FACV No 18, 19 & 20 of 2011

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

FINAL APPEAL NOS 18, 19 & 20 OF 2011 (CIVIL)
(ON APPEAL FROM CACV NOS 132, 134 & 136 OF 2008)

Between :

C	Appellant in FACV 18/2011
KMF	Appellant in FACV 19/2011
BF	Appellant in FACV 20/2011

– and –

DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

– and –

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	Intervener

Court : Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ and Sir Anthony Mason NPJ

Dates of Hearing : 5 – 7 March 2013

Date of Judgment : 25 March 2013

J U D G M E N T

Mr Justice Chan PJ:

1. I would, for the reasons given in the judgment of Mr Justice Tang PJ and the further reasons as explained in the judgment of Sir Anthony Mason NPJ, allow these appeals and make the order and directions as proposed by Mr Justice Tang in paragraphs 60 and 62.

Mr Justice Ribeiro PJ:

2. I agree with the judgment of Sir Anthony Mason NPJ and, subject to that judgment, am also in broad agreement with the judgment of Mr Justice Tang PJ.

Mr Justice Tang PJ:

Introduction

3. 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") impose important obligations on contracting state parties. Such obligations include an obligation to "facilitate the assimilation and naturalization of refugees" (Art 34)[1]. A refugee is a 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; or who …" (Art 1A(2))[2].

4. Both the UK and the PRC are contracting states to the Convention. However, as is permissible under Art 40, neither the UK (prior to 1997) nor the PRC has applied the Convention to Hong Kong Special Administrative Region ("HKSAR").

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[1] References are to articles in the Convention unless otherwise stated.
[2] The word refugee is used in this sense throughout the judgment.

5. It is the firm policy of the HKSAR not to grant asylum to refugees. That policy is not challenged. It is not contended that HKSAR Government ("HKSARG") is obliged to "facilitate the assimilation and naturalization of refugees".

6. These proceedings are concerned with the principle of non refoulement expressed in Art 33 as follows:

> "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."[3]

7. The appellants claimed protection as refugees upon or shortly after their respective arrival in HK. They made their claims[4] to the UNHCR which processed them in accordance with the procedural standards for Refugee Status Determination ("RSD") under UNHCR's mandate. The critical decision for the Director in such cases is whether to order the removal of such claimants and if so, to which country they should be removed. The Director's practice is that pending RSD by UNHCR, a refugee claimant in Hong Kong, would be permitted to remain and that if the claim succeeds, the refugee would not be repatriated pending resettlement.

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[3] The prohibition against refoulement applies to a person who has the requisite fear of persecution who has entered a receiving state. *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2AC 1. However, under Art 1F and Art 33(2), a person is not entitled to the protection of the Convention if, for example, that person has committed a crime against humanity or is a person in respect of whom there are reasonable grounds for regarding as a danger to the security of the receiving country. A refugee may be removed to a safe third country. *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514.

[4] It is the Director's case that persons who claim protection as refugees would be told that they should apply to the UNHCR.

Background[5]

8. C, the appellant in FACV 18 of 2011 is a national of the Democratic Republic of Congo (Zaire). His claim for refugee status was rejected by UNHCR on 19 March 2004 and his appeal dismissed by UNHCR by letter dated 24 March 2004. The letter stated, inter alia, that he was excluded by virtue of Article 1(F)(a). On 24 March 2004, a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") claim was lodged on his behalf. The CAT claim has not been resolved.

9. The home country of KMF, the appellant in FACV 19/2011, is the Republic of Congo ("Congo-Brazzaville"). He made a refugee claim to the UNHCR on 17 November 2004. His appeal was dismissed in July 2006. It was stated in the Form 86A filed on 23 April 2007, he had not "as yet ….made" a CAT claim.

10. BF (FACV 20/2011) is a citizen of Congo-Brazzaville. He arrived in Hong Kong on 10 November 2003 and made a refugee claim with UNHCR on 11 November 2003. His claim and appeal were rejected in early 2006. He has made a CAT claim which is still outstanding.

Two grounds of appeal

11. The appellants accept that as the Convention have not been extended to the HKSAR, Art 33 has no direct application. However, they contended, with the support of the intervener, the UNHCR[6], that the principle of non-refoulement ("PNR") has become a rule of customary

[5] Greater details can be founded in the judgment of Hartmann J (as he then was) at first instance.

[6] The UNHCR was given leave to intervene, and was represented by Mr Gerard McCoy SC, and Timothy Parker, both of whom appeared on a pro bono basis.

international law ("CIL") as well as a peremptory norm, and as such, has become part of the common law of HKSAR. They also contended, again with UNHCR's support, that to give effect to such CIL, HKSARG should make its own RSD, and the Director must not return any refugee claimant without appropriate enquiry into their PNR claims. This was the first of the appellants' two grounds.

12. Although the Court of Appeal only granted leave to appeal on issues covered by the first ground, Mr Michael Fordham QC, for the appellants, relied on a second ground, namely that, in any event, the Director's decision to return a refugee claimant is subject to judicial review and must satisfy the high standards of fairness required given the gravity and importance of the decision.[7]

The Second Ground

13. I will deal with Mr Fordham's second ground first.

14. If a person is recognized as a refugee by the UNHCR, Hartmann J said:

> "10. … it is the inevitable practice of the Director not to repatriate that person but to afford him temporary refuge until the UNHCR - *not* the Hong Kong Government - is able to settle that person elsewhere in the world. I have described this practice of the Director as 'inevitable' because, during the course of the hearing, it was never suggested that the Director had in fact returned a recognised refugee to a country where there was a real risk he would be persecuted."[8]

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[7] Mr Benjamin Yu SC for the Director correctly raised no procedural objection to this submission, which was fully argued before us. I note that in *Bugdaycay*, the sole successful appellant, Musisi, succeeded on a ground which was raised for the first time in the House of Lords. (P.526H).

[8] As noted in para 7 above, it was also the Director's practice not to return refugee claimant pending determination by the UNHCR.

Immigration Control

15. This practice has to be considered in the context of immigration control in Hong Kong.

16. Art 154 of the Basic Law ("BL 154") provides:

> "The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions."

17. Immigration controls are administered by the Director[9] under powers conferred in the Immigration Ordinance Cap 115 (the Ordinance). Under the Ordinance the Director has wide discretionary powers. He may refuse permission to land. He may give permission to land subject to a limit of stay and impose conditions.[10] Persons refused permission to land may be removed.[11] The Director is also enabled by s13 to authorize a person who landed in Hong Kong illegally (illegal immigrants) to remain in Hong Kong, subject to such conditions of stay as he thinks fit.

The Rule of Law

18. The Ordinance is silent on how the Director's wide powers should be exercised. Mr Yu accepted that the exercise must be rational, such that, for example, the Director may not decide on a toss of a coin. He also accepted that the Director must "administer the scheme of immigration control embodied in the Ordinance fairly and properly."[12]

19. Mr Yu's submissions are consistent with the authorities. For example, Wade and Forsyth, Administrative Law, 10th ed, states:

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[9] And his duly authorized officers.
[10] eg s11.
[11] eg under s18 & s19.
[12] Per Litton JA (as he then was) in *R v Director of Immigration, ex p Chan Heung-mui and Others* (1993) 3 HKPLR 533 at 545.

> "What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should control its exercise" (p 286)
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> "… the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn…It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere."[13] (pp 296 & 297)

20. An important expression of these principles can be found in Lord Hoffmann's judgment in *A(Alconbury Ltd) v Environment Secretary* (HLCE) [2003] 2 AC 295 at 326 that:

> "73. There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individual, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals… The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament."

21. Lord Hoffmann's observations are not limited to "decisions affecting the *rights* of individuals" (Emphasis added). In the landmark decision of *ex parte Doody* 1994 1AC 531 at 560, Lord Mustill said with the concurrence of all their lordships, that "Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances."

22. It is beyond doubt, for example, that the Director cannot exercise his power on, for example, racial, colour or gender grounds.[14] The rule of law would not permit it. The legislature would not be taken to have

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[13] A similar and longer passage in the 5th edition was cited with approval in *R v Tower Hamlets London Borough Council Ex parte Chetnik Developments Ltd* [1988] 1 AC 858 at 872, by Lord Bridge of Harwich in a judgment which had the concurrence of all their lordships.

[14] This is so, even in the absence of any constitutional or human rights consideration. Such grounds would be as irrational as the red-haired teacher of *Wednesbury* fame. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66 at 91 gave the example of the red-haired teacher, dismissed because she had red hair.

ever intended it. Also, the law requires, and the legislature must have intended, that the Director would take into consideration relevant matters, and ignore irrelevant matters. This is how Lord Greene MR described this requirement:

> "For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."[15]

23. The Director's case stated clearly that:

> "66. For the avoidance of doubt, it should be stated that even though it is the HKSARG's position that there is no duty on its part to conduct RSD independently, the Director does independently consider the exercise of his power of removal in each case on its own merits.
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> 67. It is therefore not accepted that if no independent RSD is conducted by the HKSARG, there is no practical and effective protection against refugee non-refoulement."

24. Since it is rightly accepted, the Director would "independently consider the exercise of his power of removal in each case on its own merits", what is required of the Director when such decisions are made is of pivotal importance to these appeals.

25. The Director accepted that a claim to refugee status is a relevant humanitarian or compassionate consideration. However, Mr Yu added, the Director is under no duty to have regard to any humanitarian or compassionate reason. This submission has to be taken in the context of Mr Yu's express agreement that the Director would never say in response to a refugee claim "I don't care, you will be returned."

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[15] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]1KB 223, at 229.

26. What then would the rule of law require of the Director's decision whether or not to refoule a person who claimed to be a refugee?

Prabakar

27. Mr Fordham relied on *Secretary of Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, an unanimous decision of this Court. At one level, the issue in *Prabakar* was, in determining whether or not a person faced a well-founded risk of torture in the event of removal to the putative country of torture, whether the Secretary could rely solely on a determination by UNHCR which had rejected a claim to refugee status by that person. The court held that the Director could not do so.

28. Li CJ explained why:

> "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."

29. But the decision in *Prabakar* went much further. It decided that the Secretary for Security, who had a policy not to refoule a torture claimant if a claim is well-founded, must determine whether the claim is well-founded. In such determination, Li CJ said:

> "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 p Doody* [1994] 1 AC 531 at p.560D-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."

30. Moreover, although ultimately, it was for the Secretary to assess the materials and to come to an independent judgment[16]:

> "45. … 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 p Bugdaycay* [1987]] 1 AC 514 at p.531 E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully."

31. Here, Mr Fordham submitted that, in respect of refugee claimants, the Director must also assess the materials and come to an independent judgment whether the appellants' fear of persecution was well-founded. Also, the Director's determination must be subjected to "rigorous examination and anxious scrutiny to ensure that the required high standards of fairness has been met".

32. Mr Yu submitted that *Prabakar* is distinguishable because, in *Prabakar* the court was concerned with CAT which, unlike the convention, was applied to HKSAR.

33. But the decision in *Prabakar* did not depend on the application of CAT to Hong Kong. It is trite that treaties do not form part of domestic law unless domesticated by legislation. The Secretary's stance was that,

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[16] At para 60 per Li CJ.

"as a matter of Hong Kong domestic law, the Secretary has no legal duty to follow the policy".

34. Further, although it was the torture claimant's case that the Secretary was under a legal duty to follow the policy on the following bases: the Basic Law, the Bill of Rights, customary international law and legitimate expectation, Li CJ said:

> "4. … 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 duty exists."

35. It is clear from the foregoing that it was not critical to the decision in *Prabakar* whether there was a legal duty. It sufficed that the genuineness of a torture claim was relevant to a determination whether or not to remove a person.

36. Mr Yu relied on *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300, where Li CJ, with the concurrence of other members of the Court, said in the context of persons who claimed to be a permanent resident under Art 24(2) of the Basic Law but who were in fact regarded as illegal immigrants under the Ordinance that:

> "… in relation to such a person the Director has no duty to consider humanitarian grounds in considering the making of a removal order against him. But he can take such grounds into account if he thinks it appropriate in the case in question."

37. The reliance is misplaced. *Lau Kong Yung* was concerned with very different circumstances. *Lau Kong Yung* was not concerned with claims such as refugee claims with their much more serious consequences. There, the Court had matters such as family reunion in mind. In Lau Kong

Yung, legislative provisions which had been struck down by this Court as unconstitutional, were restored by an interpretation of the Art 22(4) and Art 24(2)(3) of the Basic Law. Since the effect of the restored provisions was to prevent persons, many of whom, children of one or more Hong Kong parents[17], from rejoining their parents in Hong Kong, humanitarian reasons such as family union has less scope as a basis for resisting a removal order.

38. Mr Yu also sought to distinguish *Prabakar* because there the Secretary had a policy not to deport a person to a country where that person's claim that he would be subjected to torture is well-founded. Mr Yu submitted that, here, the Director had no policy, but only a practice. Such labelling was rightly described by Andrew Cheung J (as he then was) in *MA v Director of Immigration* HCAL 10/2010 (unreported, dated 6 January 2011) as "a matter of semantics". Since the Director[18] must exercise the powers under the Ordinance in a principled manner, it is surprising indeed if the exercise of such power is not facilitated by a practice or policy. It does not matter what label is used.

39. Mr Yu also submitted:

> "The concurrent finding of the Court below is that the relevant policy administered by the Director in making removal orders is that he may take into account humanitarian or compassionate grounds…"

40. Indeed, the Director may. To do so fairly and properly, the Director must consider the circumstances of the individual concerned. Since, whether a person is a refugee is a relevant consideration, it follows that if a person claims refugee status, before the Director exercises his/her power, the Director must determine whether the claim is well-founded.

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[17] But neither parent was at the time of these persons' birth entitled to a right of abode under Article 24(2)(2) or (3).

[18] And his duly authorized officers.

Otherwise the power would have been exercised in ignorance of a relevant consideration. That plainly is not permissible.

41. Mr. Yu went on to submit that Hartmann J and the Court of Appeal also made concurrent findings that "The Director does *not* have a policy which requires him to determine whether a removee is a refugee within the meaning of the 1951 Convention." I am not persuaded that there was any such finding. But I will deal with Mr. Yu's submission as stated. With respect, I believe he has confused the disease for the cure. When the complaint is that the Director should determine "whether a removee is a refugee…" because that is relevant to the Director's exercise of power under the Ordinance, it is not a sufficient answer to say that the Director has deferred to or relied on UNHCR's RSD. Since a decision of such moment attracts the high standards of fairness identified in *Prabakar*, the Director's decision must meet such high standards of fairness.

42. It is unnecessary for present purposes to decide whether the Director when exercising the powers of removal under the Ordinance must have regard to humanitarian reasons when confronted with a refugee claim. It is sufficient that the Director does so in accordance with his practice, and that a relevant humanitarian reason is whether or not a person is indeed a refugee. Nor is it my decision that humanitarian reasons alone must decide the exercise of such power. In a suitable case, for example, where Art 1F or Art 33(2) applies, the Director might well think it right to insist on refoulement. Whether refoulement may be ordered for any other reason is not for decision now.

43. For the sake of completeness, I should mention that although CAT also covered "Cruel, Inhuman or Degrading Treatment or

Punishment"("CIDTP"), *Prabakar* was concerned with non-refoulement of a torture claimant because CAT only expressly prohibited non-refoulement in relation to torture.

44. In *Ubamaka Edward Wilson v Secretary for Security and Another*, FACV 15/2011 (unreported, dated 21 December 2012), this court was concerned with the deportation of a Nigerian national who claimed that upon return to Nigeria he would face CIDTP. This Court was concerned with the Director's exercise of discretionary powers of removal or deportation under the Ordinance, and held that since non-derogable and absolute rights protected by Bill of Rights Art 3 were engaged.

> "160. … a sufficiently established threat of BOR Art 3 being violated by the receiving country if the deportee should be sent there constitutes a ground for restraining the Hong Kong Government from proceeding with the deportation."

45. No doubt, following *Ubamaka*, the Government would adopt procedures which satisfy the high standards of fairness required in determining whether such threat was sufficiently established.[19]

Adverse Consequences?

46. Mr Yu submitted that a danger of requiring HKSARG to conduct a RSD is that UNHCR might not assist a person screened in under such circumstances to settle elsewhere, with the result that HKSAR would be forced to allow these refugees to settle in Hong Kong. Mr McCoy, informed us on behalf of UNHCR that, since HKSAR would not grant

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[19] In a press release dated 18 February 2013 in response to statements issued by the Hong Kong Bar Association and the Law Society, a spokesman on behalf of the Immigration Department said "The Immigration Department "is actively exploring the various possible options to ensure the relevant duties are carried out in accordance with the CFA's judgment" in *Ubamaka*. The Immigration (Amendment) Ordinance 2012 has introduced a new Part VII C to the Immigration Ordinance to deal with torture claimants as a result of *Prabakar*.

asylum[20], the UNHCR, faithful to its mandate to assist established refugees, would continue to help them to settle in a safe country.

47. Mr Yu also submitted that a decision adverse to the Director might result in a flood of economic migrants. Mr Chu King Man, Principal Assistant Secretary (Security) said in his affidavit filed on 28 February 2007 at para 11:

> "According to UNHCR HK, they received some 390, 800, 1000, 2400 refugee status claims in year 2003, 2004, 2005 and 2006 respectively. The number of outstanding refugee status claims has built up to some 2440 as at the end of January 2007. According to a report submitted on 18 July 2006 to the LegCo by the UNHCR HK, only some 10-11% of the asylum seekers had been mandated as refugees."

48. Mr Chu expressed concern that:

> "… to institute an RSD mechanism in Hong Kong will likely attract more economic migrants to Hong Kong in the hope of possible changes in the Government's asylum policy…"

49. But as I have pointed out we are not concerned with the grant of asylum and nothing in this judgment calls into question the Government's policy not to grant asylum. We are only concerned with potentially returning persons to countries where they have a well-founded fear of persecution on the grounds mentioned above.

50. The UNHCR, the Bar Association and the Law Society have advocated an unified and efficient system consisting of one domestic screening exercise covering torture, CIDTP and refugee claims to avoid duplication and to reduce unmeritorious and protracted claims. Presently, claims could be made sequentially to maximize delay. Their suggestion merits careful consideration.

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[20] It is not contended that the HKSAR is obliged to offer asylum.

51. In any event, the solution is not to reduce Hong Kong's human rights standard. The rule of law has real consequences and effect must be given to them.

52. It was also submitted that to require the Director to conduct RSD would require much expense and expertise.

53. According to a Memorandum of Understanding made between the HKSARG and the UNHCR dated 20 January 2009, HKSARG has agreed, at its own cost, to supply appropriately experienced immigration officials (the secondees) to UNHCR "in order to provide services to UNHCR wholly in connection with refugee status determination related duties ("RSD duties")". The secondees' duty:

> "13. … include conducting RSD interviews, drafting RSD assessments and formulating recommendations to UNHCR on the merits of refugee status applications, in accordance with UNHCR policies and standards. Recommendations on refugee status determination will be signed by the Secondee and reviewed and signed by UNHCR, which will take and sign the final decision. UNHCR will take full responsibility for these decisions."

54. Thus, although the final decision is made by the UNHCR, the secondees already play an important role in RSD. So lack of expertise should not be a serious problem. In any event, as *Prabakar* shows, compliance with the high standards of fairness will require the Director to obtain relevant information and materials.

55. Mr Yu submitted that the Director is entitled to rely on UNHCR's RSD. I would agree that the Director is entitled to give weight to a RSD by the UNHCR. But it is essential that the determination must be made by the Director and his duly authorized officers and that the determination must satisfy the high standards of fairness required. *FB v*

Director of Immigration [2009] 2 HKLRD 346 provides an illustration of what might be required.

56. To conclude, I am of the view that, given it is the practice of the Director, when deciding whether or not to exercise his power under the Immigration Ordinance to remove a refugee claimant to the country of putative persecution, to have regard to humanitarian considerations, and that whether such claim is well-founded, is a relevant humanitarian consideration, the Director must determine whether the claim is well-founded. Moreover, any such determination must satisfy the high standards of fairness required having regard to the gravity of the consequence of the determination.

First Question

57. Both Hartmann J and the Court of Appeal were satisfied that refugee non-refoulement as expressed in Art 33 has become a rule of CIL but not a peremptory norm. The Court of Appeal also agreed with Hartmann J:

> "that the ordinance shows a clear legislative intent to give an unfettered discretion to the Director, sufficient to override the CIL of non-refoulement of refugees."

58. I am indebted to counsel for their very helpful and interesting submissions on the first question. However, in view of my decision on the second ground, it is unnecessary for me to decide the first question and I express no view on any of the issues raised under the first question.

Disposition

59. I would allow the appeal.

60. Since we have not had submissions on any relief which might be granted under the second ground, the parties are invited to agree a draft order for the Court's approval within 14 days of the judgment. Failing agreement, the parties are at liberty to submit their respective drafts within 10 days thereafter.

61. I have had the benefit of reading the judgment of Sir Anthony Mason NPJ in draft. I wish to say, specifically, that I am in full and respectful agreement with paragraphs 81 & 82 of his lordship's judgment.

Costs

62. I also make an order nisi that the appellants should have the costs here and below (including the trial), such costs to be paid by the respondent and to be taxed if not agreed. If any party wishes to have a different order for costs, written submissions should be served on the other party and lodged with the Court within 14 days of the handing down of this judgment, with liberty to the other party to lodge written submissions within 14 days thereafter. In the absence of such written submissions, the order nisi will stand as absolute at the expiry of the time limited for those submissions.

Mr Justice Bokhary NPJ:

63. There are parts of the world where some people are sometimes subjected to persecution on account of their race, religion, nationality, membership of a particular social group or political opinion. In the context of the present case, the word "persecution" means persecution on account of one or more those things. What happens when persons — each of these appellants being such a person — arrive in Hong Kong and ask not to be returned to the place from whence they came, saying that they would be

subjected to persecution there if returned? On the evidence before the Court, the answer is that they will not be returned (or "refouled", to use the legal term) if their fear is well-founded. That does not mean that they will necessarily be permitted to settle in Hong Kong. They may be sent elsewhere. But they will not be returned to the place from which they had fled. They will be permitted to remain in Hong Kong until they are resettled in some country to which they want to go and which is prepared to accept them.

64. So Hong Kong's practice conforms with the principle of "persecution non-refoulement". Such a practice necessarily includes — because it would be unworkable unless it includes — determining whether the asserted fear of persecution in the event of return is well-founded. Axiomatically it is for the official or officials through whom the government's "persecution non-refoulement" practice is conducted to make a determination on whether such fear is well-founded. In making such a determination, that official or those officials must proceed fairly, with due regard to the vulnerability of the person concerned and with a degree of care commensurate with what is at stake. If the determination is adverse to the person resisting return, the reasons for it must be given. And the reasons must be sufficient to meet the reasonable needs for judicial review purposes of that person's legal advisers and of the court.

65. Nothing short of the foregoing would be compatible with the rule of law. And the government's present approach in these matters, though no doubt well-intentioned, falls far short of the foregoing. Although the government rightly recognizes the relevance of a well-founded fear of persecution in the event of return, no government official makes any determination on whether the asserted fear of persecution in the

event of return is well-founded. All that the government does, it has told the Court, is to "take into account" the refugee status determinations made by the United Nations High Commissioner for Refugees ("the UNHCR"). The UNHCR's immunity from legal process in regard to its official functions puts its refugee status determinations beyond the reach of judicial review. Even so, the government says that since the UNHCR's refugee status determination in respect of each appellant is adverse to him, the way is now legally open to return each of them. No, it is not.

66. In respect of each of these three appellants, the government must, doing so properly as explained above, make its own determination on the question of whether his asserted fear of persecution in the event of return is well-founded and, doing so properly as explained above, give its reasons for any determination adverse to any appellant. I would allow each of these three appeals on the ground of the government's failure to make its own determination on that question, and call upon the parties to submit an agreed draft order if one can be achieved or rival drafts otherwise. It is of course to be understood that provided that the legal requirements declared by the judiciary are complied with, it is up to the executive to choose what screening method to adopt. One of the choices open to the executive is to screen torture and persecution fears together where both are asserted.

67. Although this appeal can be disposed of as briefly as that, I should say a word further to explain why it has proved unnecessary to address the questions of international law which have been debated before us. Quite simply, this case is in truth covered by the Court's decision in *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187. It is immaterial for present purposes that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 extends to Hong

Kong while the Convention Relating to the Status of Refugees 1951 does not. Even in *Prabakar's* case, which was a *torture* non-refoulement case, the government did not accept that Hong Kong domestic law prohibits return that would put a person in peril of being tortured. The government did not accept that any such prohibition had become part of 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).

68. As to that, I said in *Prabakar's* case at para 68 that the government's policy of not ordering any return that would put a person in peril of being tortured provided a sufficient basis for classic judicial review, the government having made no determination of its own on the asserted fear of torture in the event of return. There is no material difference between the "policy" admitted and averred by the government in that case and the "practice" which the government cannot deny in the present case. It is to be stressed that no slight whatsoever to the UNHCR is involved in the proposition that the government cannot simply rely on an UNHCR refugee status determination adverse to the person concerned. Indeed, that proposition is a vindication of the UNHCR's stance, which is that it is for Hong Kong independently to enquire into whether the asserted fear of persecution in the event of return is well-founded.

69. As to costs, I would leave them to be dealt with on written submissions as to which the parties should seek procedural directions from the Registrar. In thanking all the lawyers in the appeal for the arguments prepared and presented to the Court, I make special mention of the fact that counsel and solicitors for the UNHCR have been so public-spirited and generous as to donate their valuable services free-of-charge.

Sir Anthony Mason NPJ:

70. I am in broad agreement with the reasons for judgment of Tang PJ. My agreement is subject to such qualifications as appear from my reasons which follow. In these reasons I use the same abbreviations and acronyms as those used by Tang PJ.

The threshold question - background

71. The threshold question is whether the relevant decisions of the Director to remove the appellants are subject to judicial review. It is no objection to the general availability of judicial review that the power of removal is expressed in wide and unqualified terms.

72. A statutory discretionary power, no matter how widely expressed, is necessarily subject to some limits. It must, for example, be exercised by the repository of the power. Other limits may arise from context of the power and from the purpose or purposes which it is designed to serve. Or the limits may arise from extraneous considerations giving rise to an abuse of power, such as bias and bad faith, which are naturally presumed to lie outside the scope of the statutory grant of power. Judicial review is available to correct an exercise of power that exceeds the limits set by the statutory grant of power or otherwise constitutes an abuse of power.

73. The exercise of a general statutory power may give rise to judicial review by reason of the way in which the power is exercised. One such example, which is relevant for present purposes, is where the decision-maker adopts a policy in order to provide guidance as to the way in which the power will be exercised and to promote consistency in its

exercise. Or when the decision-maker makes a representation as to the way in which the power is exercised, including cases where the representation creates a legitimate expectation.

74. The adoption of a policy by a decision-maker exercising a very general discretion has the advantages of promoting certainty, consistency and administrative efficiency. It is, however, important that the policy adopted, whether general in character or confined to a class of persons, is not so rigid as to exclude the exercise of discretion by the decision-maker to consider the merits of the particular case and a willingness to depart from the policy, if need be, in a particular case, at least in the general run of cases. This is because the exclusion of a residual discretion as a result of a decision-maker applying a rigid policy might well, depending on the circumstances, be at variance with the very discretion created by the statute. However, where the decision-maker purports to exercise that discretion in accordance with the stated policy the manner of that exercise may be reviewed by the courts.

The threshold question – what is the principle to be applied?

75. The common law of judicial review of administrative action has travelled a long way from its early beginnings in 1863 in *Cooper v Wandsworth Board of Works*[21] where a local authority was held to be under a duty to accord natural justice before exercising its power to demolish a person's house. The history of the common law development of the remedy of judicial review has been marked by a number of abiding concerns, of which two are of immediate relevance. The first was: what is the legal or philosophical foundation for judicial review? The second,

[21] (1863) 14 CB(NS) 180; 143 ER 414.

which is linked to the first, was: what class of administrative decisions or what class of discretionary powers attracts the remedy of judicial review.

76. One approach to the first of these two questions was the "autonomous" common law approach, encapsulated in the words of Byles J in *Cooper v Wandsworth Board of Works*:

> "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."[22]

A second approach was the statutory *ultra vires* theory based on the proposition that the power has been conferred on the decision-maker on the underlying (and fictional) assumption that the power is to be exercised only within the jurisdiction conferred, in accordance with fair procedures, and reasonably in a *Wednesbury* sense[23]. The House of Lords endorsed this approach in *Reg v Hull University Visitor, Ex parte Page*[24] and in subsequent cases[25].

77. While in particular cases these approaches retain their utility, it is now accepted that the foundation of judicial review is the rule of law. The rule of law as a foundation has the advantage that it extends judicial review to the exercise of non-statutory powers, including prerogative and common law powers[26], and it is capable of extending to administrative powers of non-government agencies[27], these being powers the exercise of which would not necessarily have attracted judicial review on the statutory

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22 Ibid at 194 [6].
23 See *Reg v Hull University Visitor, Ex parte Page* [1993] AC 682 at 701.
24 Ibid.
25 See *Boddington v British Transport Police* [1999] 2 AC 143 at 173; *Reg v Home Secretary, Ex parte Doody* [1994] 1 AC 531 at 560.
26 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (the action under review was an executive act but it was enough that it had its source in the common law and its exercise gave rise to justiciable issues).
27 See, for example, *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815.

ultra vires theory. I therefore accept as a correct statement of the principle to be applied in resolving the threshold question in this case the observations of Lord Hoffmann in *R (Alconbury) v Environment Secretary*[28]:

> "There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals."[29]

78. His Lordship was then writing with reference to the context of European Law but there is no reason to doubt that his comments apply to English as well as European law.

79. Nor is there reason to doubt that the principle enunciated applies to administrative powers generally and that it is not limited to decisions affecting the rights of individuals. Lord Mustill in *R v Home Secretary, Ex parte Doody*[30] expressed the reach of the principle more generally when his Lordship, in discussing the standards of fairness, said:

> "where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances."[31]

80. In earlier times, the availability of judicial review was restricted by reference to the nature of the powers that were exercised or by reference to the character of the decisions that were made – the second of the two questions identified in para 75 above. These restrictions no longer have the force that they once had. So much appears from the statements by Lord Hoffmann and Lord Mustill.

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[28] [2003] 2 AC 295.
[29] Ibid at 326B.
[30] [1994] 1 AC 531 at 560.
[31] Ibid at 560D-E.

The limits of judicial review

81. Although judicial review has expanded beyond its earlier boundaries and now extends to administrative powers generally, it is important to recognize that it is subject to a number of limitations. This is not the occasion to discuss them generally. It is sufficient here to identify as examples two substantial and overlapping limitations, one arising from separation of powers considerations and the other arising from the requirement of justiciability. The separation of powers may deny jurisdiction to the courts when the function involved is exclusively the province of the legislature or the executive. Questions of justiciability may arise in connection with broad issues because they may involve a lack of judicially manageable standards, such as matters of economic or social policy. Questions of justiciability may also arise in connection with issues which have a political character and a high political content where a political rather than a legal solution may be called for. When questions of justiciability arise it may appear that the courts are not institutionally equipped or competent to deal with the issues for determination.

82. Other limitations on judicial review relate not so much to what I have termed the threshold question as to the scope (or grounds), standards and intensity of review and standards of fairness. Some decisions may be reviewable for procedural fairness for example, but not otherwise. And this Court has recognized that the courts should attach particular weight to the views and policies adopted by the legislature in appropriate cases, as it did in *Lau Cheong v HKSAR*[32]. In *Fok Chun Wa v Hospital Authority*[33] Ma CJ

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[32] (2002) 5 HKCFAR 415 (where the Court, after giving particular weight to the legislative judgment, concluded that the imposition of a mandatory life sentence for murder based on the infliction of grievous bodily harm was not "arbitrary" for the purposes of art 28 of the Hong Kong Bill of Rights.

[33] FACV 10/2011 (2 April 2012), paras 10, 61-81.

(in a judgment with which other members of the Court agreed) pointed to the need for the courts to allow a margin of appreciation in relation to legislative and executive decisions affecting macrosocio-economic rights. And the Court has recognized that what fairness requires depends on the circumstances of the case and that the standards will vary according to the circumstances[34]. In *Lam Siu Po*[35] Ribeiro PJ, in what was the leading judgment, drew attention to the need to avoid standards which involve "over-lawyering" or "over-judicialisation" of procedures in certain administrative and disciplinary tribunals. I mention these instances not because they are relevant to the disposition of the present case, but because they provide some illustrations of the limitations attaching to judicial review.

Judicial review in this case

83. Once the principle identified in paragraphs 77-79 above is applied to the facts of the present case, the Director's decisions to remove the appellants are subject to judicial review. The power to remove is a far-reaching administrative power. Moreover, the Director's decisions are clearly of momentous importance to the appellants. The decisions deny the appellants' claims for protection from what may be a well-founded fear of persecution in the state of their nationality and expose them to *refoulement* to that state. The decisions therefore affect the appellants in a very material and serious way.

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[34] *Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234 at 271 para 109 (where, for example, the risk of "over-lawyering" was taken into account in arriving at what was "fair" in disciplinary proceedings.

[35] (2009) 12 HKCFAR 237 at paras 69-71.

84. This Court's decision in *Secretary for Security v Sakthevel Prabakar*[36] supports this view. In that case this Court held that judicial review was available in relation to the Secretary for Security's deportation of Prabakar who fled from Sri Lanka as a refugee and claimed that he was tortured in Sri Lanka and was in danger of being tortured again if he were to return there. It was the Secretary's policy not to deport a person to a country where that person's claim that he would be subjected to torture was well-founded. The policy reflected the safeguard in art 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which applied to Hong Kong. Without deciding whether the Secretary was under a legal duty to follow the policy as a matter of law, the Court subjected the Secretary's decision to judicial review and applied high standards of fairness, an aspect of the matter to which I shall return shortly. Although *Prabakar* was a case in which Hong Kong was subject to a Convention obligation reflected in art 3 of the Bill of Rights unlike the present case, it was a decision on the statutory power of deportation where the Secretary's decision, like the Director's decisions here, involved his adherence to a policy which he formulated in order to provide guidance and consistency in the exercise of the statutory power. In the context of the availability of judicial review in this case, it is the relation between the exercise of the statutory power and the application of the policy that is of crucial importance rather than the legal foundation for the policy, though that is a relevant factor.

85. *Reg v Home Secretary, Ex parte Bugdaycay*[37] likewise supports the availability of judicial review in the present case. There a question arose whether the administrative decision to remove the appellant

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[36] (2004) 7 HKCFAR 187.
[37] [1987] 1 AC 514.

Musisi to Kenya could properly be challenged in judicial review proceedings[38]. The House held that the Secretary of State had failed to consider the evidence that there was a danger that his removal would result in his removal to a third country where he had a well-founded fear of persecution. Lord Bridge of Harwich (with whom Lord Brandon of Oakbrook, Lord Griffith and Lord Goff of Chieveley concurred) said:

> "The action of an authority entrusted by Parliament with decision-making can be investigated by the court:
>
> > 'with a view to seeing whether they have taken into account matters which ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account': *per* Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, 233-234.
>
> In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."[39]

See also *R v Home Secretary, Ex parte Doody*[40].

Standard of Review

86. In the light of the nature of the Director's decision and its drastic consequences for the appellants, it follows from *Prabakar* in particular and other cases mentioned that the Court is bound to:

> "subject the [Director's] determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met …. If the courts decide that they have not been met, the determination will be held to have been made unlawfully",

in the words of Li CJ in *Prabakar*[41].

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38 Ibid at 526G-H.

39 Ibid at 537F-H.

40 [1994] 1 AC 531 at 560D-G.

41 [2004] 7 HKCFAR at 204H.

The Director's policy

87. What is the Director's policy? In answering this question I put aside as an unnecessary distraction the Director's submission that, whatever it may be, it is a practice not a policy. In the context of this case, the submission amounts to a distinction without a difference.

88. Mr Benjamin Yu, SC for the Director, then submitted that there was a concurrent finding by the courts below that the relevant policy administered by the Director in making a removal in the case of claimants for refugee is that he may take into account humanitarian or compassionate grounds. I agree that the Director may do so. But that seems to be neither a policy nor a practice. It is simply a statement about the scope of his power of removal under the Ordinance.

89. Further, this is not a case in which this Court's practice of not interfering with concurrent findings of fact in the courts below is engaged. That practice was comprehensively reviewed by Ribeiro PJ in *Chinachem Charitable Foundation Limited v Chan Chun Chuen*[42]. Here the findings of fact were made by the courts below on different materials. The Memorandum of Understanding (MOU) between the Government of the HKSAR (HKSARG) and the Office of the UN High Commissioner for Refugees dated 20 January 2009, which provided for the UNHCR to make RSDs, only came to light in the proceedings in the Court of Appeal. So the findings of fact made by Hartmann J at first instance were made in the absence of knowledge of the MOU which is of great materiality to the existence of the Director's policy. Hence this is not a case of concurrent findings of fact which is an expression applied to findings of fact based on

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[42] Miscellaneous Proceedings No 20 of 2011 (Civil), decision delivered on 24 October 2011, reasons handed down on 28 October 2011.

substantially the same materials. This conclusion also answers another submission of the Director that there were concurrent findings of fact that the Director had no policy requiring him to determine whether a claimant is a refugee within the meaning of the Convention.

90. Once regard is brought to the MOU, which I shall examine shortly, the Director's policy is to be properly understood as a policy of not returning to their country of nationality claimants for refugee status whose fear of persecution is well-founded. It is that policy that enables the Director to say that, although he is under no obligation to comply with the Convention, he voluntarily complies with its requirements.

91. The processing of claimants for refugee status in Hong Kong is conducted in accordance with the MOU. The MOU recites that the UNHCR maintains a sub-office in the HKSAR to conduct "refugee status determinations" (RSDs) under its UN mandate. Clause 21 acknowledges the position of the HKSARG when it provides:

> "The HKSARG considers that it has no obligation to grant asylum and process refugee status claims under the … Convention … and its 1967 Protocol or otherwise and that it is under no obligation to investigate, consider or determine any refugee status claims."

92. The MOU provides that the HKSARG will second appropriately experienced personnel to UNHCR to perform RSD duties (cl 2), their remuneration to be paid by the HKSARG (cl 7). The Secondees will comply with all rules, regulations and instructions issued by UNHCR regarding their duties made available to them (cl 11(d)). The Secondees are to perform RSD duties, conducting RSD interviews, drafting RSD assessments and "formulating recommendation to UNHCR on the merits of refugee status applications in accordance with UNHCR policies and standards" (cl 13). Recommendations on refugee status determination

"will be signed by the Secondee and reviewed and signed by UNHCR which will take and sign the final decision. UNHCR will take full responsibility for these decisions" (cl 13).

93. The MOU contains provisions dealing with the provision of information by the UNHCR to the HKSARG. The information which can be provided, set out in Appendix B to the MOU, relates to "assessment of refugee status application of asylum seekers" who have authorized the sub-office in writing to release and the HKSARG to receive such information (cl 22). The information to be provided includes case summaries, the grounds for rejection of refugee status, information relating to the claimant's credibility and whether the claim is considered well-founded, as well as "the final decision" of the UNHCR on the claim.

The Director's decisions

94. It follows from the provisions of the MOU that, as between the HKSARG and the UNHCR, that the UNHCR takes the "full responsibility" for making the RSDs of refugee status claimants in Hong Kong. As far as the MOU is concerned, the Director's participation is limited to the part played by his "secondees" in the processing of applications. No doubt it was in the interests of both the HKSARG and the UNHCR to vest the responsibility for making the RSDs in the UNHCR.

95. Nonetheless the Director's case filed in this Court asserts that:

> "the Director does independently consider the exercise of his power of removal in each case on its own merits." (para 66)

This assertion calls for several comments. First, it is a statement only and is not supported by evidence. Secondly, it is a statement that does not tell us what is involved in the consideration of each case "on its own merits".

Thirdly, we were informed that in all the cases where the UNHCR has made an RSD in favour of a claimant, namely that he has a well-founded fear of persecution in his country of nationality, the Director has not returned him to that country and has allowed him to remain in Hong Kong pending re-settlement.

96. In a case of this kind, one would have expected the Director to adduce evidence showing in detail the consideration he gives to claims for refugee status after the UNHCR makes its "final" determination of refugee status, including his receipt of the UNHCR case summaries and the materials identified in the Appendix to the MOU. No such evidence has been forthcoming, even in the matters relating to the appellants.

97. 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 reasons 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 the UNHCR determinations, as his counsel contended. It is, of course, legitimate for the Director to give weight to the UNHCR determination but not to simply rely on it.

98. 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. 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 that assessment, the Director must observe high standards of fairness.

Conclusion

99. I conclude therefore that the appellants succeed on what Tang PJ has identified as their second ground of appeal. To that end I would allow their appeal.

100. For the sake of clarification, I point out that my reasons and my conclusion relate *only* to the exercise of the Director's power of removal pursuant to the policy which I have identified. If the Director were to put an end to the policy or adopt another policy, different considerations would apply.

Orders

101. I agree with the order proposed by Tang PJ as to costs.

Mr Justice Chan PJ:

102. The Court unanimously allows the appeals and makes the order and directions as proposed in paragraphs 60 and 62.

(Patrick Chan) Permanent Judge	(RAV Ribeiro) Permanent Judge	(Robert Tang) Permanent Judge

(Kemal Bokhary) Non-Permanent Judge	(Sir Anthony Mason) Non-Permanent Judge

Mr Michael Fordham, QC, Ms Gladys Li, SC & Mr Simon Young, instructed by Barnes & Daly assigned by the Legal Aid Department, for the appellants

Mr Benjamin Yu, SC, Professor Vaughan Lowe, QC, Mr Anderson Chow, SC & Ms Grace Chow, instructed by the Department of Justice, for the respondents

Mr Gerard McCoy, SC & Mr Timothy Parker, instructed by Baker & McKenzie, for the intervener

Press Summary (English)

Press Summary (Chinese)