such a state of affairs that it has crossed my mind that this deportation order is open to attack not only for procedural unfairness but also for irrationality or even for the lack of a decision by anyone to whom our law entrusts the power to decide on

deportation. But I am content that this deportation order be quashed simply on the ground of procedural unfairness. That suffices for this case.

71. For the reasons which I have given and those developed in greater detail by the Chief Justice, I would dismiss this appeal by the Secretary against the Court of Appeal's decision quashing this deportation order. Although this case involves procedure, it is not to be thought that Mr Prabakar's position lacks substantive merit. If it had been known at the time that Mr Prabakar was a torture victim fleeing from the danger of being tortured again, I doubt that his possession of a forged Canadian passport would have resulted in a prosecution let alone a prison sentence.

72. We have been much assisted by the able arguments of Mr David Pannick QC for the Secretary and Mr Nicholas Blake QC for Mr Prabakar in regard to what is acceptable in future cases. In that regard, there are only two points that I would add in my own words to what the Chief Justice has said. The first is that the vulnerability of persons in situations of this kind must be recognised so that pro-active care be taken to avoid missing anything in their favour. And the second is that the strength of the case for quashing this deportation order should not mask the need for strong procedural safeguards even in cases where the stakes are far less high than they were in this one.

73. I concur in the Chief Justice's proposal as to costs. Mr Prabakar should certainly be granted a certificate for three counsel. And for my own part, I incline to the view that his costs ought to be taxed on an indemnity basis. Although no useful purpose would be served by pressing it to the point of dissent, I consider it right to disclose this

inclination when acknowledging, as I do, the debt which justice owes Mr Prabakar's lawyers.

74. My last word in this case of sad beginnings is for Mr Prabakar himself, and it is to wish him well in his new life in Canada where he has been accepted.

Mr Justice Chan PJ:

75. I agree with the judgment of the Chief Justice.

Mr Justice Ribeiro PJ:

76. I agree with the judgment of the Chief Justice.

The Lord Millett NPJ:

77. I agree with the judgment of the Chief Justice.

Chief Justice Li:

78. The Court unanimously dismisses the appeal with costs, with a certificate for three counsel.

(Andrew Li) Chief Justice	(Kemal Bokhary) Permanent Judge	(Patrick Chan) Permanent Judge

(R.A.V. Ribeiro) Permanent Judge	(Lord Millett) Non-Permanent Judge

Mr David Pannick, QC and Mr William Marshall, SC (instructed by the Department of Justice) for the appellant

Mr Nicholas Blake, QC, Mr Philip Dykes, SC and Mr Hectar Pun (instructed by Messrs Barnes & Daly) for the respondent