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HCMA 70 /2010
HCMA 114/2010
HCMA 244/2010
HCMA 379/2010
HCMA 402/2010
(Heard Together)

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

MAGISTRACY APPEAL NO. 70 OF 2010
(On Appeal From STCC No. 27 of 2010)

BETWEEN

HKSAR — Respondent

and

USMAN BUTT (D2) — 1st Appellant

ALI SULMAN (D5) — 2nd Appellant

MAGISTRACY APPEAL NO. 114 OF 2010
(On Appeal From STCC No. 309 of 2010)

BETWEEN

HKSAR — Respondent

and

SUNIL KOIRALA (D3) — Appellant

MAGISTRACY APPEAL NO. 244 OF 2010
(On Appeal From STCC No. 504 of 2010)

BETWEEN

HKSAR Respondent

and

WASIM ASHRAF Appellant

MAGISTRACY APPEAL NO. 379 OF 2010
(On Appeal From STCC No. 1584 of 2010)

BETWEEN

HKSAR Respondent

and

BALDEV SINGH Appellant

MAGISTRACY APPEAL NO. 402 OF 2010
(On Appeal From STCC No. 663 of 2010)

BETWEEN

HKSAR Respondent

and

TAHIR WASIM Appellant

Before: Hon Cheung JA, McMahon and Lunn JJ in Court

Date of Hearing : 12 October 2010

Date of Judgment: 27 October 2010

J U D G M E N T

Hon Cheung JA (giving the Judgment of the Court) :

Immigration Control

1. Hong Kong has been exercising the power of immigration control both before and after reunification in 1997. Such power is necessary especially in a place like Hong Kong which is a small area but with a large population. Resources devoted to meet the needs of its inhabitants such as housing, education, medical, social benefits and security are limited and have to be planned on a long term basis. Immigration control is also needed to ensure there are employment opportunities for the people. Matters arising from employment such as compulsory employees' insurance and compensation payable from public funds in respect of death and injury arising from employment but not met by insurance coverage are closely related to employment issues.

2. Because of the historical link with the Mainland, Hong Kong has been receiving a large number of immigrants from the Mainland under regulated schemes. At the same time attracted by its affluence and liberal atmosphere, Hong Kong has from time to time attracted waves of illegal immigration to its shores.

Illegal immigration from the Mainland has always been a feature in Hong Kong, then there was the Vietnamese boat people influx in the 1990's and more recently claimants of asylum and torture from developing countries.

So Man King

3. While measures both preventive and remedial to tackle problems arising from the illegal entry are provided by the administration, the Courts have always responded to this issue in a proactive way when the issue is before them. The Courts have adopted deterrent sentences against illegal immigrant taking up employment in Hong Kong. It was perceived that such sentence may effectively deter the entry of illegal immigrants.

4. In *The Queen v. So Man-king and Others* [1989] 1 HKLR 142 this Court *(Cons, CJ (Ag), Hunter and Penlington JJA)* in dealing with a charge brought under section 38(1)(b) of the *Immigration Ordinance* (the '*Ordinance*') (Cap. 115) of a person unlawfully remaining in Hong Kong, adopted a sentence of 15 months' imprisonment after plea. The prosecution policy then was that, among other things, prosecution would only be undertaken against illegal immigrants if they were found working as one of a sizeable group on a construction site, factory, restaurant or farm. The sentence was adopted when it was found that it was more effective to deter illegal immigration than the sentence of six to twelve months' imprisonment which had been applied by the Courts for the previous two years.

The common question

5. In these five appeals, five of the appellants are illegal immigrants while one has overstayed his permission to enter Hong Kong. They came from countries such as Pakistan, India and Nepal. They had lodged claims for asylum or refugee status ('the asylum or refugee claim') under the *Convention Relating to the Status of Refugees* (the '*Refugee Convention*') or made claims that they would be tortured if returned to their original abode ('the torture claim') under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ('the *Torture Convention*'). They were prosecuted under section 38AA(1) of the *Ordinance* which came into operation on 14 November 2009. They pleaded guilty and were sentenced to the following terms of imprisonment :

	Name	Term
(1)	Usman Butt (D2) (HCMA 70/2010)	14 months
(2)	Ali Sulman (D5) (HCMA 70/2010)	14 months
(3)	Sunil Koirala (D3) (HCMA 114/2010)	14 months
(4)	Wasim Ashraf (HCMA 244/2010) 2 charges : Charge 1 : section 38AA(1)(b) : 15 months (3 months consecutive to Charge 3) Charge 3 : section 38(1)(b) : 15 months	18 months

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(5)	Baldev Singh (HCMA 379/2010)	6 months
(6)	Tahir Wasim (HCMA 402/2010)	11 months and 26 days

6. Their appeals against sentence to the Court of First Instance were referred by Wright J (four cases) and Lunn J (one case) to this Court for determination under section 118(1)(d) of the *Magistrates Ordinance* (Cap. 227). There are other appellants whose pending appeals are similar to the ones we are dealing with.

Sentences imposed by Magistrates under section 38AA

7. For the period from 19 November 2009 to 28 August 2010 various Magistrate Courts in Hong Kong had sentenced 157 defendants under section 38AA. In 44 cases a sentence of no more than three months' imprisonment was imposed, 24 cases had sentences imposed of between four and nine months' imprisonment, two cases imposed a sentence of slightly less than 12 months' imprisonment. Of the remaining 87 cases, a sentence of at least 12 months' imprisonment was imposed : the majority was a sentence of 14 to 15 months' imprisonment.

8. The 14 to 15 months' imprisonment adopted by Magistrates was based on the guideline of this Court in *So Man-king*.

The common question

9. The common question in these five appeals is what is the appropriate sentence for offence under section 38AA. Specifically whether the sentence in *So Man-king* should be adopted. In view of the divergence of views of the magistrates it is imperative for this Court to give a guideline on this topic. We acknowledge as appropriate the decisions to refer the appeals to this Court.

Section 38AA

10. Section 38AA provides that

> ' (1) A person-
>
> (a) who, having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director under section 13; or
>
> (b) in respect of whom a removal order or a deportation order is in force,
>
> must not take any employment, whether paid or unpaid, or establish or join in any business.
>
> (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.'

The appellants

HCMA 70/2010

Usman Butt ('D2')

11. Usman Butt is a Pakistani. He entered Hong Kong unlawfully on 29 March 2009 and was arrested for unlawful remaining on 20 May 2009. He made a torture claim. He was released on recognizance on 31 May 2009. He was arrested for

taking up employment on 29 December 2009. He pleaded guilty to a charge under section 38AA(1)(a). The Magistrate adopted 15 months' imprisonment and reduced it to 14 months' imprisonment after taking into account the 11 days in administrative detention prior to his release on recognizance.

Ali Sulman ('D5')

12. Ali Sulman arrived in Hong Kong unlawfully on 13 August 2009. He was arrested for unlawful remaining on 13 August 2009. He made a torture claim and was released on recognizance on 21 August 2009. He was arrested for taking up employment on 29 December 2009. He pleaded guilty to a charge under section 38AA(1)(a). The Magistrate adopted 15 months' imprisonment and reduced it to 14 months' imprisonment after taking into account his 9 days' administrative detention.

HCMA 114/2010 : Sunil Koirala ('D3')

13. The appellant is a Nepali national. He entered Hong Kong illegally on 13 November 2007. He was arrested for unlawful remaining on 13 November 2007. He made a torture claim in November 2007. He was released on recognizance on 5 December 2007. He withdrew his torture claim in November 2009. He was arrested for taking up employment on 12 January 2010. He pleaded guilty to a charge under section 38AA(1)(a). The Magistrate adopted 15 months' imprisonment and reduced it to 14 months after taking into account his 19 days in detention prior to being released on recognizance.

HCMA 244/2010 : Wasim Ashraf

14. The appellant is a Pakistani. He entered Hong Kong illegally on 2 May 2006. He made a refugee claim. His claim was dismissed on 26 May 2006. He was found taking up employment and arrested by the Police for unlawful remaining on 25 April 2007 (which became Charge 3 under section 38(1)(b)). A removal order was issued and served on him on 2 and 4 June 2007 respectively. He made a torture claim on 5 June 2007. He was released on recognizance on 18 August 2007. The torture claim, however, was withdrawn on 29 December 2009. He was arrested for taking up employment on 21 January 2010 (which became Charge 1 under section 38AA(1)(b). He pleaded guilty to both charges. The Magistrate adopted a sentence of 15 months' imprisonment in respect of each charge. He ordered three months of Charge 1 to be served consecutively to the 15 months' imprisonment of Charge 3 and imposed a total sentence of 18 months' imprisonment. He was detained for a period of 121 days. The Magistrate did not give him any credit for the period of time when he was in detention.

HCMA 379/2010 : Baldev Singh

15. The appellant is an Indian national. He entered Hong Kong lawfully as a visitor on 25 March 2004 and was permitted to remain until 24 June 2005. He made a claim for asylum which was subsequently dismissed. He was arrested for overstaying on

21 October 2006. A removal order was issued and served on him on 22 and 28 November 2006 respectively. He made a torture claim on 24 January 2007. He was released on recognizance on 27 January 2007 pending determination of his torture claim. He was arrested for taking up employment on 25 March 2010 and was charged under section 38AA(1)(b). He pleaded guilty. The Magistrate used a starting point of nine months' imprisonment and reduced it to six months because of the guilty plea. He was in detention for three months and six days. No credit was given for this period.

HCMA 402/2010 : Tahir Wasim

16. The appellant is a Pakistani national. He entered Hong Kong unlawfully on 4 July 2006. He made a claim for asylum. He was arrested by the Police for unlawful remaining on 14 August 2006. He made a torture claim on 16 August 2006. He was released on recognizance on 18 October 2006. His claim for asylum was refused on 6 March 2007. He was arrested for taking up employment on 31 October 2007. He was convicted of section 38(1)(b) and was sentenced to 13 months' imprisonment on 22 November 2007. He was released from prison on 19 July 2008. A removal order was issued and served on him on 21 and 23 July 2008 respectively. He was released on recognizance pending determination of torture claim on 25 July 2008. He was arrested for taking up employment on 29 January 2010. He was charged with a section 38AA(1)(b) offence. He pleaded guilty. The Magistrate adopted 14 months' imprisonment and sentenced him to 11 months and 26 days' imprisonment after taking into account his 65 days in detention prior to release on recognizance.

History of section 38AA

17. It is necessary for the purpose of this appeal to refer to the background of the enactment history of section 38AA.

18. The Court of Final Appeal in *Secretary for Security v. Sakthevel Prabakar* (2004) 7 HKCFAR 187 ruled that the Hong Kong Government was not to deport torture claimants under the *Torture Convention* which applies to Hong Kong until a proper assessment of their claims had been undertaken by the government under the *Torture Convention*. The practical effect of the decision for torture claimants (and by indirect application, asylum or refugee claimants under the *Refugees Convention*) is that they are able to remain in Hong Kong during the time when their claims are processed. In respect of asylum or refugee claims the process is undertaken by the United Nation High Commission for Refugees ('UNHCR') through its Hong Kong office under the *Refugee Convention* which does not apply to Hong Kong.

19. To take into account the decision of the Court of Final Appeal the Department of Justice issued a policy in respect of prosecutions against asylum, refugee and torture claimants who came illegally to Hong Kong. The policy was contained in a circular entitled 'Legal Circular No. 4 of 2007 Prosecution Policy towards refugees, asylum seekers and torture claimants' ('the Prosecution Policy').

20. It was observed by this Court (Ma CJHC, Yeung JA and Andrew Cheung J) in *Iqbal Shahid v. Secretary for Justice* [2010] 4 HKLRD 12, the effect of the Prosecution Policy is that a person

having landed in Hong Kong unlawfully and remained here seeking asylum, claiming refugee status or claiming to be a torture claimant would not normally be prosecuted for an offence such as that contained in section 38(1)(a) (entering Hong Kong illegally) or section 38(1)(b) (entering and remaining in Hong Kong illegally); or, if he is prosecuted, the prosecution would seek an adjournment of the proceedings. This would be the position at least until the person's claims were fully processed, including any appeal. This immunity or temporary immunity would not, however, apply to the prosecution for any other offence, whether an immigration offence or otherwise, which was not connected with that person being in Hong Kong for the purpose of his claim (for example, if the applicant committed an offence or was engaged in unlawful employment).

21. In the first instance decision of the case (*Iqbal Shahid and others v. Secretary for Justice* [2009] 5 HKC 393) a number of refugee claimants and torture claimants who were released on recognizance by the Director of Immigration ('the Director') issued under Section 36 of the *Ordinance* pending determination of their claims were found working at places of employment. They were prosecuted for illegally remaining in Hong Kong. The applicants applied for judicial review against the Magistrate's decision that, among other things, it was not possible for the applicants to successfully argue that the recognizance amounted to an authority of the Director to remain in Hong Kong or provide them with a defence to the charge. Wright J at first instance held that the recognizance constituted an authority from the Director for the applicants to remain in Hong Kong, and thus provided them with a defence to a charge under section 38(1)(b) of the *Ordinance*

as if it were in effect as at the date of the commission of the alleged offence. The practical effect of the decision is that the illegal immigrants were able to take up employment after being given the recognizance.

22. Following that decision there was an upsurge of 'non-ethnic Chinese illegal immigrants' ('NECIIs') entering Hong Kong together with an increase in the number of torture claims. The increased number of NECIIs went from the monthly average of 37 between January and February 2009, to 136 from March to May 2009 (an increase of 260%). It further rose to 152 from June to August 2009 (a 310% increase from the January – February 2009 average of 37). This was believed to be encouraged by 'snake-heads' who spread messages that NECIIs could take up employment in Hong Kong once they made torture claims and were granted a recognizance.

23. The Secretary for Justice lodged an appeal against Wright J's decision and at the same time the Administration took immediate measures to amend the *Ordinance* by introducing the new section 38AA which was eventually passed by the Legislative Council and came into operation on 14 November 2009.

24. This Court on 31 May 2010 overruled Wright J's decision and held that the recognizance did not amount to an authority by the Director to the claimants to remain in Hong Kong for the purpose of section 38(1)(b).

The appellants' case

25. Mr. Acton-Bond, counsel for the appellants, argued that *So Man-king* was decided in 1989 against a very different background of illegal immigrants arriving from the Mainland. Since then there had been a marked decrease in people prosecuted as illegal immigrants but a marked increase in those coming to Hong Kong legally but taking employment in breach of their conditions of stay. Over the 21 years since *So Man-king* the nature of employment in Hong Kong has substantially changed. Many manual and unskilled jobs have moved to the Mainland. The type of job that the average illegal immigrants will take is found to be at the lower end of the skill market. It is not taking away employment that the vast majority of Hong Kong workers want to engage in. For example the appellants in HCMA 70/2010 were working in a recycling depot; the appellant in HCMA 114/2010 was a restaurant waiter; the appellant in HCMA 244/2010 was employed in removing electrical appliances in Shamshuipo; the appellant in HCMA 379/2010 was an odd-job worker in premises that were being renovated and the appellant in HCMA 402/2010 was working on the assembly of a stall in Tung Choi Street, Mongkok.

26. Mr. Acton-Bond further submitted that the appellants are liable, after serving their section 38AA sentence which relates to taking up employment, to be prosecuted under section 38(1) for remaining in Hong Kong illegally if their refugee or torture claims

are eventually rejected. In the circumstances they would be subject to a further penalty. He submitted that the appropriate sentence to be adopted in section 38AA situations should be the two to three months' imprisonment as imposed in breach of condition of stay cases.

Our view

27. In our view a sentence of 15 months' imprisonment is required to be applied in a section 38AA offence both in respect of (1)(a) and (1)(b) for the following reasons :

(1) *So Man King* has proven to be effective;

(2) The present situation justifies the same approach;

(3) There should be consistency between sentences under section 38(1) and section 38AA offences;

(4) Comparison with sentences imposed for breach of conditions of stay is not appropriate;

(5) The possibility of further prosecution is not a ground for departing from *So Man King*.

(6) Humanitarian considerations have been addressed.

28. We will elaborate on each of the reasons.

(1) *So Man King* has proven to be effective

29. *So Man King* was decided in 1988. It was expressly stated to be a deterrent sentence and was effective to deter illegal immigration. It has consistently been applied by the Courts in subsequent years against illegal immigrants. In *R v. Wu Chun* (HCMA 693/1994) an illegal immigrant from the Mainland pleaded guilty to two charges : (1) possession of a forged Hong Kong Identity Card and (2) remaining in Hong Kong without the authority of the Director of Immigration contrary to section 38(1)(b) of the *Ordinance*. On charge (1) she was sentenced to 18 months' imprisonment and on charge (2) 15 months to be served concurrently making a total of 18 months' imprisonment.

30. Litton JA (as he then was) sitting as an additional High Court held that,

> ' The policy behind the sentence is deterrence. The evidence adduced before the court in *So Man-king* suggested that whilst the more lenient sentences ranging from about six to twelve months' imprisonment had little impact, the cranking up of the sentence to 15 months' imprisonment had the desired effect; it resulted in the figures of illegal immigrants detected in June and July 1988 dropping dramatically. Plainly, a paramount policy consideration behind the guideline is the deterrent effect of the 15 months' imprisonment.'

31. *So Man King* was also applied to the wave of Vietnamese illegal immigrants who came in Hong Kong in the 1990's. In *The Queen v. Nguyen Thi Tham* (HCMA 747/1996), a Vietnamese illegal immigrant pleaded guilty to three charges, namely,

(1) possession of a forged Vietnamese Refugee Card,

(2) breach of a deportation order, and

(3) remaining in Hong Kong without the authority of the Director.

32. While recognizing that the magnitude of the problem was less with Vietnamese illegal immigrants than the Mainland arrivals in the 1980's, Gall J nonetheless adopted the sentence in *So Man King* of 15 months' imprisonment in respect of the illegal remaining charge. The same view was expressed in *R v. Nguyen Van Doan & Others* [1997] 3 HKC 594 and *HKSAR v. Nguyen Bui Tan* (HCMA 159/2001).

33. After reunification, entry to Hong Kong by Mainlanders is largely regulated by the two-way permit system which restricts the visitor from taking up employment in Hong Kong. However, again that there was a serious problem of visitors taking up employment unlawfully while they were in Hong Kong by means of forged identity cards. In *HKSAR v. Li Chang Li* [2005] 1 HKLRD 864, this Court (Yeung JA, Tang JA (as he then was) and Tong J) held that a sentence of 15 months' imprisonment after plea should be imposed for offenders who has actually produced or used a forged identity card or identity card belonging to another in order to conceal his identity, work illegally or unlawfully further his stay in Hong Kong.

34. This Court observed that

> ' In order to crack down on illegal workers more effectively, to preserve employment opportunities for local workers and to prevent the wages of workers in the lower class from being brought down excessively, the courts are to take a more severe approach in dealing with the offence of possessing a forged identity card or identity card belonging to another. Were this not done, unemployment and polarization between the rich and the poor would remain, the number of families in

> abject poverty would increase, and the ensuing social problems would become more and more serious.'

35. The sentence of 15 months' imprisonment was clearly a recognition of the *So Man King* approach.

(2) <u>The present situation justifies the same approach</u>

36. As pointed out earlier, in the past the problem of illegal immigration is connected with entry from the Mainland and Vietnam because of their physical proximity to Hong Kong. But as this appeal shows there are now illegal arrivals from other countries as well. With the Mainland providing visa free access to developing countries, illegal immigrants from these countries are able to come to Hong Kong using the Mainland as a springboard. On top of that, with ease of international travel, people from these developing countries have been able to come to Hong Kong directly and overstayed their permitted entry. The affluence of Hong Kong must be one of the factors which attracted the new wave of illegal immigrants. According to statistics provided to this Court, there were 7,008 illegal immigrants intercepted over the two year period from September 2008 to August 2010.

<u>Particulars</u>

Mainland Chinese	4337
Vietnamese	881
Non-Ethnic Chinese	1790
	7008

37. In respect of torture and asylum claims made by the new category of arrivals, between January 2005 and August 2010, there were 9,032 torture claimants.

Particulars

Year	Persons
2005	211
2006	528
2007	1584
2008	2198
2009	3286
2010 (up to August)	1225
	9032

38. Statistics for asylum or refugee claimants are not available because the claims are separately processed by the UNHCR.

39. The following table showed that the number of torture claimants is sizeable. It confirmed that there was a marked increase in the number of torture claims after the Court of First Instance's decision in *Iqbal Shahid* in March 2009.

Statistics on the number of torture claims received

Month	Case	Person
Jan 2005	3	10
Feb 2005	7	7
Mar 2005	10	12
Apr 2005	6	12
May 2005	5	8
Jun 2005	15	21
Jul 2005	17	17
Aug 2005	8	8

Month	Case	Person
Jan 2008	235	235
Feb 2008	222	222
Mar 2008	155	155
Apr 2008	208	208
May 2008	197	197
Jun 2008	171	171
Jul 2008	173	173
Aug 2008	182	182

Sep 2005	26	27
Oct 2005	25	25
Nov 2005	41	41
Dec 2005	23	23
Jan 2006	26	27
Feb 2006	17	17
Mar 2006	20	20
Apr 2006	34	34
May 2006	33	35
Jun 2006	37	42
Jul 2006	41	42
Aug 2006	63	64
Sep 2006	50	50
Oct 2006	46	46
Nov 2006	68	72
Dec 2006	79	79
Jan 2007	83	83
Feb 2007	97	97
Mar 2007	98	99
Apr 2007	87	87
May 2007	109	109
Jun 2007	94	94
Jul 2007	98	98
Aug 2007	109	109
Sep 2007	285	285
Oct 2007	167	167
Nov 2007	170	170
Dec 2007	186	186

Sep 2008	165	165
Oct 2008	174	174
Nov 2008	189	189
Dec 2008	127	127
Jan 2009	202	202
Feb 2009	189	189
Mar 2009	211	211
Apr 2009	302	302
May 2009	308	308
Jun 2009	322	322
Jul 2009	306	306
Aug 2009	292	292
Sep 2009	320	320
Oct 2009	309	309
Nov 2009	297	297
Dec 2009	228	228
Jan 2010	174	174
Feb 2010	137	137
Mar 2010	145	145
Apr 2010	172	172
May 2010	157	157
Jun 2010	163	163
Jul 2010	131	131
Aug 2010	146	146
Total	**8992**	**9032**

40. While there was a significant withdrawal of torture claims immediately after section 38AA came into operation in November 2009, the withdrawal has since slowed down.

Statistics on the number of torture claims withdrawn

Period	Withdrawal cases
14-08-2009 to 13-09-2009	70
14-09-2009 to 13-10-2009	83
14-10-2009 to 13-11-2009	77

14-11-2009 to 13-12-2009	175
14-12-2009 to 13-01-2010	340
14-01-2010 to 13-02-2010	208
14-02-2010 to 13-03-2010	83
14-03-2010 to 13-04-2010	77
14-04-2010 to 13-05-2010	74
14-05-2010 to 13-06-2010	79
14-06-2010 to 13-07-2010	76
14-07-2010 to 13-08-2010	78
14-08-2010 to 13-08-2010	39

41. It is revealed that illegal immigrants and many overstayers only lodged the torture claim after they were arrested for taking up employment. Between 2006 and 2009, there were 2,902 illegal immigrants and 3,804 overstayers who lodged torture claims. Among them 2,839 illegal immigrants and 3,292 overstayers lodged the claims **after** they were arrested. These high figures raise a serious question on the genuine nature of many of the torture claims. The Court of Final Appeal in *Secretary for Security v. Sakthevel Prabakar* (2004) 7 HKCFAR had authoritatively stated that a high standard of fairness is required in determining a torture claim. A bogus torture claim not only causes strain on the resources and clogs up the process of determination, it also causes delay to the assessment of genuine torture claimants. Further as pointed out by this Court (Tang VP, A Cheung and Barma JJ) in *A & Others v. Director of Immigration* [2008] 4 HKC 151 that, by virtue of Article 5 of the *Hong Kong Bill of Rights*, the Director must justify the detention of those claimants who have been served with removal or deportation

orders and who have lodged torture or refugee claims. The practical effect is that the Director is required to grant recognizance to these applicants. To allow these claimants to undertake employment while their claims are being processed could potentially attract more economic migrants to Hong Kong. We would, however, like to observe that whilst the asylum or torture claims are still being assessed, it is wholly inappropriate for a Magistrate to express the view that, as one did in the present appeals, the applicants are economic migrants and not genuine asylum or torture claimants.

42. The deterrent sentence of 15 months' imprisonment ensures that illegal immigration will become less attractive with the risk of a long jail term. If the deterrent sentence imposed in *So Man-king* which was to address the issue of illegal immigration has been proved to be effective then it should be applied to **all** illegal immigrants irrespective of their ethnic origin. The source of illegal immigration may change from time to time but if a deterrent sentence is targeted at the mischief of illegal immigration, then arguments that the new category of illegal arrivals may not be as numerous as the other racial groups would necessarily fall by the side. In any event, the statistics showed that the size of the new arrivals is by no means small.

43. We are not convinced by the argument that the local workforce are not willing to take up the jobs now undertaken by the new arrivals. Further as pointed out earlier, there are related issues connected with unlawful employment such as employees' compensation. In any event, as the focus is against illegal immigration and not the nature of the employment, this justifies

applying the same level of deterrent sentence as the majority of the Magistrates have done in the first place.

44. The measure taken by the government to tackle illegal immigration is not confined to prosecuting illegal immigrants who took up employment but also against employers who hired them. The previous guideline for the sentence against employers was also 15 months' imprisonment. However, as shown in *Secretary for Justice v. Ho Mei Wa & Another* [2004] 3 HKLRD 270, this guideline was not observed by the Magistrates. The offence imposed on the employers is in the nature of a strict liability offence. No doubt there are serious difficulties faced by the employers who employed causal workers in determining whether the identification documents produced by the job seekers were genuine or not. In view of the problem, this Court (Ma CJHC (as he then was) Stuart-Moore VP, Stock JA) changed the guideline to a sentence of three months' imprisonment. With this background in mind, it is not appropriate to apply the same sentence of three months' imprisonment to the present cases. The evidence actually showed that the majority of the Magistrates are applying 15 months' imprisonment in a section 38AA offence.

(3) <u>Consistency</u>

45. It should be noted that, aside from the levels of fine, the maximum sentence imposed by section 38AA of three years' imprisonment is the same as section 38(1) which creates the offence of landing and remaining in Hong Kong without authority. Bearing in mind the legislative history of section 38AA, a sentence

of 15 months' imprisonment based on a section 38(1) offence must, as a matter of consistency, be applied to section 38AA as well.

46. Both sections are targeted against illegal immigration. Section 38AA(1) specifically deals with illegal immigrants taking up employment (section 38AA(1)(a)) or those, in respect of whom a removal order or a deportation order is in force, taking up employment (section 38AA(1)(b)). As shown in the paper presented by the Security Bureau to the Bills Committee of the Legislature Council during the legislative process for section 38AA, the government had been prosecuting illegal immigrants taking employment for 'unlawful remaining' under section 38(1)(b). One can understand that it is not easy to identify an illegal immigrant unless he is caught working. Hence, in view of the common mischief that both sections target, the same level of sentence should be adopted.

(4) <u>Inappropriate to adopt sentences for breach of condition of stay cases</u>

47. It is important to draw a distinction between controlled immigration and illegal immigration. In the former the Hong Kong government is able to control the entry either by way of prior approval of visa applications or at border points when the person is being assessed by an immigration officer. This will ensure that only those who are eligible to enter Hong Kong are permitted to enter. By contrast the government is precluded from exercising any scrutiny in an illegal entry. Hence, it is not appropriate to adopt in respect of illegal immigrants taking up employment the

same level of sentence as those who had breached a condition of stay by taking up employment in Hong Kong.

48. In many of the breach of condition of stay cases, the defendant would usually face at least a more serious charge as well. The Courts did not specifically discuss the rationale of the two to three months' imprisonment imposed on the breach of condition charge because that sentence was usually merged with the heavier sentence imposed in respect of the more serious charge. In any event, this Court (Stuart-Moore VP, Gall and Lugar-Mawson JJ) has in *HKSAR v. Zhuang Xiaoluo* (CACC 265/2004) held that taking up of illegal employment in breach of condition of stay was a serious aggravating feature and the starting point should be a sentence of nine months' imprisonment. Mr. Wesley Wong SADPP, who appeared together with Ms Samantha Chiu PP for the respondent, informed the Court that *Zhuang Xiaoluo* is not cited in *Cross and Cheung on Sentencing in Hong Kong*. Similarly, we note that it is not cited in *Archbold Hong Kong, 2010*. That probably accounts for it not being drawn to the attention of the Courts.

49. We are satisfied that in *HKSAR v. Palash Bakchi & Others* (TMCC 1353/2010), in which a sentence of two months' imprisonment was imposed for a section 38AA(1)(a) charge, the magistrate fell into error in both his reasoning and the sentence imposed.

50. We have at the outset stated that a sentence of 15 months' imprisonment should also apply to the section 38AA(1)(b) offence. A person subject to a removal order or deportation

order may well have had permission to enter Hong Kong in the first case. However it is still not appropriate to adopt the lesser sentence appropriate to breach of condition of stay cases because we consider taking up employment when a removal order or deportation order is in force, is a serious aggravating feature and hence the same sentence of 15 months' imprisonment should be adopted. In any event, as the Legislative Council has prescribed the same maximum sentence for both (a) and (b), we consider that it is only appropriate to apply the same level of sentence.

(5) <u>The possibility of further prosecution is not a ground for departing from *So Man King*</u>

51. We are of the view that the possibility of the applicants, after having had their torture or refugees claims rejected, facing a prosecution under section 38(1) for illegal remaining is not a ground for adopting a lower sentence for the section 38AA offence. In the first place, it is not even certain if the government will take such a step when both sections in effect deal with illegal immigration. In any event the Court which deals with the future prosecution, if it happens, may well wish to consider that it is appropriate to give a substantial credit for the section 38AA sentence which had been served.

(6) <u>Humanitarian considerations have been addressed</u>

52. A genuine torture or refugee claimant deserves sympathy and should not be left in a destitute state during the determination of his status. However, his basic needs such as accommodation, food, clothing and medical care are provided by

the Government. As revealed in the paper of the Security Bureau :

> '12. On humanitarian grounds, the Administration, in collaboration with non-governmental organisations and on a case-by-case basis, offers in-kind assistance to torture claimants and asylum seekers who cannot meet their basic needs while their claims are being processed. The assistance offered includes temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, counselling and medical service. As at end of August 2009, 4 234 persons were receiving such assistance. In 2008/2009, the direct expenditure of the Government in this area amounted to $56 million; the provision for the financial year 2009/2010 would be $159 million. The provision of the assistance is arranged by the International Social Service Hong Kong Branch under a service project commissioned by the Social Welfare Department. As requested by Members, details on the provision of food are set out at Annex C. Some Members also asked about the role of the UNHCR Sub-Office Hong Kong in the provision of assistance. The Office has a mandate to provide assistance and arrange for resettlement in recipient countries for refugees. The assistance is provided through non-governmental organisations.
>
> 13. We believe that the basic needs of the above groups of persons are catered for by the humanitarian assistance. There is no need for them to take employment to earn a living. Considering the unique circumstances of Hong Kong and to prevent an abuse of our immigration regime, we have no plan to change the present policy regarding torture claimants and refugees/asylum seekers.'

53. The provision of that assistance clearly removes the need of a genuine claimant to seek employment pending the determination of his claim.

<u>Adjustment of the sentence of 15 months' imprisonment</u>

54. Mr. Wong has categorized seven situations and invited us to state how each situation may cause an adjustment of the 15 months' imprisonment. For example, he submitted that the most

serious situation is an illegal immigrant who, despite the enforcement of a deportation order, has come back to Hong Kong and taken up employment.

55. We would refrain at this stage from giving detailed guidelines on how the sentence may be adjusted. We would adopt what has been said in *So Man King* and only add that repeated offences is clearly an aggravating factor.

> ' The guideline already allows for the almost inevitable plea of guilty, but voluntary surrender to the authorities should warrant a substantial discount, and strong humanitarian considerations should always be honoured, even to the extent sometimes of suspending whatever prison sentence is otherwise thought appropriate. On the other hand, the Court should take into account, by upward adjustment, any previous unlawful entry, whether resulting in prosecution or not, and other circumstances which may aggravate the offence, such as the actual use of a forged or other person's identity card to obtain some particular benefit.'

Individual appeals

(1) *Usman Butt* and *Ali Sulman* (HCMA 70/2010)

56. The sentences of 14 months' imprisonment imposed on Usman Butt and Ali Sulman in HCMA 70/2010 are correct and their appeals are dismissed.

(2) *Sunil Koirala* (HCMA 114/2010)

57. Likewise the appeal of Sunil Koirala in HCMA 114/2010 is dismissed as his sentence of 14 months' imprisonment is correct.

(3) *Wasim Ashraf*

(HCMA 244/2010)

58. Both Charge 1 and Charge 3 should receive a sentence of 15 months' imprisonment respectively. As these two offences occurred over different periods of time, the sentences should not be concurrent. We agree with the Magistrates' approach of ordering the sentence of three months' imprisonment of Charge 1 to be consecutive to the sentence of Charge 3 resulting in a total of 18 months' imprisonment.

59. The applicant was in custody for 116 days from 25 April 2007 to 18 August 2007 in respect of Charge 3 and five days from 21 January 2010 to 25 January 2010 in respect of Charge 1. Mr. Wong accepted that this period of 121 days should be given credit under section 67A(1A) of the *Criminal Procedure Ordinance* (Cap 221). It should be noted that the applicant had lodged a civil claim against the government for damages in respect of his detention from 25 April 2007 to 18 August 2007. While the applicant said he obtained damages of $57,000. Mr. Wong confirmed that a settlement of $60,000 was reached between the parties on the claim on a non-admission of liability basis on 13 July 2010.

60. Accordingly, the applicant's appeal is also dismissed. We direct that 121 days of his detention should be taken into

account by the Commissioner for Correctional Services in calculating the earliest date of release of the applicant on his sentence of 18 months' imprisonment.

(4) *Baldev Singh* (HCMA 379/2010)

61. The sentence of six months' imprisonment, from a starting point of nine months after the discount for the plea, is by itself incorrect in view of our guideline. However, he had been detained for three months and six days after he was arrested for overstaying. Eventually he was charged with the section 38AA(1)(b) offence and not a section 41(1) offence of overstaying. That period of detention will not be given credit under the present sentence pursuant to section 67A of the *Criminal Procedure Ordinance*. In the circumstances we will not disturb the sentence of six months' imprisonment. His appeal is dismissed.

(5) *Tahir Wasim* (HCMA 402/2010)

62. The appeal of Tahir Wasim in HCMA 402/2010 is dismissed. Although the sentence of 14 months' imprisonment (adjusted to 11 months and 26 days) is slightly below the guideline, we do not consider it appropriate to disturb it.

(Peter Cheung) Justice of Appeal	(M.A. McMahon) Judge of the Court of First Instance, High Court	(Michael Lunn) Judge of the Court of First Instance, High Court

Mr. Wesley W. C. Wong, SADPP and Ms Samantha Chiu, PP of Department of Justice, for the Respondent

Mr. Jonathan Acton-Bond, instructed by Messrs Krishnan & Tsang for the Appellants (HCMA 70/1010, HCMA 114/2010, HCMA 244/2010, HCMA 379/2010 and HCMA 402/2010)