

## Torture Claimants

- *Convention Against Torture*, Art 3(1): “No State Party shall return a person to another State where there are *substantial grounds for believing* that he would be in danger of being subjected to torture.”
- *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, CFA
  - Secretary’s policy for not deporting person to country where that person’s claim that he would be subjected to torture in that country was considered to be well-founded
  - Where Secretary follows the policy, determination of torture claim must be made fairly.
  - Appropriate standard of fairness. Approach involving examination of all aspects, including context, nature and subject matter (*Doody*). *Momentous importance to the individual concerned. So ... high standards of fairness must be demanded in the making of such a determination* [44].
- To honour Art 3(1), if such substantial grounds for belief established, HKSAR Government would have to grant claimant stay in HK until such time as a place could be found to remove the claimant, where he or she would not face the *risk* of torture. Another option is integration into HK.

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- *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, CFA
  - What high standards of fairness require:
    - The potential deportee be given every reasonable opportunity to establish claim;
    - Claim be properly assessed by Secretary;
    - If claim is rejected, reasons sufficient for consideration of subsequent review action be given. [51]
  - Secretary to make own assessment:
    - Country conditions (past and more importantly current);
    - Appreciation of difficulties of proof;
    - Should not be passive and putting claimant to strict proof (reference to shared duty to ascertain and evaluate all relevant facts, that UNCHR emphasizes)
    - Matters to be considered:
      - Claim of past torture (including consideration of medical or other independent evidence);
      - Engagement of activities making claimant vulnerable to risk of being tortured on return;
      - Credibility.

## Torture Claimants

- *Assessment Mechanism* established
  - Questionnaire and Interview by Officer A (“examiner”)
  - Review of papers by Officer B
  - Written representations following “minded to refuse” letter
  - Determination by Officer C (usually Asst Dir/Immi)
  - Petition to Secretary for Security as delegate of Chief Executive

## Torture Claimants

- Successful Judicial Review of *Assessment Mechanism* by reference to –
  - “high standards of fairness” in *Prabakar*;
  - the common law duty to act fairly (setting up a fair system and operating system fairly).

## Torture Claimants

- **Successful Judicial Review of *Assessment Mechanism***
  - “Magic words” argument: Approach of Immigration Dept [78]-[84]
  - Policy to deny legal representation whatsoever (including presence) and policy not to provide publicly funded legal assistance to claimants unable to pay for own legal representation [105], [126], [139]
  - Determination not made by examiner but by directorate officer much higher up hierarchy with one intermediate reviewing officer [174]
  - Petition: System that routinely denies oral hearing and legal representation; Insufficient training, guidance or instruction of subordinate officers in Security Bureau advising Secretary; Non-disclosure of legal advice; Failure to give adequate reasons [191], [213], [216], [226]

## Torture Claimants

- **Implications of successful Judicial Review of *Assessment Mechanism***
  - Numbers: About 400 having been assessed; Over 2,600 awaiting assessment.
  - ➔ Reassessment of cases that were refused and assessment of those awaiting assessment under “high standards of fairness” compliant system that is *also* efficient, effective and relatively expeditious.
  - Suggestions for compliant system:
    - UK Border & Immigration Agency protocols; see <http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/>  
Judgment: [142]-[144]

## Torture Claimants

- Implications of successful Judicial Review of *Assessment Mechanism*
  - Suggestions for compliant system:
    - UK Border & Immigration Agency protocols: “The Border and Immigration Agency believes that legal representation at an interview is not necessary to enable an applicant to set out his grounds for his asylum and/or human rights application. However, the presence of a legal representative should not be objected to without specific reason, and no legal representative should be prevented from being present at the start of an interview except in the circumstances noted within.”
    - Tape-record the interviews.
    - Access to publicly funded legal advice during completion of questionnaire and interview. Approach the Duty Lawyer Service.

## Torture Claimants

- Implications of successful Judicial Review of *Assessment Mechanism*
  - Suggestions for compliant system:
    - Decision-making power be vested on the examiner since credibility is central to the decision and the examiner has received proper training. Noting inconsistencies not necessarily justify finding of lack of credit. Judgment: [165]-[175], [187], [194]
      - On the other hand, some difficulties to entrust exclusively junior rank officers with duty to make the decision:
        - » Sensitive information relevant to particular claimant;
        - » Evaluation of country conditions by reference to variety of sources;
        - » External relations considerations.

## Torture Claimants

- Implications of successful Judicial Review of *Assessment Mechanism*
  - Suggestions for compliant system:
    - Petition procedure
      - What is the nature of the petition procedure, bearing in mind that there is a first instance decision with reasons? Rehearing of merits *or* review on matters of lawfulness, reasonableness and fairness?
      - One solution: An institutionally independent appeal tribunal staffed by part-time unofficial members drawn from retired judges and the legal profession; plus extension of legal aid. See, *Jabari v Turkey* (App 40035/98, 11/07/00), 9 BHRC 1, ECtHR
      - Example: New Zealand Refugee Status Appeal Authority  
[http://www.nzrefugeeappeals.govt.nz/Pages/Ref\\_Home.aspx](http://www.nzrefugeeappeals.govt.nz/Pages/Ref_Home.aspx) and [Links](#).

## Torture Claimants

- Other Issues
  - Identity
  - Burden and standard of proof
  - Credibility
  - Contextual/ Cultural sensitivity
  - Quality and reliability of translation
  - Country conditions: For specific countries conditions, might even need to go to cases decided by non-Commonwealth countries. See [http://www.nzrefugeeappeals.govt.nz/Pages/ref\\_links.aspx](http://www.nzrefugeeappeals.govt.nz/Pages/ref_links.aspx).