香港特別行政區政府
保安局

香港添馬添美道 2 號

The Government of the
Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.:

來函檔號 Your Ref.:

電話 : 2810 2506
傳真 : 2868 1552

香港中區
立法會綜合大樓
立法會秘書處
議會事務部
首席議會秘書 2
湯李燕屏女士

湯女士：

2011 年入境（修訂）條例草案
補充資料

在 4 月 30 日的會議上，逐條審議的工作已完成。現特函提供所需的補充資料，以協助委員會總結審議工作。

回應團體意見

2. 我們對代表團體意見的回應載於附件一，供委員參考。事實上，大部分的團體意見和政府的回應，已細列於 CB(2)1859/11-12(02)號法案委員會文件，我們亦樂意就文件內的建議向委員會詳細介紹。

其他補充資料

3. 委員曾要求我們作書面回應的其他資料如下：

(a) 現時入境處與所有聲請人會面時，均會安排合資格的傳譯員。傳譯員在審核會面的角色，亦已在會面守則中訂明。

(b) 若入境處或上訴委員會準備撤銷已確立的聲請，而該聲請人不同意，他可獲公費法律支援，即透過當值律師服務提供的支援，以協助處理其個案。

(c) 就上訴委員會委員酬金，我們將建議參考裁判官的酬金水平（約每小時$800）。

(d) 有一委員提及一宗報導，指稱懷疑有聲請人被遣離香港後遭酷刑對待，我們不會評論個別個案。然而，不論在行政機制或《條例草案》的規定下，若入境處人員有理由相信，如聲請人被遣往另一個國家有遭受酷刑危險，入境處會向聲請人提供「免遣返保護」。

(e) 《條例草案》第43A條將干擾上訴委員會程序定爲罪行，在香港法例中已有先例，包括法定的行政上訴委員會和市政服務上訴委員會亦有相同罪行條文，確保上訴委員會可不受干擾地有效運作。這安排符合人權法的原則，不會影響聲請人就有關上訴向上訴委員會作出陳述的權利。在其他普通法地區如英國、紐西蘭等的相類上訴委員會，亦有類似安排。

(f) 就過渡性條文的安排，一如我們在4月30日的會議上解釋，根據酷刑聲請審核機制所作的決定，不論是在現時行政機制或在《條例草案》通過並生效後所作的決定，若違反程序公義或屬於不合理地作出，聲請人均可行使其權利，向法院申請司法覆核。《條例草案》附表4的過渡性條文，絕不會影響聲請人的有關權利。相反，過渡性條文可確保《條例草案》通過並生效後，酷刑聲請人的權益受到法定審核機制所保障，所有聲請可按法定機制的程序公平、有效處理，並減少濫用程序。

裁決和報告的原文資料

4. 法院在 *Prabakar 訴 保安局局長*（FACV 16/2003）及 *MA 及其他人 訴 入境處處長*（HCAL 10, 73, 75, 81 & 83/2010）的裁決，載於以下網頁（只有英文）（見附件二、三）：
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=40511&QS=%2B&TP=JU

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=74703&QS=%2B&TP=JU

5. 中國根據《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》提交的最新報告，載於以下網頁（見附件四）：
http://www.fmprc.gov.cn/chn/gxh/zlb/zcwj/P020081125515621712135.pdf

修正案

6. 我們已於 4 月 27 日向委員會提交文件，介紹我們在細心考慮委員會的建議後，擬將修訂《條例草案》的內容。我們將盡快另行提交修正案文本。

保安局局長
（周永恒　　代行）

二零一二年五月九日

《2011 年入境（修訂）條例草案》

回應代表團體意見

意見	回應
新增第 37W 條：對在香港提出免遣返保護聲請的人的限制	
條文使聲請人首先違法(逾期逗留)，然後才符合資格提出酷刑聲請和尋求法律援助。政府不應要求聲請人在須被或可被遣離時，才可提出聲請。	《禁止酷刑公約》第 3 條所指的「免遣返保護」，只適用於被遣離或移交的人。法院在 *BK* 及 *CH* 訴入境處處長（CACV 59 & 60/2010）一案，亦確認這符合《公約》要求。
新增第 37Y 條：提交酷刑聲請表格	
應延長要求聲請人交回表格的期限；未能交回表格亦不應被視爲聲請已被撤回。	爲減省聲請人等候個人資料的時間，入境處已加快程序，在派發表格的同一天，在聲請人同意下，同時向聲請人提供處方所持其個人資料；這樣可減省現時聲請人需等候資料的時間。此外，入境處會修訂填表須知，說明聲請人可在交回表格後補交文件。 聲請表格的內容，主要爲聲請人已掌握的個人資料及遭遇；如有需要，可申請延後交回。參考外國經驗，沒有其他國家給予聲請人 28 天以上的時間。 在作出上述措施後，我們認爲《條例草案》中交回表格的時限，維持在 28 天是合理的安排。
新增第 37ZC 條：醫療檢驗	
不應只在聲請人的身體或精神狀況受爭議時才進行醫療檢驗。	作爲聲請的考慮因素，如入境處（或上訴委員會）與聲請人就其身體或精神狀況沒有爭議（即入境處或委員會信納聲請人描述的有關狀況爲事實），應毋需爲聲請人安排醫療檢驗。

醫療檢驗不應經由入境處及政府醫生處理。	根據目前安排，爲保持程序的公正性，入境處不會參與揀選負責進行檢驗的醫生，亦不會參與檢驗過程。
律師應可在絕對保密的情況下，與有關醫療人員直接溝通，而不必知會入境處。	除非聲請人同意，入境處不會要求醫生披露檢驗結果。
新增第 37ZD 條：聲請人的可信性	
若作決定的人員有所偏頗或程序上有疏忽（例如沒有要求聲請人就其行爲作出解釋），便可能出現不公平的情況，因此應刪除條文。	可能損及聲請人可信性的情況，已臚列於第 37ZD 條，以增加入境處人員作有關考慮時的透明度。一般情況下，入境處自當要求聲請人就其行爲作出解釋；條例已指明，只有在聲請人「無合理辯解」而作出有關行爲的情況下，入境處才可能以此作爲損及聲請人的可信性的根據。
新增第 37ZH 條：處理聲請的次序	
入境處應訂立決定處理聲請次序的制度。	入境處曾於 2010 和 2011 年共兩次提醒等候審核的聲請人，如有需要可要求優先處理其聲請。現時，所有聲請人亦可在提出聲請時，要求優先處理。此外，入境處會先處理被羈留人士，在時序上較早提出，及其他特別（如涉及兒童）個案。
新增第 37ZI 條：酷刑聲請的決定	
應在《條例草案》中列出考慮聲請的因素。	我們同意此要求，並會修訂第 37ZI 條，參考《禁止酷刑公約》第 3(2)條，在《條例草案》具體訂明，入境處必須在審核時考慮所有有關因素，包括有關國家內是否存在一貫嚴重、公然、大規模地侵犯人權的情況。

新增第 37ZL 條：撤銷接納酷刑聲請的決定等	
已獲確立的聲請不應被撤銷。	《禁止酷刑公約》第 3 條所指的「免遣返保護」，並沒有要求締約國給予聲請人居留身份。因此，若出現第 37ZL(2)條所指的情況，應考慮撤銷確立聲請的決定。 根據《條例草案》，在撤銷接納酷刑聲請爲已確立的決定前，入境處會先向聲請人發出有關該項擬撤銷決定的通知書，並詳細列明理由。該名聲請人可於 14 天內提出反對及其理由，以供入境處考慮。在考慮該聲請人的反對通知後，若入境處決定撤銷，須向聲請人發出書面通知有關決定，並詳列理由及其上訴權利。 至於有建議經由上訴委員會確立的聲請，若日後情況有實質轉變需考慮撤銷原先決定，應由上訴委員會決定，而不應由入境處作出。我們同意此建議，並會修訂第 37ZL條及其他一系列有關上訴委員會職能和程序的條文。
新增第 37ZO 至 37ZS 條及附表 1A：上訴委員會	
《條例草案》防止上訴委員會提出與聲請有關的問題；如聲請人能提供一些具爭議性的理據，入境處須協助聲請人讓上訴委員會自行確立對有關國家的理解。	根據附表 1A 第 18 段，上訴委員會有全權審視有關個案的是非曲直，包括審視入境處在決定聲請時所考慮的所有關於該個案的資料、關乎在作出該決定後發生的事宜的證據，或其他在作出該決定前並非可在合理情況下供取用的證據。此外，若上訴委員會作出要求，入境處亦會提供協助，盡力搜索上訴委員會所要求，關於有關國家的其他背景資料。
只由一名上訴委員會委員決定的個案，或欠公平。	行政長官在任命上訴委員會委員時，會確保每名委員均合乎資格，具備處理上訴的能力。此外，《條例草案》亦訂明，上訴委員會主席可根據個案情況，遴選三名委員處理特別個案。我們認爲《條例草案》在有效處理個案及確保公平兩方面，已取得恰當平衡。

應讓聲請人可就入境處否決重新啓動已撤回的聲請及不接納後繼聲請提出上訴。	考慮到中途撤回的聲請，其實並未完成審核程序，我們同意修訂第 37ZE、37ZG條及其他有關上訴委員會職能和程序的條文，若入境處否決重新啓動已撤回聲請的要求，聲請人可要求覆檢，由上訴委員會作最後決定。 至於經由入境處或上訴委員會完成審核程序的個案，若入境處拒絕聲請人提出後繼聲請，實無需讓上訴委員會重複覆檢此決定，避免眾多已完成審核的聲請人可藉此濫用程序，不斷在沒有充份理據支持的情況下，向入境處及上訴委員會重覆提出後繼聲請或覆檢。
新增第 37ZV 條：已確立聲請的聲請人可申請接受僱傭工作的准許等	
有團體認爲，應准許所有已確立聲請人，甚至所有等候審核的聲請人工作。 亦有團體認爲，聲請人即使聲請獲確立，亦不應獲准工作。	法院曾裁定，入境處處長對已確立聲請的人士，應在極其特殊（exceptional）的情況行使酌情權，批准其工作申請。現建議與裁定一致。
新增第 37ZW 條：聲請人並非通常居於香港	
應讓已確立聲請的聲請人在香港居住。	《禁止酷刑公約》第 3 條並沒有要求給予聲請人居留身份。若聲請獲確立，當局會向聲請人提供「免遣返保護」，但聲請人在香港並無居留權。
修訂第 42 條：虛假陳述、僞造文件、使用及管有僞造文件	
將虛假陳述刑事化必須謹慎處理（例如聲請人因曾受創傷而作出虛假陳述不應被檢控）。	將《入境條例》第 42 條適用範圍延伸至涵蓋酷刑聲請，可防止以虛假陳述或僞造文件等行爲違反入境管制。此安排與現時入境處執行其他法定權力的相關安排一致。

加入第 43A 條：干擾酷刑聲請上訴委員會的法律程序	
干擾或影響酷刑聲請上訴委員會的法律程序不應是刑事罪行，有關條款模糊。	我們需要確保上訴委員會能在不受干擾的情況下有效執行審核程序。其他普通法地區（英國、紐西蘭）的程序亦有類似規定。
修訂入境規例新表格 8(擔保書)	
新增條款或會引致一些聲請人因簡單理由（例如於錯誤日期到入境處進行審核會面）而被檢控；新表格第(1)(b)項可填寫的條件空泛。	聲請人不會因未有遵守擔保書內的會面要求而被檢控。另外，入境處人員對聲請人施加的擔保條件，已於第 36(1A)及(1B)條訂明。

FACV No. 16 of 2003

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

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

Between:

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

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

J U D G M E N T

Chief Justice Li:

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

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

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

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

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

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

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

The Convention Against Torture

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

> "Article 3
>
> 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

8. Article 1(1) of the Convention defines "torture" to mean:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

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

China's report to the Committee against Torture

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

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

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

The Refugee Convention

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

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

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

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

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

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

Comparison of the two Conventions

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

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

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

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

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

UNHCR

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

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

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

UNHCR Handbook

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

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

The facts

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

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

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

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

The respondent's conviction

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

The power to deport

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

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

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

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

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

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

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

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

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

The deportation order

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

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

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

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

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

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

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

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

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

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

Recognition as refugee

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

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

Decision not to rescind

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

The judicial review proceedings

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

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

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

Leave to appeal

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

Standards of fairness

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

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

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

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

Mere reliance on UNHCR's unexplained rejection?

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

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

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

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

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

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

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

What high standards of fairness require

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

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

Matters to be considered

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

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

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

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

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

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

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

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

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

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

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

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

UNHCR determination

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

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

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

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

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

Result

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

Costs

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

Mr Justice Bokhary PJ:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr Justice Chan PJ:

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

Mr Justice Ribeiro PJ:

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

The Lord Millett NPJ:

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

Chief Justice Li:

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

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R.A.V. Ribeiro)
Permanent Judge

(Lord Millett)
Non-Permanent Judge

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

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

HCAL 10/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 10 OF 2010

———————

BETWEEN

MA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 73/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 73 OF 2010

———————

BETWEEN

GA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 75/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 75 OF 2010

———————

BETWEEN

PA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 81/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 81 OF 2010

———————

BETWEEN

FI Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 83/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 83 OF 2010

BETWEEN

JA Applicant

and

DIRECTOR OF IMMIGRATION Respondent

(Heard Together)

Before: Hon Andrew Cheung J in Court
Dates of Hearing: 24-26 November 2010
Date of Judgment: 6 January 2011

J U D G M E N T

Facts

1. These 5 applications for judicial review, which have been heard together, concern 4 mandated refugees and 1 screened-in torture claimant. They raise some common issues. Stated generally, the main issue raised concerns the circumstances, if any, under which a mandated

refugees or a screened-in torture claimants, who has been stranded in Hong Kong for a prolonged period of time and has little prospect of resettlement (or departure) in the immediately foreseeable future, may be permitted to take up available employment in Hong Kong, pending resettlement (or departure).

2. MA is a Pakistani national. He is in his 30s. He was involved in regional politics in Pakistan, where many had been killed in sectarian-related violence. In 2001, MA received information that he and his family were targeted by terrorist extremist groups due to his political involvement. He fled Pakistan in October 2001 and came to Hong Kong as a visitor on 11 October 2001. On the same day, MA sought asylum and applied for protection under the Convention relating to the Status of Refugees 1951 with the UNHCR[1] Office in Hong Kong. MA's permission to stay was extended on several occasions but it eventually expired on 25 January 2002. He went underground shortly thereafter. On 8 June 2004, he was officially mandated by the UNHCR as a refugee. He surrendered himself to the Immigration Department on 18 June 2004 and was released on recognizance in lieu of detention, pursuant to section 36 of the Immigration Ordinance (Cap 115). As such, MA could not work in Hong Kong whilst awaiting overseas resettlement to be arranged by the UNHCR. MA, single and alone in Hong Kong, survived on "assistance in kind" offered by the Government, as a form of "tide-over support" provided on humanitarian grounds, and on other assistance provided by religious and charitable organisations.

3. By a letter dated 20 October 2009, MA through solicitors wrote to the Director of Immigration, pointing out that according to the

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[1] United Nations High Commissioner for Refugees

UNHCR, previous resettlement efforts had been in vain and the prospect of resettlement was remote. The letter went on to say that MA was unable to return to his home country, nor could he be sent elsewhere. He would remain in Hong Kong indefinitely. In those circumstances, the letter maintained that the only practical solution, as "the appropriate durable solution" for MA, was for him to be allowed to live and work in Hong Kong, as a resident. The Director was therefore asked to exercise his power to grant MA permission to remain in Hong Kong, on such conditions as he might consider appropriate.

4. The request was rejected by the Director. In his letter of reply dated 2 November 2009, the Director pointed out that the Refugees Convention 1951 was not applicable to Hong Kong; the Government had a firm policy of not granting asylum and did not have any obligation to admit individuals seeking refugee status under the Convention. The letter went on to point out that removal actions against mandated refugees might, upon the exercise of the Director's discretion on a case-by-case basis, be temporarily withheld pending arrangements for their resettlement elsewhere by the UNHCR. Finally, the letter stated categorically that the Administration owed no obligation to mandated refugees arising from their refugee status.

5. GA, of Burundi nationality, is in his mid-40s. He was involved in political activities in his home country. In June 2004, armed soldiers raided his house and his two elder sons were killed. He fled the country and eventually arrived in Hong Kong on 26 June 2004. He sought asylum shortly after arrival. On 5 July 2004, he was recognised by the UNHCR Office in Hong Kong as a mandated refugee. He was released from detention on recognizance. However, attempts by the UNHCR Hong

Kong Office to resettle him elsewhere had not been successful. GA had lost contact with his wife and remaining children. Alone in Hong Kong, he could not work. On 20 October 2009, through the same firm of solicitors (Barnes & Daly) who represented also MA, GA wrote to the Director asking for permission to stay in Hong Kong so as to allow him to live and work here as a resident. The contents of the letter were similar to that written on behalf of MA. By the same letter of reply dated 2 November 2009 already described, the Director refused both the request of MA and that of GA.

6. PA, a Sri Lankan national, is in his mid 40s. He was involved with the Tamil Tigers. Because of his involvement, he was subjected to arrest, detention and torture on more than one occasion whenever there was any significant Tamil action against the government. On 24 December 2000, he arrived in Hong Kong as a visitor. On 4 January 2001, he approached the Immigration Department for an extension of stay on the ground of fear of torture in Sri Lanka. In April 2001, he was joined by his wife and three children in Hong Kong, who were all permitted to remain as visitors. Since October 2002, PA together with his family were placed on recognizance, after the expiry of their permissions to stay. At one stage, a removal order was issued against him, but it was withdrawn one year later (in 2004). He was screened in by the Director as a torture claimant under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) on 14 May 2008. He was, as at the time of hearing, the first successful screened-in torture claimant. PA has not been permitted to work in Hong Kong since his arrival. By a letter dated 28 January 2010, PA through his solicitors wrote to the Director of Immigration, pointing out that for an unforeseeable and indefinite period of time, the prospect of returning PA to his country or to

resettle him in a safe third country was remote, and PA and his family would remain in Hong Kong indefinitely. The solicitors maintained that the only practical solution available to the Director was to allow PA to live and work in Hong Kong with a permission to remain. The Director was asked to exercise his discretion accordingly. Furthermore, the Director was asked to clarify his policy on "post-screening management" of successful claimants, whether they would be allowed to work in Hong Kong, and under what circumstances they would be able to exercise such a right. Up to the time of hearing, no substantive reply had been given to this letter of PA. According to the evidence filed on behalf of the Director in these proceedings, as of 15 October 2010, PA's request was still "under consideration".

7. According to the expert evidence filed on behalf of the applicants in these proceedings (affirmation of Dr Susan Mistler dated 9 November 2010), PA is suffering from "a severe major depression", and according to Dr Mistler's opinion, "his inability to work and provide for his family is a major contributing factor to the cause and maintenance of his mental illness" (para 45).

8. FI is a Sri Lankan national. He is now in his late 30s, single. He was heavily involved in politics in his home country, and as a result, he was a target of political assassination. In July 2005, an attempt on his life failed. He left Sri Lanka for Hong Kong in September the same year. On 19 September 2005, he arrived in Hong Kong and contacted the UNHCR Office in the following month. His permission to stay expired on 4 October 2005 and thereafter he became an overstayer in Hong Kong. On 6 December 2006, FI was mandated by the UNHCR as a refugee and granted protection in Hong Kong pending a durable solution. He was

arrested by the police on 10 December 2006 for overstaying. Following an interview with the Immigration Department, he was released on recognizance on 12 December 2006. Efforts by the UNHCR to resettle him in a third country have thus far been futile. According to expert evidence filed shortly before the substantive hearing, as a result of the assassination attempt he experienced in Sri Lanka, FI had a series of psychiatric complications. He is suffering from post-traumatic stress disorder that has resulted in episodes of high anxiety and paranoid, although the treatment he has received has alleviated many of these symptoms. According to Dr Mistler, "his inability to work and earn a living for himself is a maintaining factor in his mental illness" (para 54). Allegedly, his inability to work in Hong Kong has led to the breakdown of a relationship which FI has once developed with a local woman.

9. JA is a Pakistani national. He is in his mid-20s, single. He and his family fled Pakistan for Hong Kong and arrived on 1 October 2002 to escape religious persecution in their home country. They claimed protection as refugees immediately upon arrival. They were detained for 7 days until they were mandated as refugees by the UNHCR on 7 October 2002. Since then, JA has been remaining in Hong Kong on recognizance.

10. At one stage, arrangements were made by the UNHCR to resettle JA to Canada, but the plan did not materialise because JA was suspected of and charged for committing a rape in 2004 even though the charge was later withdrawn. JA ran into difficulties with the law and was convicted on 3 occasions in 2008, 2009 and 2010 for theft, burglary and possession of dangerous drugs respectively. As a result, a deportation order was issued against him on 11 December 2009. His criminal

convictions have substantially affected his chances of overseas resettlement.

11. According to Dr Mistler, because of his idling in Hong Kong for the past 8 years, JA "feels alone, helpless, useless, his brain foggy" and he "lives in the darkness"; he is suffering from a major depression (para 57).

Applications for judicial review

12. All 5 applications for judicial review challenge the so-called blanket policy of the Director not to permit mandated refugees or screened-in torture claimants to work in Hong Kong, even where the individual concerned has been stranded in Hong Kong for a prolonged period of time and has been forced to live on others' mercy and charity and to survive at a subsistence level, and even where there is little prospect of resettlement or departure in the immediately foreseeable future.

13. Essentially, the applicants complain that the blanket policy infringes the injunction against cruel, inhuman or degrading treatment as well as the right to employment. The applicants also complain that their rights to private life have been compromised. In any event, the applicants argue, the blanket policy is irrational or unreasonable in the conventional public law sense.

14. The applicants seek declaratory and other relief accordingly.

15. Furthermore, at the individual decision level, both MA and GA, whose express requests for permission to work have been turned down, challenge the decisions of the Director on essentially the same

grounds. PA has made a similar request, but has not yet received a substantive reply. As for FI and JA, at the hearing, there was a suggestion that the Director was under an ongoing duty to review their cases regardless of whether any request for permission to work was specifically made. On that basis, a similar challenge was also made on behalf of FI and JA. Attempts were also made to make use of the expert evidence (Dr Mistler's affirmation) filed shortly before the substantive hearing to challenge the individual decisions.

16. The applicants also challenge the lawfulness of the recognizances which they have been required to give in lieu of detention. They seek relief accordingly.

17. JA, against whom a deportation order has been made, also challenges the lawfulness of the order, and seeks relief against it.

18. PA, the only screened-in torture claimant, challenges separately the Director's lack of a policy or accessible policy on the post-screening management of successful torture claimants.

So-called blanket policy

19. Before turning to the law and arguments, it is necessary to deal with one factual matter, namely, the so-called blanket policy. I have already described the so-called blanket policy as the applicants see it. The Director does not put his policy as such. According to the Director, the starting point is that he does not accept at all that he has a policy not to *refoule* a mandated refugee. He only considers individual cases on a case-by-case basis and exercises his discretion accordingly. However, there cannot be any serious doubt that there is no known case, at least in recent

years, of the Director (or the Secretary for Security) removing or deporting a mandated refugee from Hong Kong against his will to the country or place where he has fled as a refugee. Invariably, the mandated refugee is allowed to remain in Hong Kong (on recognizance), pending overseas resettlement.

20. In those circumstances, it is apparently a matter of semantics whether the Director has a "policy" not to *refoule* a mandated refugee.

21. As regards a screened-in torture claimant, one learns from the leading case of *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187 that the Secretary for Security has adopted the policy of not deporting a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well-founded (para 3). There is no suggestion that a different policy has since been adopted by the Secretary. Nor is there any suggestion that the Director of Immigration follows a different policy.

22. So much for non-removal/deportation.

23. The so-called blanket policy involved in these proceedings relates to whether a mandated refugee or screened-in torture claimant is allowed to work whilst remaining in Hong Kong pending resettlement overseas or departure.

24. Mr Paul Shieh SC (Ms Grace Chow with him), for the Director, maintains that the policy of the Director is as set out in paragraph 6 of the affirmation of Tam Kwok Ching, Assistant Secretary of the Security Bureau, dated 15 October 2010, filed in HCAL 75/2010. In

short, the Assistant Secretary says that the Government's immigration policy on entry for employment is very stringent, in order to ensure that it will not undermine the protection of the local workforce or open a floodgate for the admission of foreign workers. The immigration guidelines for entry for work cover various categories of immigrants, such as employment as professionals or entry for investment; non-local graduates; Mainland talents and professionals; imported workers; foreign domestic helpers and so forth. The guidelines do not cover and have no category for mandated refugees or screened-in torture claimants. According to Ms Tam (paragraph 6), the Government's policies (and guidelines) may change taking into account the prevailing circumstances, especially any immigration concerns faced by Hong Kong at the relevant time, and the need to maintain stringent immigration control with regard to entering or staying in Hong Kong for employment. The paragraph goes on to say that there is nonetheless no fetter on the discretion of the Director by these policies because "each case is to be considered on its own individual merits and the discretion is to be exercised on a case-by-case basis having regard to the entire circumstances of the case".

25. Mr Shieh explains that since mandated refugees and screened-in torture claimants do not fall within any of the established categories in the immigration guidelines, *prima facie*, they are not permitted to take up employment in Hong Kong. However, this does not mean that the Director will not look at their cases individually and exercise his discretion accordingly. Counsel elaborates that strong compassionate or humanitarian reasons or other special extenuating circumstances may persuade the Director to exercise his discretion to permit, exceptionally, an individual to work in Hong Kong.

26. In my view, this is a long way of saying that save in exceptional cases, mandated refugees and screened-in torture claimants are not permitted to work in Hong Kong.

27. It is also plain from the evidence that thus far, no mandated refugee or screened-in torture claimant has been permitted, exceptionally, by the Director, in the exercise of his discretion, to work in Hong Kong.

28. This is not surprising at all on the evidence. Paragraph 17 of Ms Tam's affirmation says:

> "The point I seek to make above is a simple one. Hong Kong's position is unique and vulnerable. Any sign (however tenuous) of potential relaxation in the Government's attitude towards illegal immigrants would likely be interpreted (with or without attempts on the part of "human smugglers" to talk up their hopes and expectations) as a ray of hope for them. It is not a matter of how many claimants eventually succeed in being screened in. It is, sadly, human experience and sheer common sense that even a mere possibility of being allowed to stay and work in Hong Kong can have a strong pulling force in attracting a large number of illegal immigrants to Hong Kong."

29. The same point is made by John Cameron, a police superintendent, in his affirmation dated 15 October 2010 filed in HCAL 75/2010, in which he outlines the perspective of the police (para 9):

> "Human experience and common sense suggests that if there is a hope (and a signal is given out) that if illegal immigrants succeed in their claims (whether under CAT, or as mandated refugees) then they would or might be able to establish themselves in Hong Kong and to work, then there is a significant risk that there would be a steep surge in the number of illegal immigrants who would wish to enter Hong Kong to "take their chances". The above statistics, in my respectful view, serves as a timely reminder of this common sense conclusion and of the "pulling effect" of decisions which might be understood or interpreted by potential illegal immigrants as giving them a risk worth taking."

30. All this is also plain from the minutes of meeting of the Bills Committee on the Immigration (Amendment) Bill 2008 relating to the addition of section 38AA to the Immigration Ordinance to make it illegal for asylum-seekers, refugees and torture claimants to be employed in Hong Kong without permission[2], in which the Administration has been recorded as saying that it had no plan to change "the present policy of not allowing the employment of torture claimants and refugees/asylum-seekers" (para 31 of LC Paper No CB(2)77/09-10).

31. The number of mandated refugees stranded in Hong Kong at any particular point of time is not particularly high. As at 31 January 2010, there were a total of 82 mandated refugees in Hong Kong. 29 of them had been remaining in Hong Kong for 4 or more years since mandated as refugees. However, as is illustrated by the cases of the applicants, if one were to start counting from the date of arrival, the period of time that the refugee has spent in Hong Kong would be much longer.

32. As mentioned, PA was the only screened-in torture claimant as at the time of hearing. He has been in Hong Kong since December 2000. It is a known fact that there are still thousands of torture claimants awaiting screening.

Fundamental rights directly relied on

33. It is now necessary to go to the law. As mentioned, the applicants rely on various rights under different instruments. These instruments include the Basic Law, the Hong Kong Bill of Rights in the

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[2] The amendment was introduced to close a loophole resulting from the first instance decision of Wright J in *Iqbal Shahid v Secretary for Justice*, HCAL 150/2008, 2 March 2009 – the decision was partially reversed on appeal subsequent to the enactment of section 38AA: [2010] 4 HKLRD 12.

Hong Kong Bill of Rights Ordinance (Cap 383) which is the domestic implementation of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CAT. The substantive rights invoked include the right to human dignity; the prohibition against cruel, inhuman or degrading treatment; the right to private life; and the right to work.

Rights under the Hong Kong Bill of Rights/ICCPR

34. A necessary prior question to answer is the extent to which these instruments, or the relevant rights provided thereunder, apply to mandated refugees or screened-in torture claimants in Hong Kong. I start with the Hong Kong Bill of Rights, which is based on the ICCPR. The applicants rely on or refer to article 3 (no torture or inhuman treatment etc), article 14 (privacy) and article 19 (family rights) in the Hong Kong Bill of Rights (and the corresponding articles in the ICCPR) in support of their respective cases. However, section 11 of the Hong Kong Bill of Rights Ordinance specifically provides:

> " As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

35. Mr Robert Whitehead SC (Mr Earl Deng with him) submits on behalf of the applicants that their cases are not caught by section 11. Leading counsel argues that their immigration status has already been decided by the Director, who suffers their presence and stay in Hong Kong pending resettlement or departure. What is in issue is whether they should be permitted to work pending resettlement or departure, which, it is argued, is not an immigration matter, but a welfare matter. In those circumstances,

one is not concerned with the applicants' "stay" in Hong Kong, and section 11 has no application.

36. Section 11 of the Hong Kong Bill of Rights Ordinance simply reflects the so-called immigration reservation made by the Government of the United Kingdom when it ratified the ICCPR and extended its application to Hong Kong in 1976. It reserved to the UK Government and to each of its (then) dependent territories, including Hong Kong, the right to continue to apply such immigration legislation "governing entry into, stay in and departure" from the UK or the dependent territory concerned as might be deemed necessary from time to time.

37. In my view, the phrase "entry into, stay in and departure from Hong Kong" must be given its natural and ordinary meaning. The phrase covers, amongst other things, the entire period, from arrival until departure, that a foreigner is on Hong Kong soil, irrespective of his so-called "immigration status" (ie as a lawful visitor, an illegal immigrant, an overstayer, and so forth). The Immigration Ordinance gives the Director powers to permit or authorise a foreigner to enter or to remain in Hong Kong on conditions, one of which is restriction on taking up employment here.

38. Thus analysed, I have no difficulty in rejecting the applicants' argument that the present cases only concern the applicants' right to work in Hong Kong, rather than their "stay" in Hong Kong. In my view, their ability or inability to work is just one facet of their "stay" in Hong Kong, controlled by the Immigration Ordinance. Here, the word "stay" is used in its natural and ordinary meaning, and may cover both lawful and illegal

stay. In other words, the applicants' cases are caught precisely by section 11.

39. Mr Whitehead then seeks to argue that section 11 is incompatible with article 39(1) of the Basic Law and is therefore unconstitutional and of no effect. Article 39(1) of the Basic Law provides that the provisions of the ICCPR, the ICESCR, and international labour conventions "as applied to Hong Kong" shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. For various reasons put forward in a supplementary submission, leading counsel argues that section 11 cannot exclude the application of the provisions of the ICCPR, on which our Hong Kong Bill of Rights is based, to the applicants.

40. I need not go into these reasons. In my view, it is plain that the matter is covered squarely by the very recent Court of Appeal decision in *Ubamaka Edward Wilson v The Secretary for Security*, CACV 138/2009, 19 November 2010. Amongst other things, the Court of Appeal rejected a similar argument based on article 39(1) of the Basic Law against the validity of section 11 of the Hong Kong Bill of Rights Ordinance in relation to certain rights guaranteed under the Hong Kong Bill of Rights: paras 126 to 148. This is dispositive of the issue in question as far as this Court is concerned. In short, as the Court of Appeal has decided, the ICCPR is only applicable to Hong Kong pursuant to article 39(1) to the extent it was applied by the UK Government to Hong Kong as at the time of promulgation of the Basic Law in 1990. As mentioned, the UK Government applied the ICCPR to Hong Kong subject to the immigration reservation, which is fully reflected by section 11 of the Hong Kong Bill of Rights Ordinance. Before 1997, the Ordinance gave the

ICCPR, as applied to Hong Kong internationally by the UK Government, domestic effect. After 1997, the Ordinance was and is the domestic legislation by which the ICCPR as applied to Hong Kong is implemented, as is required by article 39(1).

41. I note that in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752, the Court of Appeal held that the power of detention under section 32 of the Immigration Ordinance was contrary to article 5(1) of the Hong Kong Bill of Rights and was therefore unlawful. In that case, in which I sat as a member of the Court of Appeal, the Director did not rely on section 11 of the Hong Kong Bill of Rights Ordinance to argue that section 32 of the Immigration Ordinance was excepted from the operation of the Hong Kong Bill of Rights. In *Ubamaka*, it was not argued before the Court of Appeal, of which I also sat as a member, that the decision in *A (Torture Claimant)* stood in the way of the Court's eventual conclusion that section 11 was effective to except the Immigration Ordinance from the operation of the Hong Kong Bill of Rights in relation to matters concerning entry into, stay in and departure from Hong Kong.

42. Given this state of the law (as stated in *Ubamaka*), the applicants' reliance on the rights guaranteed under the Hong Kong Bill of Rights or the ICCPR must be rejected.

Right to employment under the ICESCR

43. I now turn to the ICESCR. The applicants rely on article 6 of the ICESCR. Paragraph 1 of article 6 reads:

> "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to

> gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

44. Article 39(1), as mentioned, provides, amongst other things, that the provisions in the ICESCR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

45. The applicants' reliance on article 6 of the ICESCR raises immediately several issues. First, whether article 39(1) of the Basic Law *by itself* gives the provisions of the ICESCR as applied to Hong Kong domestic force, or whether domestic legislation is required to give the provisions such force in Hong Kong. It should be noted that article 39(1) specifically provides for the implementation of the provisions of the ICESCR through domestic legislation. Secondly, if the ICESCR has no domestic force as such absent implementation, whether the provisions therein may nonetheless be resorted to by way of legitimate expectation. Thirdly, there is the question of whether the provisions of the ICESCR are merely "promotional" or "aspirational" in nature only. See *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125, 133C/D to 134A & 135E to H; *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109, 131D to 134B; but *cf* United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports submitted by State Parties under articles 16 and 17 of the Covenant – China: Hong Kong Special Administrative Region*, 21 May 2001, paras 16 and 27. See also *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628, paras 65 to 67; *Yeung Chung Ming v Commissioner of Police* (2008) 11 HKCFAR 513, para 63.

46. However, it is unnecessary for me to express any concluded views on these issues. This is because, in my opinion, there is a fatal objection to the applicants' reliance on article 6 of the ICESCR as applied to Hong Kong. When the ICESCR was applied by the UK Government to Hong Kong,

> "The Government of the United Kingdom reserve the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory."

47. It cannot be denied that one of the major purposes of the Director's stringent policies on employment is the protection of the local workforce. In those circumstances, the matter falls squarely within the reservation made by the UK Government when the ICESCR was applied to Hong Kong. In other words, regardless of whether article 39(1) by itself gives the provisions in the ICESCR domestic force and regardless of whether those provisions are merely promotional or aspirational in nature, the restrictions placed by the Director on mandated refugees and screened-in torture claimants in relation to their ability to work whilst remaining in Hong Kong cannot be challenged under article 6 of the ICESCR. Nor can there be any legitimate expectation arising in relation to article 6 in the light of the specific reservation.

48. Mr Whitehead contends that there is a distinction between a reservation and an interpretative declaration by reference to Shaw, *International Law* (5th ed), pp 822 to 823:

> "… This is not the case with respect to multilateral treaties, and here it is possible for individual states to dissent from particular provisions, by announcing their intention either to omit them altogether, or understand them in a certain way. Accordingly, the effect of a reservation is simply to exclude the treaty

> provision to which the reservation has been made from the terms of the treaty in force between the parties.
>
> Reservations must be distinguished from other statements made with regard to a treaty that are not intended to have the legal effect of a reservation, such as understandings, political statements or interpretative declarations. In the latter instance, no binding consequence is intended with regard to the treaty in question. What is involved is a political manifestation for primarily internal effect that is not binding upon the other parties. A distinction has been drawn between 'mere' interpretative declarations and 'qualified' interpretative declarations, with the latter category capable in certain circumstances of constituting reservations. Another way of describing this is to draw a distinction between 'simple interpretative declarations' and 'conditional interpretative declarations'. The latter is described in the ILC Guide to Practice as referring to a situation where the state subjects its consent to be bound by the treaty to a specific interpretation of the treaty, or specific provisions of it."

49. I have no difficulty with the distinction. However, it is plain from the "reservation" made by the UK Government extracted above that what is involved is a reservation made "upon ratification", rather than an "interpretative declaration". This is clear from the "Declarations and Reservations" relating to the ICESCR relied on by the applicants (applicants' authorities, item 6). In the document, declarations and interpretative declarations are described as such. On the other hand, reservations are made when a government reserves the right to do or to refrain from doing a particular thing upon ratification, accession or succession. The wording of the reservation itself supports such a reading. Furthermore, the United Nations Committee on Economic, Social and Cultural Rights, in its *Consideration of Reports, supra*, relating to Hong Kong, also referred to the article 6 reservation as a "reservation", as opposed to an "interpretative declaration" (para 29).

50. In any event, what matters is not whether the UK Government's reservation (or supposed reservation) over article 6 is

"binding upon the other parties" to the ICESCR, a matter of concern to the author of the book relied on by Mr Whitehead. What matters is the extent to which article 39(1) applies the provisions of the ICESCR to Hong Kong under our Basic Law. Article 39(1) provides that the provisions of the ICESCR "as applied to Hong Kong" – by the UK Government as at the time of promulgation of the Basic Law in 1990 – "shall remain in force". Article 39(1) itself is based on the Sino-British Joint Declaration, Annex I (JD Ref 156)[3]. What is therefore important is the extent to which the UK Government considered itself to have applied the provisions of the ICESCR to Hong Kong. That is a question of subjective intention and understanding of the UK Government, rather than an objective question of international law. What matters is the subjective intention and understanding of the UK Government which applied the provisions of the ICESCR to Hong Kong subject to the reservation in question, rather than whether, as a matter of international law, the reservation or purported reservation was binding on the other parties to the Convention. A similar approach has been adopted by the Court of Appeal in *Ubamaka* in relation to the suggested invalidity under international law of the immigration reservation made by the UK Government when it ratified the ICCPR and applied it to Hong Kong: paras 134, 135 and 143 to 146. In short, the Court took the view that regardless of whether the UK's position on the validity of the immigration reservation she made was sound at the international law level, so far as article 39(1) of the Basic Law and the domestic courts are concerned, one must proceed from the immigration reservation as it was understood by the UK Government at the time. In my view, the same approach applies to the article 6 reservation in relation to

[3] "The provisions of the [ICCPR] and the [ICESCR] as applied to Hong Kong shall remain in force."

the ICESCR, and that represents the true meaning of the important phrase "as applied to Hong Kong" in article 39(1).

Rights under the CAT

51. I now turn to the CAT. Only article 16 is relevant. It prohibits acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 of the Convention.

52. As has been noted by the Court of Appeal in *Ubamaka* (para 95 and fn 12), the CAT is a treaty which has not been incorporated into domestic law and therefore *prima facie* cannot give rise to any directly enforceable right. It is fair to point out that the applicants have not placed any real reliance on article 16 of the CAT.

Rights incorporated under common law?

53. Before I turn to the last instrument, namely, the Basic Law, for the sake of completeness, I should deal with one peripheral argument briefly touched on during submission. It has been suggested by the applicants in reply submission that the various rights recognised and guaranteed under the international instruments reflect corresponding rules of customary international law or even preemptory norms. By the doctrine of incorporation, they form part of our common law and are therefore enforceable as such.

54. I do not accept the argument. A similar argument has been rejected by the Court of Appeal in *Ubamaka* (paras 149 to 151).

Article 17 of the Refugees Convention 1951

55. Also for the sake of completeness, it should be pointed out that article 17 of the Refugees Convention provides that the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. However, as noted, whether before or after 1997, the Refugees Convention has not been extended to Hong Kong.

Rights under the Basic Law

56. I turn now to the Basic Law. The applicants rely on articles 28, 29, 30, 33, 37 and 41 of the Basic Law.

57. The significance of article 39(1), for the purposes of the present proceedings, needs no further elaboration. Article 41 is also of importance. It provides that persons in Hong Kong other than Hong Kong residents shall "in accordance with law" enjoy the rights and freedoms of Hong Kong residents prescribed in Chapter III of the Basic Law, where all the other articles relied on by the applicants may be found. On that basis, the applicants argue that the substantive rights given under these other articles are also applicable to them.

58. The applicants rely on article 28. Article 28 is concerned with the freedom of the person of Hong Kong residents, arrest, detention, imprisonment, search, and deprivation or restriction of the freedom of the person. The applicants apparently rely on the last sentence in article 28(2) which provides that "torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited".

59. However, it is not the applicants' case that the treatment they have received amounts to "torture", as opposed to "cruel, inhuman or degrading treatment". In those circumstances, article 28 is not engaged at all.

60. Article 29 of the Basic Law provides that the homes and other premises of Hong Kong residents shall be inviolable. It prohibits arbitrary or unlawful search of, or intrusion into, a resident's home or other premises.

61. It is plain that this article does not provide a general right to privacy or to private life as such. It is only concerned with protection of the homes and other premises of Hong Kong residents. It is not engaged on the facts of the present case.

62. Likewise, article 30 of the Basic Law has nothing to do with the present case. It provides a very specific type of protection against intrusion of privacy:

> " The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

63. In short, articles 29 and 30 of the Basic Law, unlike article 14 of the Hong Kong Bill of Rights, do not guarantee a general right to privacy. Moreover, on the facts, those two articles in the Basic Law are simply not engaged.

64. That leaves article 33 of the Basic Law:

> " Hong Kong residents shall have freedom of choice of occupation."

65. According to case law, article 33, even when interpreted generously and purposively, does not guarantee the right to be employed, or to be employed in any particular field of occupation. It is to be interpreted rather in the light of what it seeks to prevent, namely, outside of issues of national service, any form of conscription to particular fields of occupation: *Cheng Chun-ngai Daniel v Hospital Authority*, HCAL 202/2002, 12 November 2004, Hartmann J, para 55; *Financial Services and Systems Limited v Secretary for Justice*, HCAL 101/2006, 6 July 2007, Fung J, paras 49 to 53; *Ng King Tat Philip v Post-Release Supervision Board*, HCAL 47/2010, 23 August 2010, Lam and Andrew Cheung JJ, paras 116 to 117. See also Yash Ghai, *Hong Kong's New Constitutional Order, the Resumption of Chinese Sovereignty and the Basic Law* (2nd ed), 435 to 436.

66. However, Mr Whitehead argues that article 33 clearly pre-supposes that Hong Kong residents enjoy the right to employment (where available), and guarantees the right and freedom of choice of occupation. The freedom of choice of occupation so guaranteed only makes sense if there is a right to seek and take up available employment in the first place.

67. I accept that this argument has not been covered by the case law referred to. The authorities have all focused on whether there is a right to be employed, and particularly, whether there is a right to be employed in a particular field. The answers are in the negative. However, Mr Whitehead argues not for those rights. He contends for a right and freedom to seek and take up available employment.

68. I can see the force of Mr Whitehead's argument, particularly if a purposive and generous approach is to be adopted in interpreting the fundamental right given to Hong Kong residents in article 33. I prefer to leave this point open because in my view, there is a direct answer to Mr Whitehead's argument on behalf of the applicants.

69. In the present case, one is not concerned with a Hong Kong resident's right to take up employment. One is only concerned with the right (if any) under the Basic Law, of mandated refugees and screened-in torture claimants, to take up employment. The matter is not directly governed by article 33 as such. Rather, the contended right is said to be derived from article 41 of the Basic Law. However, as mentioned, a non-resident only enjoys the rights guaranteed in Chapter III of the Basic Law "in accordance with law". The Basic Law must be read as a whole in order to find out what right to take up employment, if any, is conferred on mandated refugees and screened-in torture claimants, as non-residents in Hong Kong.

70. In this regard, one must not overlook the fact that the right to take up employment is a subject matter specifically covered by article 6(1) of the ICESCR. Article 39(1) stipulates that the provisions of the ICESCR, including therefore article 6 thereof, "as applied to Hong Kong" (by the UK Government subject to the article 6 reservation), shall remain in force in Hong Kong. Quite plainly, the article 6 reservation permits the Government to impose restrictions on non-residents regarding taking up employment in Hong Kong.

71. In those circumstances, even if one assumes, for the purposes of argument, that article 33 gives Hong Kong residents the right and

freedom to take up employment in Hong Kong, yet when one reads together articles 33, 39(1) and 41, the only sensible conclusion is that the (assumed) right of Hong Kong residents to take up available employment is not intended by the drafters of the Basic Law to extend to mandated refugees and screened-in torture claimants. Such a right has been specifically removed by the article 6 reservation by the UK Government when it applied the ICESCR to Hong Kong. Article 39(1) maintains the *status quo* and thus excludes, amongst others, mandated refugees and screened-in torture claimants from the ambit of article 6 of the ICESCR. It would then be a strange interpretation to adopt if one were to read the general provisions in article 41 as importing, through the backdoor, the right to take up employment in favour of these non-residents.

72. This interpretation is reinforced by article 154(2) of the Basic Law. It reads:

> " 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."

73. As mentioned, the Basic Law must be read and interpreted as a whole. One important immigration control that the Government used to impose before 1997 and continues to impose after 1997 is restriction on employment. Construing the Basic Law and the provisions therein as a whole, and having regard to the theme of continuity underlying the Basic Law, it is difficult to see how the very general provisions in article 41 can have the effect of giving non-residents the right to take up employment in Hong Kong, as if they were local residents. This would defeat the obvious intention behind article 154(2) and amount to a drastic departure from the pre-1997 position.

74. In those circumstances, even if one were to assume that article 33 gives residents the right and freedom to take up available employment, the same does not extend to non-residents.

75. In short, none of the provisions in the Basic Law assist the applicants directly.

Cruel, inhuman or degrading treatment

76. In other words, the applicants' challenges, insofar as they are based on rights guaranteed under the various instruments discussed above as directly enforceable rights in their favour, must fail.

77. It is therefore unnecessary to decide whether the prolonged refusal on the part of the Director for the applicants to take up employment in Hong Kong amounts to cruel, inhuman or degrading treatment; or whether the so-called blanket policy has such an effect on the applicants. However, for the sake of completeness, I would very briefly indicate my views.

78. The meaning of "inhuman or degrading treatment" has been examined in *Ubamaka*, paras 71 to 83. *Ubamaka* was of course concerned with a very different type of situation from the one faced by the Court in the present proceedings. However, the general principles stated there are still of relevance. In particular, the ill-treatment in question must obtain a minimum level of severity and must involve bodily injury or "intense physical and mental suffering". It must deny "the most basic needs of any human being" "to a seriously detrimental extent". Paragraph 72 of the judgment, citing Clayton & Tomlinson, *The Law of Human Rights* (2nd ed), para 8.19. See also the leading case of *Pretty v United Kingdom* (2003) 35

EHRR 1, para 52; and the House of Lords case of *R (Limbuela) v Home Secretary* [2006] 1 AC 396. The absence of an intention to humiliate does not necessarily mean that the conduct or treatment is not cruel, inhuman or degrading: *Price v United Kingdom* (2002) 34 EHRR 53.

79. I accept that in principle, in the case of a mandated refugee or screened-in torture claimant, a prolonged period of prohibition against taking up employment (even if available), when there is little prospect of the individual being resettled or being able to depart in the immediately foreseeable future, could, depending on the circumstances, amount to inhuman or degrading treatment.

80. However, it would all turn on the circumstances of an individual case. This is because, in my view, there are both an objective and a subjective element to the question of inhuman or degrading treatment. So far as it turns on the subjective element, obviously all personal and other circumstances pertinent to an individual's case must be taken into account. A prolonged period of restriction on employment may, quite obviously, have different subjective effects on different individuals depending on their sex, age, former and present status in life and so forth. Thus in *Lorsé v Netherlands* (2003) 37 EHRR 3, para 59, it was pointed out that the assessment of the minimum level of severity required to be reached would depend on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

81. Of course, the objective element cannot be overlooked. Here, the prohibition against employment must be viewed against, amongst other things, the overall programme of assistance provided by the Government

and other agencies to refugees and torture claimants. However, life as a human being is not all about survival and subsistence. The right to work has been recognised in many international instruments, for instance, the Universal Declaration of Human Rights (article 23), to be a fundamental human right[4]. Moreover, I accept that there is a subtle distinction between doing unpaid voluntary work only and having gainful employment, and over time, the former may be no substitution for the latter. I also accept that the right to work is closely related to the inherent dignity of a human being and his right to privacy or to private life. All this must also be borne in mind when considering any individual case.

82. In short, so far as looking at the matter at the policy level is concerned, my view is that one cannot say, as a sweeping statement, that the so-called blanket policy amounts to inhuman or degrading treatment of mandated refugees and screened-in torture claimants, even in a prolonged type of situation. All one may say is that if carried out to extreme and without meaningful exception, the policy may potentially have such an effect in individual cases. In an extreme case, it could even amount to constructive *refoulement*.

83. There is medical evidence filed on behalf of the applicants to the effect that prolonged deprivation of the opportunity to work, in the circumstances of refugees and torture claimants, is detrimental to the mental health of the individuals concerned. There is some expert study to similar effect: see eg, Noel Calhoun, *UNHCR and community development: a weak link in the chain of refugee protection?* (October 2010). On the other hand, the respondent has filed expert evidence to dispute the

[4] For other international and regional human rights instruments which protect the right to work, see *The Michigan Guidelines on the Right to Work* 31 Mich J Int'l L 293-306 (2010), at pp 293-294.

proposition. The Court cannot, of course, resolve the differences in expert opinion in these proceedings. Nor is it absolutely necessary to do so. For even if the Court were to proceed on the basis that prolonged deprivation of the opportunity to work in the circumstances under discussion could have a potentially adverse impact on the mental health and condition of the individuals concerned, one would still have to look at the individual cases to see the actual impact involved.

84. So far as individual cases are concerned, all I wish to add at this stage, given the *obiter* nature of my observations, is that where it is medically established that the prolonged prohibition on employment in the circumstances described has resulted in or materially contributed to the development or maintaining of a serious mental condition, such as a major depression, on the part of the mandated refugee or screened-in torture claimant, the case for saying that the individual has suffered, or, if the prohibition is not relaxed, would suffer, inhuman or degrading treatment is strong. However, before one can arrive at any such conclusion, both the mental condition and the requisite causal link must be clearly established by medical or other relevant evidence. Furthermore, in such a case, the appropriate relief may not necessarily lie in the relaxation of the prohibition. It all depends on the form of treatment indicated and the prognosis concerning the individual.

Conventional public law review – intensity of review

85. I now turn to the applicants' challenges against the Director's so-called blanket policy and decisions in individual cases based on conventional public law. A preliminary question that has arisen is the intensity of review. Mr Shieh for the Director contends that the orthodox

Wednesbury unreasonableness test is the appropriate standard of review to adopt. Mr Whitehead submits otherwise.

86. The *Wednesbury* unreasonableness test of course represents the orthodox approach of judicial review. However, it is now firmly established in conventional public law in the UK that even within the conventional limitations on the scope of the court's power of review, the court must be entitled to subject an administrative decision to the more vigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. At the extreme end of the scale where, for instance, the individual's right to life, the most fundamental of all human rights, is said to be put at risk by a decision, "the basis of the decision must surely call for the most anxious scrutiny", even though the human right itself is not directly enforceable as such domestically: *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514, 531 E/F to G, per Lord Bridge. In other words, there is a sort of a sliding scale in terms of the intensity of review, and as Bingham MR (as he then was) accepted, "the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable": *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554F to G. See *de Smith's Judicial Review* (6th ed), paras 11-007; 11-086; 11-092 to 11-097, where the book's editors refer to the type of review under discussion as the "anxious scrutiny unreasonableness review", "heightened scrutiny unreasonableness review" or "variable scrutiny unreasonableness review"[5]. Irrespective of what it is called, the court's function remains one of review for error of law. The court is not a fact-finder. However, the burden of argument shifts from the applicant to the

[5] For the sake of convenience, the remainder of this judgment will simply use the term "anxious scrutiny approach" to describe this type of review.

decision-maker, who needs to produce a justification[6] for the decision. The court will be less inclined to accept *ex post facto* justifications from the decision-maker, compared to traditional *Wednesbury* unreasonableness review. On how far the common law in the UK has gone down the path of proportionality in applying the anxious scrutiny approach particularly in extreme cases, see for instance, *Doherty v Birmingham City Council* [2009] 1 AC 367, para 135 (Lord Hope).

87. In a refugee case decided in November 1997, the Hong Kong Court of Appeal has, without much discussion, accepted and applied the anxious scrutiny approach: *The Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641, 648G, per Godfrey JA.

88. On the other hand, in *Bahadur v Secretary for Security* [2000] 2 HKLRD 113, 125C/D to J, the Court of Appeal (differently constituted) doubted the anxious scrutiny approach in the immigration or deportation fields, on the ground that section 11 of the Hong Kong Bill of Rights Ordinance excluded the application of immigration legislation from its ambit, and section 12 limited the operation of article 9 of the ICCPR in its application to deportation decisions.

89. In *Society for Protection of the Harbour Ltd v Chief Executive in Council*, HCAL 102/2003, 9 March 2004, Hartmann J (as he then was) clearly pointed out that when fundamental human rights are involved, the classic *Wednesbury* test is not appropriate. Rather, the greater the degree of interference with a fundamental right, the more the court will require by way of justification before it is satisfied that the decision is reasonable in

[6] The word is used here in a non-technical sense.

the public law sense (paras 74 to 77). However, it should be noted that the case was not concerned with immigration matters.

90. Despite some initial hesitation to exactly adopt the same approach (see *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1, para 67, where the point was expressly left open[7]), the Court of Final Appeal has since referred to the anxious scrutiny approach as part of the law of judicial review on more than one occasion: *Prabakar, supra*, paras 44 to 45 (concerning screening of torture claimants); *Shiu Wing Steel Ltd v Director of Environmental Protection* (2006) 9 HKCFAR 478, para 93 (in the context of relief).

91. In particular, in *Prabakar*, para 44, the Court of Final Appeal pointed out that the determination of the potential deportee's torture claim by the Secretary for Security was plainly one of "momentous importance" to the individual concerned, as his "life and limb" were in jeopardy and "his fundamental human right not to be subjected to torture [was] involved". That was why high standards of fairness must be demanded in the making of such a determination. Equally importantly, the Court went on to point out (in paragraph 45) that in any future challenge against a determination of the Secretary:

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

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[7] In his partially dissenting judgment in *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1, paras 367 to 374, a case concerning legitimate expectation in the context of the right of abode governed by the Basic Law, Bokhary PJ discussed without coming to any definite conclusion on whether there could be different standards of review depending on the subject matters involved as a matter of Hong Kong law.

92. The case law speaks of fundamental rights or fundamental human rights. By definition, one is concerned with fundamental rights that are not directly enforceable in domestic courts. If it were otherwise, the individual involved could simply sue on the right and the decision-maker would have to act in accordance with it save where his departure therefrom could be justified (under the proportionality test). In that scenario, the question of whether the right was really engaged and whether it was infringed (using the proportionality test) would indeed be one ultimately for the court to determine. This is why after the enactment of the Human Rights Act in 1998, the need for the UK courts to resort to the anxious scrutiny approach has greatly diminished, as the fundamental rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms have become domestically enforceable as such: see *de Smith*, para 11-096. In the present discussion, one is concerned with the situation where the relevant fundamental right is not domestically enforceable. The decision-maker is therefore not required by law to act in accordance with the right as such. Nor can the court, under a conventional public law review, require him to do so. *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. What the court may do, however, is to subject the relevant decision to anxious scrutiny.

93. The underlying rationale of the anxious scrutiny approach and the basic reason why it is compatible with the well-known constraints of a conventional public law review are not difficult to see. Substantively speaking, where the subject matter of a decision or exercise of discretion engages an individual's fundamental right, commonsense would dictate that the decision-maker should not, for no good reason, make a decision or exercise his discretion in such a way that would amount to an infringement

of the right even though it is not domestically enforceable by the individual as such. Thus for instance, even though the injunction against inhuman or degrading treatment protected under the Hong Kong Bill of Rights is not directly enforceable by a non-resident in immigration matters for reasons already explained, it does not follow that a public authority may make a decision or exercise a discretion that would have the effect of inflicting such treatment on a non-resident for no good reason. For to do so would render the decision or exercise of discretion unreasonable, irrational, arbitrary or perverse, even in the conventional public law sense. Even within the considerable conventional latitude accorded to a decision-maker, it must still be generally correct to say that the more important the fundamental right concerned or the more serious the (potential) encroachment on the right, the weightier the reasons or justification[8] the court would expect the decision-maker to provide in explanation of his decision or exercise of discretion.

94. Procedurally speaking, conventional public law demands an appropriate degree of procedural fairness in the decision-making process. The degree of fairness required is dependent on the entire circumstances. That, by definition, includes the importance of the subject matter concerned. Everything being equal, the more fundamental the decision to the individual concerned, the greater procedural protection the court would require from the decision-making process. That again is simply natural and commonsense. For instance, the court would require the decision-making process to meet "high standards of [procedural] fairness" and subject the decision to "rigorous examination and anxious scrutiny" where what is at stake is an individual's life and limb. Indeed that is precisely what *Prabakar* has held, as described above.

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[8] The word is used here in a non-technical sense.

95. How does all this fit into immigration and deportation cases in Hong Kong? First, I do not think the mere fact that many of the fundamental rights, including all the fundamental rights involved in the present proceedings, are not directly enforceable as such by non-residents such as mandated refugees and screened-in torture claimants (for reasons given above) makes the anxious scrutiny approach inapplicable. As explained, the approach works within the established confines of a conventional public law review and does not require the decision-maker to act in accordance with the relevant fundamental right as such. Rather it requires the decision-maker to provide reasons to justify[9] his decision and subjects it to a suitably intensive review. Yet, secondly, the approach sits comfortably well with the relatively generous degree of latitude allowed by the courts to the Director (and Secretary for Security) in immigration and deportation matters. This apparent paradox is explained by the well-known saying that "in public law, context is all": *R v Secretary for State for the Home Department, ex p Daly* [2001] 2 AC 532, para 28 (per Lord Steyn). The anxious scrutiny approach does not ignore, but rather has full regard to the context, when it requires the decision-maker to provide reasons to justify his decision. And in immigration and deportation matters, almost invariably, the overall immigration picture would provide an important, if not overwhelming, justification[10] for the stringent policies of the Director and his apparently harsh decisions, even though fundamental rights are or may be involved.

96. For instance, in these proceedings, the reason why the important rights concerned are not directly enforceable in Hong Kong by mandated refugees and screened-in torture claimants, is that they have

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[9] The word is used here in a non-technical sense.

[10] The word is used here in a non-technical sense.

been specifically excluded from application by the Basic Law and the relevant legislation (ie articles 39(1) and 41 of the Basic Law, section 11 of the Hong Kong Bill of Rights Ordinance and the Immigration Ordinance). All this represents a clear intention on the part of the drafters of the Constitution and on the part of the legislature to exclude mandated refugees and screened-in torture claimants from the protection afforded under these internationally recognised rights. This is to be contrasted with the position in the UK before the Human Rights Act 1998, which gave the European Convention which the UK Government had signed direct domestic force, was enacted. There, Parliament had simply not (yet) legislated to implement the European Convention domestically. Here, in Hong Kong, the legislature has specifically legislated to exclude immigration legislation from the protection under the relevant rights and the Basic Law is to the same effect. This is an important part of the context that the court must bear firmly in mind.

97. The legislative (and indeed constitutional) intent and purpose is plain to see. As the courts, including this Court, have noted on various occasions, in the light of Hong Kong's small geographical size, huge population, substantial daily intake of immigrants from the Mainland, and relatively high per capita income and living standards, and given Hong Kong's local living and job market conditions, almost inevitably Hong Kong has to adopt very restrictive and tough immigration policies and practices. The courts recognise that the legislature has chosen to entrust the high responsibility for and wide discretions on immigration matters to the Director. It is an important responsibility, given Hong Kong's unique circumstances, and the discretions conferred are indeed wide. And it is not at all surprising that the Director has consistently devised and implemented very restrictive and stringent immigration policies. The courts have said

repeatedly that they will not lightly interfere with the Director's policies or exercise of discretion, even though many of the cases involved, or potentially involved, family reunion, detention/freedom of the person, or other important subject matters. This approach represents not only a specific application of the general principle of public law that a court in its conventional public law jurisdiction only exercises a supervisory jurisdiction, and it does not sit as an appellate court from the decision of the decision-maker. But it also represents an acknowledgment on the part of the courts that the legislature, in its wisdom, has entrusted the Director with the unenviable task of manning Hong Kong's immigration controls. More generally speaking, the courts' consistent approach also demonstrates their recognition that under the Basic Law it is the executive which has been given the right and the responsibility to administer the affairs in Hong Kong generally. As mentioned, article 154(2) of the Basic Law specifically authorises the Government to apply immigration controls on entry into, stay in and departure from Hong Kong by persons from foreign states and regions. The role to be played by the courts is essentially supervisory in nature. See, for instance, *Hai Ho-tak v Attorney General* [1994] 2 HKLR 202, 204, 209 & 210; *Aita Bahadur Limbu v Director of Immigration*, HCAL 133/1999, 10 December 1999, Stock J, p 2; *Bhupendra Pun v Director of Immigration*, HCAL 1541/2001, 22 January 2002, Hartmann J, paras 9 to 23; *Durga Maya Gurung v Director of Immigration*, CACV 1077/2001, 19 April 2002, paras 53 to 60; *Re Singh Sukhmander*, HCAL 89/2008, 18 September 2008, Andrew Cheung J, paras 7 to 9; *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219, paras 19 to 22. This important and well-established body of case law throws important light on how the court should approach its task of review in immigration and deportation matters.

98. In my view, therefore, when deciding whether the decision of the Director, whether at the policy level or at the individual decision level, is rational or reasonable in the public law sense, the court is bound to have substantial regard to the overall immigration picture as a general justification[11] for the Director's policy or exercise of discretion concerned, in deciding whether the Director has acted outwith the degree of latitude public law allows to him. The court must firmly bear in mind that it is not entitled, even under the anxious scrutiny approach, to dictate to the Director what policy he should make or how he should exercise his discretion or otherwise act, in accordance with the relevant fundamental right (which is not directly enforceable). Nor does the anxious scrutiny approach entitle the court to tell the Director that he must take into account humanitarian or similar considerations under any or any particular circumstances when exercising his wide discretions. Indeed the Court of Final Appeal has specifically said in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, a case where, amongst other things, family rights were potentially at stake, that the Director is under no duty and hence not bound to take humanitarian considerations into account (at p 322F/G).

99. On the other hand, where, as here, it is part of the Director's own policy that each case will be looked at on its individual merits and he will take into account the entire circumstances, including humanitarian or other similar considerations, when considering how to exercise his discretion on a case-by-case basis, the court is entitled to hold the Director, with an appropriate degree of strictness that is commensurate with the importance or seriousness of the fundamental right at stake, to his own policy, so as to ensure due compliance thereof. Where, for instance, the

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[11] The word is used here in a non-technical sense.

lawfulness of the Director's decision depends on whether he has taken into account all relevant considerations and has disregarded all that are irrelevant, the court would examine the record and evidence carefully to see whether the Director has really done so conscientiously or is just paying lip service to the law's requirement. As mentioned, the court would be suitably wary of *ex post facto* justifications. Where, by way of a further example, the Director's decision turns on a finding of fact, the court would, generally speaking, examine the relevant factual materials and fact-finding procedure sufficiently closely, yet without taking over the role of the primary fact-finder, in order to satisfy itself that the decision has been lawfully made. And if the court is so satisfied, the mere fact that the decision is one that adversely affects the concerned individual's fundamental right is no ground for interfering with the decision. This is because, *ex hypothesi*, the right is not directly enforceable by the individual.

Conventional challenge against the "blanket policy"

100. I now turn to the so-called blanket policy of the Director. I have already set out my own understanding of the actual policy of the Director. It is fair to say that *prima facie*, no mandated refugee or screened-in torture claimant is permitted to work in Hong Kong, regardless of how long they have been in Hong Kong and how much longer they may have to stay in Hong Kong pending resettlement or departure. The *prima facie* rule is subject to discretionary exceptions based on strong compassionate or humanitarian reasons or other special extenuating circumstances. Thus far, there is no known case of the Director exercising his discretion to allow a mandated refugee or screened-in torture claimant to work.

101. The preamble to the ICCPR and that to the ICESCR both recognise the inherent dignity of the human person from which various rights under the Conventions flow. Here, what is potentially involved is the right against cruel, inhuman or degrading treatment, and thus the individual's inherent human dignity. What is also involved is the right to work. Furthermore, there is the right to privacy to be considered. In my view, it cannot be seriously disputed that these are important, fundamental rights, recognised in many international instruments.

102. I have already expressed the view that the policy, as described, may potentially, depending on the facts of an individual case, result in inhuman or degrading treatment of the individual concerned. I have already emphasised the importance of looking at the facts of the individual case. No general conclusion can be drawn.

103. As regards the right to work or the right to privacy, I do not view them in isolation. I view them together with cruel, inhuman or degrading treatment. On their own, they are important rights. However, on the facts, it is the potential infringement of the injunction against cruel, inhuman or degrading treatment that must assume the greatest significance in the present type of situation. It goes directly to the individual's inherent human dignity and respect. In the South African case of *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21, it was held that the right to productive work is a fundamental human right inherently connected to the right to human dignity and the right to life, even where that is not required in order to survive. For mankind is, according to the Court, pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful (para 27).

104. Having looked at the matter in the round, I am unable to conclude that the so-called blanket policy is irrational or unreasonable, even under the anxious scrutiny approach. The bottom line, as explained, is that the Director is not bound to devise his policy in accordance with the relevant human rights, which are not directly enforceable by mandated refugees and screened-in torture claimants. In any event, the policy admits of discretionary exceptions. Any complaints about inhuman or degrading treatment can be taken care of under the discretionary exceptions. In my view, the policy as such is not irrational or unreasonable. The interference with the right to work and the right to privacy or private life is an inevitable outcome of the policy itself, which is the product of Hong Kong's unique circumstances already described. Any hardship it may potentially cause is fully counter-balanced by the needs of society to impose restrictions in the first place. Furthermore, the Director has the discretion to depart from his own policy or *prima facie* rule in appropriate cases.

105. The Director is entitled to adopt the policy given the various considerations outlined in the evidence. In particular, I have already extracted from the evidence the concerns over the "strong pulling force" in attracting a large number of illegal immigrants to Hong Kong by any or any apparent relaxation in the employment policy of the Director. Mr Whitehead has argued that this is not reasonable or rational because any relaxation of the employment policy towards mandated refugees and screened-in torture claimants would only benefit those who are genuine refugees and torture claimants. It would not have an effect on those who are not, in terms of their decision to come to Hong Kong.

106. However, human beings do not always act rationally. The Director is entitled to think that any sign, however tenuous, of potential relaxation in the Government's attitude towards illegal immigrants would likely be interpreted, with or without attempts on the part of "human smugglers" to talk up their hopes and expectations, as "a ray of hope" for illegal immigrants. The Director is entitled to believe that even a mere possibility of being allowed to stay and work in Hong Kong can have a strong pulling force in attracting a large number of illegal immigrants to Hong Kong.

107. It has to be emphasised again that even under an anxious scrutiny review, a court does not substitute its own decision for that of the decision-maker. I do not believe the Director can be faulted for thinking in the way he does, as described in the evidence, from the public law point of view.

108. I do not think the Director can be criticised for taking into account the fact that under his policy, mandated refugees and screened-in torture claimants are not left without assistance. I have already described the assistance that the Government and other voluntary agencies offer to these protected persons. In my view, this is a relevant consideration to bear in mind when one talks about prohibiting individuals from seeking employment.

109. Likewise, I do not accept that the Director has taken an irrelevant consideration into account when he takes the view that his existing policy does not prevent mandated refugees and screened-in torture claimants from doing voluntary work, in the light of the importance of engaging in meaningful endeavours to a person's self-perception and

mental health. In my view, this is a relevant consideration that the Director is entitled to take into account. It does not follow that this is necessarily a good and sufficient answer in itself to the complaints made by the applicants. However, it cannot be regarded as an irrelevant or irrational consideration.

110. The applicant argues that the Director cannot put an individual's life "on hold" indefinitely (see *Tekle v Secretary of State for the Home Department* [2008] EWHC 3064, para 40(vii) and *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, para 37, cases involving quite different contexts from ours). Whether a person's life is put on hold indefinitely under the policy depends on the circumstances of the individual concerned. At the policy level, I do not accept the applicants' argument. Moreover, the policy admits of discretionary exceptions.

111. In conclusion, at the policy level, I do not believe the policy of the Director can be challenged, even under the anxious scrutiny approach.

Conventional challenges against individual refusals (MA and GA)

112. I now turn to the application of the Director's policy when faced with a request by a mandated refugee or a screened-in torture claimant for permission to work.

113. It should be apparent from the above discussion that a major reason for the Court's view that the Director's policy as described cannot be challenged is that it admits of exceptions. According to the evidence and leading counsel's submission, the Director is prepared to look at each case on its individual merits and he will take into account the entire

circumstances, including strong compassionate or humanitarian reasons or other special extenuating circumstances, when considering how to exercise his discretion on a case-by-case basis.

114. Yet it is self-evident that having such a policy, which admits of exceptions, only provides half of the answer. Unless the policy, particularly that part of the policy which deals with exceptions, is applied conscientiously with sufficient regard to the facts of an individual case, the position is no different from having a policy which does not admit of exceptions. In conventional public law parlance, there must be no fetter on the Director's discretion, and the Director must be always prepared to listen to anyone with something new to say. See *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp* [2009] 5 HKLRD 620, paras 31-33, and the cases cited therein.

115. Certainly, the Director denies that his discretion has been fettered and maintains that he keeps an open mind. However, the fact that there has never been any known case of any mandated refugee being permitted to work over the years would tend to suggest otherwise. The way the Director dealt with the requests by MA and GA for permission to work would also tend to support that perception.

116. In particular, if one were to simply look at the *single* reply given by the Director to the two requests, the impression one would get is that the Director's mind was really closed. The letter of reply was a letter written in reply to two different requests made by MA and GA separately for permission to work . The Director simply wrote one letter, which did not touch on the respective personal circumstances of MA and GA at all. The letter reads:

"Dear Sirs,

Mr [MA] and Mr [GA]

Thank you for your letters of 20 October 2009 concerning the captioned persons, who have been recognized as refugees by the United Nations High Commissioner for Refugees ("UNHCR") and are to date still awaiting resettlement.

The 1951 United Nations Convention relating to the Status of Refugees ("the Convention") is not applicable to Hong Kong. The Administration has a firm policy of not granting asylum and does not have any obligation to admit individuals seeking refugee status under the Convention. Claims for refugee status which are lodged in Hong Kong are dealt with by the UNHCR. For those accepted as having refugee status by the UNHCR, removal actions against them may, upon the exercise of the Director of Immigration's discretion on a case by case basis, be temporarily withheld pending arrangements for their resettlement elsewhere in the world by the UNHCR. Albeit these persons have been so recognized by the UNHCR, the Administration owes no obligation to them arising from their refugee status.

Yours faithfully

[Signature and name]
for Director of Immigration"

117. It is true that in the letters of request written on behalf of MA and GA, their solicitors did not say much about the personal circumstances of the two refugees. However, the Director had their personal files, and must have been aware that they had been stranded in Hong Kong for a prolonged period of time. In fact, MA's letter specifically mentioned that he had arrived in Hong Kong in October 2001 and had been mandated as a refugee since June 2004. It further attached a letter from the UNHCR dated 8 September 2009 about MA's prospect of resettlement. Likewise, GA's letter mentioned that he had arrived in Hong Kong in July 2004 and had been mandated as a refugee shortly thereafter. A letter from the UNHCR dated 4 September 2009 relating to GA's chances of resettlement was also enclosed.

118. The very general and brief way the Director dealt with the two separate requests for permission to work would hardly suggest that the Director had seriously considered whether the respective personal circumstances of the two individuals were such that he should exercise exceptionally his discretion to allow them to work, whether on conditions or otherwise. As a matter of fact, the letter of reply did not even say that the Director had a discretion to exercise on whether to allow the individuals exceptionally to work, let alone mention that the Director had seriously considered their respective circumstances and had come to the respective decisions against exercising his discretion in their favour.

119. In the evidence filed in these proceedings, the Director sought to provide further justifications for his refusals. The Director pointed out that the solicitors' respective letters had overstated the positions regarding the chances of resettlement. The evidence stated that the respective letters from the UNHCR did not say for certain that there was definitely no prospect of resettlement. The evidence went on to say that the solicitors were wrong to think that the Director had a general policy not to *refoule* a mandated refugee (a matter which I have dealt with in the earlier part of this judgment). The evidence continued to say:

> "Having considered all relevant circumstances of the present case, including (i) the firm policy of the Government not granting asylum which has been set out for the purpose of the present proceedings in Ms Tam's affirmation, (ii) the fact that UNHCR HK has confirmed that, the Applicant being a recognized refugee, they will assess his needs, and provide assistance for his accommodation and subsistence expenses, if necessary, during his stay in Hong Kong pending the arrangement of a durable solution for overseas resettlement as mentioned in paragraph 16 above, and (iii) the correspondence between UNHCR HK and the Immigration Department from time to time repeatedly indicating that UNHCR HK is yet to fully review the Applicant's case and to assess the most viable durable solution option, the Director therefore came to the view that there is no justifiable ground to warrant exceptional

> consideration to accede to the request by the said letter from [the solicitors]."

See paragraphs 33 to 35 of the affirmation of Chow Wing Hei dated 15 April 2010 filed in HCAL 10/2010 in respect of MA. The evidence filed in relation to GA was almost identical in contents in this regard: See affirmation of Chow Wing Hei dated on 15 October 2010 filed in HCAL 73/2010, paras 37 to 42.

120. I have already mentioned that under the anxious scrutiny approach, the court will be less inclined to accept *ex post facto* justifications from the decision-maker, compared to traditional unreasonableness review: *de Smith*, at para 11-094, citing *R (Leung) v Imperial College of Science, Technology and Medicine* [2002] EWHC 1358.

121. In any event, even if one were to take into account the subsequent reasons given, one would still see quite immediately that there was next to no consideration of the individual circumstances of MA and GA, apart from whether their solicitors had overstated their positions in relation to the chances of resettlement.

122. Whilst I have no quarrel with the three specific reasons given in the evidence for the Director's refusal[12], in my view, in a request of the present type, one should bear in mind certain considerations. First, one is, by definition, concerned with a mandated refugee or a screened-in torture

[12] Although the point has not been specifically expressed as such, I have read the first specific reason given as including a concern on the part of the Director that if he were to grant permission to the mandated refugee to remain and work here as a *resident* pursuant to section 11 or 13 of the Immigration Ordinance, which was what was asked for, there would be a possibility – and I put it no higher than that – of the refugee becoming, one day, a permanent resident of Hong Kong (if he could not be resettled), and thereby defeating the Government's long-standing policy of not granting asylum to refugees and turning Hong Kong itself to a place of settlement for refugees. This is no doubt a highly relevant consideration that the Director may take into account.

claimant; in other words, a person in genuine need of protection and help in a foreign land. The person is a vulnerable person, who cannot return to his home country or the place where torture is genuinely feared. Almost by definition, the person has gone through some traumatic events, which have prompted him to leave his place of origin in the first place. Moreover, such a person is, *ex hypothesi*, in a most disadvantaged position, and has to rely on other's charity and goodwill for almost all aspects of his life, and that would even include the making of a request to the Director for permission to work or the setting out of his case properly and sufficiently. He is in no equal footing with the Director. As Bokhary PJ observed in *Prabakar*, *supra*, at p 210F/G, "the vulnerability of persons in situations of this kind [ie torture claimants, and by the same token, mandated refugees] must be recognised so that proactive care can be taken to avoid missing anything in their favour."

123. Secondly, such a refugee (or torture claimant), in the type of situation under discussion, has been stranded in Hong Kong for a very substantial period of time. In the case of MA, it was 8 years; in the case of GA, it was 5. In other words, they have not been permitted to work, even if work is available, for a substantial period of time. The significance of this is at least threefold. First, the individual has been deprived of his basic right to work as a human being, a right recognised in many international conventions and treaties, for a prolonged period of time. Second, he has been, for a very substantial period of time, forced to rely on the goodwill and charity of others for his survival, even though he may well have preferred to earn his own living by his own efforts. This affects the person's inherent human dignity. Third, because the assistance that he gets is only for subsistence purposes, therefore, by definition, the individual has, for a substantial period of time, only been able to live at the subsistence

level. The longer the period he has been stranded in Hong Kong, the longer this situation has persisted. The situation would be aggravated if the individual also happens to have a family with him that he is supposed to support financially.

124. Thirdly, not only is the individual someone who has been stranded in Hong Kong for a substantial period of time, he is, in the type of situation under discussion, somebody with little prospect of resettlement or departure in the immediately foreseeable future. In other words, if the prohibition against employment is not lifted or otherwise relaxed, the situation that the individual has experienced, as described in the preceding paragraph, would continue indefinitely, thereby adding to the sense of hopelessness that the individual may have already experienced or would likely experience.

125. Fourthly, the individual is somebody stranded in Hong Kong. He has no choice but to stay here pending resettlement or departure. This distinguishes his case from that of a tourist, a foreign student studying in Hong Kong, an overseas person seeking employment in Hong Kong under the sponsorship of a local intending employer, or a dependant seeking to come to Hong Kong to live (and work) here under the sponsorship of some family member here. In a typical case, these persons can always leave Hong Kong and return to where they came from, or, as the case may be, remain where they are, and work and lead their life there as before. Nor are mandated refugees and screened-in torture claimants in exactly the same position as asylum-seekers and torture claimants awaiting verification or screening, whose claim may or may not be genuine.

126. Fifthly, as mentioned, there are materials to suggest that a prolonged period of enforced unemployment is detrimental to mental health. Although this is disputed by the respondent's expert, the possibility or the risk involved cannot be ignored, and much would depend on the personal circumstances of the individual concerned. At the level of individual request/decision, the decision-maker must be ever sensitive to the possibility of the prohibition, when applied in a prolonged situation, causing or contributing to adverse mental condition on the part of the individual. And if such mental condition has indeed been developed, one must bear that seriously in mind in deciding whether there are exceptional circumstances to warrant departure from the *prima facie* rule of no employment. As mentioned, it must depend on individual circumstances, including the treatment indicated and the prognosis.

127. In my view, all these considerations should be borne in mind by the Director when faced with a request for permission to work in the type of situation under discussion. I do not accept Mr Shieh's argument that these matters must be specifically raised by the individual before they need be considered by the Director. That may well be true in a normal case. However, as mentioned, one is, by definition, concerned with a genuine refugee or torture claimant, who is staying in Hong Kong at the mercy of others. Their vulnerability must be recognised so that proactive care be taken to avoid missing anything in their favour. Furthermore, many of the above points are simply commonsense matters to any reasonable decision-maker who seriously applies his mind to the circumstances of genuine refugees or torture claimants of the type under discussion. Moreover, the Director must be regarded as an expert decision-maker in relation to this sort of matter – someone who hardly requires a mandated refugee or screened-in torture claimant to remind him

what considerations or matters he should bear in mind when considering a request by them for permission to work after having been stranded in Hong Kong for a prolonged period of time with little or no prospect of resettlement or departure in the near future.

128. For these reasons, I am not satisfied that the Director has properly considered the respective requests by MA and GA for permission to work. I am not satisfied that the Director has taken into account all relevant considerations as per his own policy. I am not saying that the considerations taken into account by the Director, as set out in the correspondence and evidence, are not relevant considerations. The Director was entitled to take them into account. However, as explained, I am not satisfied that the Director has taken into account all relevant considerations that should have been taken into account in accordance with his own policy, when understood in its proper context.

129. That said, it does not mean that the Director is to be told how his discretion is to be exercised after all relevant considerations have been taken into account. Even in an anxious or heightened scrutiny unreasonableness review, it is for the decision-maker, but not the court, to make the decision. The court must not usurp the role of the Director.

130. Nor is the Court saying that the Director must devise some sub-policy or guidelines governing his exceptional exercise of discretion to depart from the *prima facie* rule. It is a matter for the Director to decide. However, if there are no guidelines or sub-policy to govern the exercise of discretion to depart, exceptionally, from the *prima facie* rule, certain consequences may follow. I would only mention two. First, different immigration officers may exercise the discretion in similar situations

differently. It may open the Director to a complaint that like cases have not been treated alike (and different cases have not been treated differently). Secondly, the absence of guidelines would mean that the Director would have to give more detailed reasons for his refusal to exercise his discretion in an individual case. Amongst other things, those reasons would be required to demonstrate that the Director has indeed looked at the individual circumstances of the case, taken into account all relevant considerations and disregarded all those that are not relevant, and have come to his decision accordingly. But as I said, whether the Director would like to devise guidelines for the exercise of his discretion to depart exceptionally from the *prima facie* rule is a matter for the Director.

131. In conclusion, I am of the view that the decisions to refuse the respective requests by MA and GA for permission to work are flawed and should be quashed.

PA's outstanding request for permission to work

132. As regards the request for permission to work made by PA, thus far no substantive reply has been made. According to the evidence filed, as at October 2010, the request was still under consideration. There is no complaint in the Form 86 that the Director has unreasonably delayed in making his decision. As the request has still not yet been answered, the Court would say nothing about it, save to say that now that the Director is aware of Dr Mistler's expert opinion that PA is suffering from a severe major depression, it is incumbent upon the Director to bear that assertion in mind and take whatever appropriate steps he might wish to take in relation to the same, in considering the request for permission to work.

The Court would refrain from making any further comment on the outstanding request.

Positions of FI and JA

133. As for FI and JA, they have not made any request for permission to work. There is, therefore, no specific refusal to challenge. I do not accept Mr Whitehead's argument that the Director is under a continuing duty to review the situation on his own initiative. No authority has been cited to support that broad proposition. The case cited, *E v Secretary of State for the Home* Department [2004] EWCA Civ 49, para 76, simply does not support the contention. As presently advised, I do not believe the Director is under any such continuing duty. In any event, the argument is not contained in the Form 86. The existence of the suggested continuing duty and/or its alleged breach are matters that may turn on evidence. That is a strong reason for not entertaining this argument in these proceedings in any event.

134. That said, there is nothing to stop FI and JA from making a request to the Director for permission to work. In particular, there is nothing to stop them from drawing to the Director's attention the views of Dr Mistler that the prolonged period of prohibition has, in the case of FI, been a maintaining factor of his pre-existing mental condition and that, in the case of JA, it has been a causative factor of his severe major depression diagnosed by Dr Mistler. It will then be up to the Director to take into account all relevant considerations and decide how his discretion should be exercised.

Challenges against the recognizances

135. I turn now to the challenges against the recognizances required to be given by the applicants by the Director. The recognizances have been given under section 36 of the Immigration Ordinance. Section 36(1) of the Ordinance reads:

> " An immigration officer and any police officer may require a person –
>
> (a) who is detained under section 27, 32 or 34; or
>
> (b) who, being liable to be detained under any of those sections, is not for the time being so detained,
>
> to enter into a recognizance in the prescribed form in such amount and with such number of sureties as the Director or such police officer may reasonably require; and where a person who is so detained enters into such a recognizance he may be released."

136. The parties' arguments have centred on whether the applicants were/are persons "liable to be detained" under section 27, 32 or 34 of the Ordinance which deal with detention pending examination and decision as to landing, detention pending removal or deportation and detention of a person arrested under section 54(3).

137. The applicants' argument is essentially that since there is no realistic prospect of the applicants' resettlement or departure within the reasonably foreseeable future, they are not liable to be detained. Therefore, no recognizances should be required of them.

138. I do not accept the argument. It is plain from the evidence that the positions of all mandated refugees in terms of their resettlement prospect are under the Director's regular monitoring. The Director liaises with the UNHCR Hong Kong Office on a regular basis. Certainly, the Director is intent on removing the refugees for resettlement once a third country willing to accept the refugees can be found. The position in

relation to PA is similar. In *A (Torture Claimant), supra*, the Court of Appeal said (para 31):

> " We agree with Mr Chow that these authorities show that so long as the Secretary is intent upon removing the applicant at the earliest possible moment, and it is not apparent to the Secretary that the removal within a reasonable time would be impossible, the power to detain pending removal is in principle still exercisable."

139. In my view, despite the apparently slim chances of resettlement or departure of the applicants in the immediately foreseeable future, the same is not wholly "impossible", as the examples given in the evidence have demonstrated, and therefore the applicants are still persons liable to be detained.

140. For these reasons, the challenges against the recognizances must be rejected.

Deportation order against JA

141. I turn to the deportation order made against JA who has committed 3 offences in Hong Kong.

142. Again, the main thrust of the argument on behalf of JA is that there is no realistic prospect of his being resettled in the reasonably foreseeable future. Therefore the deportation order should be rescinded. The mater is apparently put on a public law unreasonableness basis.

143. I do not accept the argument. It cannot be seriously disputed that it was within the power of the Secretary for Security to make the deportation order under section 20 of the Immigration Ordinance given the criminal convictions. There is no dispute that there is a discretion to

rescind the deportation order. The fact that apparently there is little prospect of resettlement in the immediately foreseeable future is a relevant consideration to take into account. However, it does not follow that the only reasonable decision, in the public law sense, that may be made in the circumstances is to rescind the deportation order.

144. I reject the challenge.

No policy on post-screening management

145. Finally, there is a challenge by PA, a screened-in torture claimant, that there is no policy regarding post-screening management of successful torture claimants.

146. PA argues that the Government's duty of *non-refoulement* does not stop with screening or a positive recognition that someone requires protection under the CAT, but is a continuing duty. The Government, it is argued, owes a duty to ensure that for the duration of their protection within its jurisdiction, successful torture claimants are not subjected to any form of cruel, inhuman or degrading treatment as set out in article 16 of the CAT. He argues that the Government has to take such steps so as to maintain the human dignity of the successful claimants and to respect for the private life and family life of the protected claimants.

147. In my view, the arguments have overstated the position. I have already discussed the position of successful torture claimants in the earlier part of this judgment, in conjunction with the position of mandated refugees. Like a mandated refugee, a torture claimant, who has been stranded in Hong Kong for a substantial period of time with little prospect of departure in the immediately foreseeable future, may make a request to

the Director for permission to work. The Director would no doubt apply his policy (described above) to his case and would no doubt also seriously consider whether he should, exceptionally, exercise his discretion to allow the successful torture claimant to work. I have already discussed the considerations that the Director should take into account, besides the many public policy considerations that the Director has described in the evidence filed which he would no doubt take into account. The Director should also take into account all other relevant personal circumstances of the successful torture claimant in question, including, in particular, any allegation that the individual is suffering from a mental condition caused or contributed to by the prolonged prohibition against employment.

148. Whether one would like to call the above process a sort of policy for managing successful torture claimants pending their departure from Hong Kong is really a matter of semantics. However, the important point here is that apart from what has been described, there is really no legal basis for saying that the Director must have some or some other post-screening policy for the management of successful torture claimants. That is not to say that the Director may not devise any such policy. It is entirely a matter for the Director. The Court cannot and should not direct the Director to do so.

149. I reject the present challenge.

Outcome

150. In conclusion, in relation to MA's and GA's respective challenges against the Director's refusals of their respective requests for permission to work, an order of *certiorari* is granted in each case to bring

up and quash the refusal. In other words, in each case the Director must consider the request for permission afresh bearing in mind, amongst other things, the latest information (and allegations) known to the Director through these proceedings as well as any other further information or materials that may be brought to the attention of the Director before any new decision is made.

151. Save to the above extent, all 5 applications for judicial review are dismissed.

152. As for costs, on an order *nisi* basis, I order that the respective costs of the proceedings in HCAL 75/2010, HCAL 81/2010 and HCAL 83/2010, including all costs previously reserved, be paid by the relevant applicants to the respondent, to be taxed if not agreed. I grant a certificate for two counsel. As regards the respective costs in HCAL 10/2010 and HCAL 73/2010, I make no order as to costs. There shall be legal aid taxation of the respective applicants' own costs.

153. I thank counsel for their assistance.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Robert Whitehead SC and Mr Earl Deng, instructed by Barnes & Daly, for the applicants in all cases

Mr Paul Shieh SC and Ms Grace Chow, instructed by the Department of Justice, for the same respondent in all cases

联 合 国 CAT

禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约

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禁止酷刑委员会

审议缔约国根据《公约》第 19 条提交的报告

缔约国应于 2004 年提交的第四次定期报告

增　编* **

中　国

[原文：中文]

[2006 年 2 月 14 日]

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*　中国的初次报告，参见 CAT/C/7/Add.5；该报告的审议情况，参见 CAT/C/SR.50 和 51 以及《大会正式记录，第四十五届会议，补编第 44 号》(A/45/44)，第 471 至 502 段。

第二次定期报告，参见 CAT/C/20/Add.5；该报告的审议情况，参见 CAT/C/SR.251、252 和 254 以及《大会正式记录，第五十一届会议，补编第 44 号》(A/51/44)，第 138 至 150 段。

第三次定期报告，参见 CAT/C/39/Add.2；该报告的审议情况，参见 CAT/C/SR.414、417 和 421 以及《大会正式记录，第五十五届会议，补编第 44 号》(A/55/44)，第 106 至 145 段。

**　根据向缔约国发送的有关报告处理问题的通知，本报告在提交翻译之前未经正式编辑。

GE. 07-42655 (C)　　050707　020807

目　录

序　言

1. 本报告是中华人民共和国根据《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》(以下简称“《公约》”)第 19 条的规定提交的第四、五次合并报告。

2. 中国于 1989 年 12 月提交了关于该公约执行情况的首次报告(CAT/C/7/Add.5)，后于 1992 年 10 月提交了补充报告(CAT/C/7/Add.14)(以下简称“补充报告”)。第三次报告(CAT/C/3/9/Add.2)于 1999 年提交，于 2000 年接受联合国禁止酷刑委员会(以下简称“委员会”)审议。

3. 中国的首次报告及其补充报告、第二次、第三次报告详细说明了中国的政治制度、行政、立法和司法机关的组织情况，法律的构成，以及在禁止酷刑方面的具体法律规定和实践。本报告提供了自 1999 年提交第三次报告以后中国为执行公约第一部分所采取的新举措和取得的新进展，并结合委员会前次审议过程中以及“结论和建议”中关注的问题，详细介绍了中国执行公约的情况。

4. 本报告第二部分为中国香港特别行政区执行公约的有关情况，第三部分为中国澳门特别行政区执行公约的有关情况，分别由香港特别行政区和澳门特别行政区撰写。

第一部分

执行公约的有关新举措和新进展

第 2 条

5. 中国补充报告的第 64-71 段、第二次报告的第 6-7 段、第 85 段，第三次报告的第 6-10 段仍然有效。自 1999 年提交第三次报告以来，中国进一步采取有效立法、行政和司法措施防止酷刑行为。

6. 2004 年 3 月 14 日，中国第十届全国人民代表大会第二次会议通过了《中华人民共和国宪法》(以下简称“《宪法》”)修正案，明确规定“国家尊重和保障人权”(第三十三条)。《宪法》确定尊重和保障人权的原则，确立了保障人权在中国法律体系和国家发展战略中的突出地位，为中国人权事业的全面发展开辟了更广阔的前景，有利于推进中国人权事业的发展。从禁止酷刑的角度看，人权入宪，将进一步推动保护刑事犯罪嫌疑人、被告人和罪犯合法权益的观念、制度和工作的发展，从而有利于进一步采取措施落实公约的各项要求。

7. 为维护社会治安秩序，保障公共安全，保护公民、法人和其他组织的合法权益，规范和保障公安机关及其人民警察依法履行治安管理职责，2005 年 8 月 28 日，第十届全国人大常委会第十七次会议通过了《中华人民共和国治安管理处罚法》。该法在赋予公安机关及其人民警察为履行治安管理职责所必须的权力的同时，也对警察权的行使作了更加严格的规范，并设专章规定了执法监督，强化了对公安机关和人民警察执法行为的规范和监督，规定了公安机关及其人民警察办理治安案件应当遵守的规定和禁止实施的行为，并明确规定违反这些规定应当承担的法律责任，以防止因权力的不当使用甚至被滥用造成对公民合法权益的侵害。例如，该法第二十一条规定：“违反治安管理行为人有下列情形之一，依照本法应当给予行政拘留处罚的，不执行行政拘留处罚：

(a) 已满十四周岁不满十六周岁的；

(b) 已满十六周岁不满十八周岁，初次违反治安管理的；

(c) 七十周岁以上的；

(d) 怀孕或者哺乳自己不满一周岁婴儿的。”

8. 第七十九条规定：“公安机关及其人民警察对治安案件的调查，应当依法进行。严禁刑讯逼供或者采用威胁、引诱、欺骗等非法手段收集证据。以非法手段收集的证据不得作为处罚的根据。”

9. 第一百一十二条规定：“公安机关及其人民警察应当依法、公正、严格、高效办理治安案件，文明执法，不得徇私舞弊。”

10. 第一百一十三条规定：“公安机关及其人民警察办理治安案件，禁止对违反治安管理行为人打骂、虐待或者侮辱。”

11. 第一百一十四条规定：“公安机关及其人民警察办理治安案件，应当自觉接受社会和公民的监督。公安机关及其人民警察办理治安案件，不严格执法或者有违法违纪行为的，任何单位和个人都有权向公安机关或者人民检察院、行政监察机关检举、控告；收到检举、控告的机关，应当依据职责及时处理。”

12. 2000 年 12 月 28 日，中国第九届全国人民代表大会常务委员会第十九次会议通过《中华人民共和国引渡法》(以下简称“《引渡法》”)。根据《引渡法》第八条，外国向中华人民共和国提出的引渡请求，如被请求引渡人可能因其种族、宗教、国籍、性别、政治见解或者身份等方面的原因而被提起刑事诉讼或者执行刑罚，或者被请求引渡人在司法程序中可能由于上述原因受到不公正待遇，或者被请求引渡人在请求国曾经遭受或者可能遭受酷刑或者其他残忍、不人道或者有辱人格的待遇或者处罚的，应当拒绝引渡。上述规定实质上是将公约第三条的规定转化为国内法上的要求，对于防止被请求引渡人在相关国家遭受酷刑具有重要意义。

13. 1999 年 6 月 28 日第九届全国人民代表大会常务委员会第十次会议通过了《中华人民共和国预防未成年人犯罪法》(以下简称“《预防未成年人犯罪法》”)。该法对预防未成年人犯罪的教育、对未成年人不良行为的预防、对未成年人严重不良行为的矫治、未成年人对犯罪的自我防范、对未成年人重新犯罪的预防以及相关法律责任等问题作出了规定。

14. 根据《预防未成年人犯罪法》第四十四条，追究犯罪的未成年人的刑事责任，应实行教育、感化、挽救的方针，坚持教育为主、惩罚为辅的原则；司法机关办理未成年人犯罪案件，应当保障未成年人行使其诉讼权利，保障未成年人得到法律帮助，并根据未成年人的生理、心理特点和犯罪的情况，有针对性地进

行法制教育。在人民法院审判未成年人犯罪的刑事案件时，应当由熟悉未成年人身心特点的审判员或者审判员和人民陪审员依法组成少年法庭进行；对于已满十四周岁不满十六周岁未成年人犯罪的案件，一律不公开审理。已满十六周岁不满十八周岁未成年人犯罪的案件，一般也不公开审理；对未成年人犯罪案件，新闻报道、影视节目、公开出版物不得披露该未成年人的姓名、住所、照片及可能推断出该未成年人的资料(第四十五条)。对被拘留、逮捕和执行刑罚的未成年人与成年人应当分别关押、分别管理、分别教育；未成年犯在被执行刑罚期间，执行机关应当加强对未成年犯的法制教育，对未成年犯进行职业技术教育；对没有完成义务教育的未成年犯，执行机关应当保证其继续接受义务教育(第四十六条)。这些规定，有利于防止对未成年人施以酷刑以及其他残忍、不人道或有辱人格的待遇或处罚。

15. 2003 年 7 月 16 日，中国国务院第十五次常务会议通过了《法律援助条例》(以下简称“《条例》”)。《条例》对法律援助的范围、标准、实施程序以及法律援助各方的权利义务、法律责任等作出明确规定，为规范法律援助工作提供了重要的法律依据。从执行《公约》的相关规定看，《条例》第十一条、第十二条规定尤为重要。根据《条例》第十一条，在下列情况下，刑事诉讼中的公民可因经济困难而向法律援助机构申请法律援助：

(a) 犯罪嫌疑人在被侦查机关第一次讯问后或者采取强制措施之日起，因经济困难没有聘请律师的；

(b) 公诉案件中的被害人及其法定代理人或者近亲属，自案件移送审查起诉之日起，因经济困难没有委托诉讼代理人的；

(c) 自诉案件的自诉人及其代理人，自案件被人民法院受理之日起，因经济困难没有委托诉讼代理人的。但在下列情况下，人民法院为被告人指定辩护的，法律援助机构应当提供法律援助，而无须对被告人进行经济状况的审查：对于公诉人出庭公诉的案件，被告人没有委托辩护人；被告人是盲、聋、哑人或者未成年人而没有委托辩护人的，或者被告人可能被判处死刑而没有委托辩护人的(第十二条)。

16. 2003 年 6 月 18 日，中国国务院第十二次常务会议通过了《城市生活无着的流浪乞讨人员救助管理办法》(以下简称“《管理办法》”)(自 2003 年 8 月 1

日起施行)，废止了收容遣送制度。《管理办法》第十四条第二款明确规定：“救助站工作人员应当自觉遵守国家的法律、法规、政策和有关规章制度，不准拘禁或者变相拘禁受助人员；不准打骂、体罚、虐待受助人员或者唆使他人打骂、体罚、虐待受助人员；不准敲诈、勒索、侵吞受助人员的财物；不准克扣受助人员的生活供应品；不准扣押受助人员的证件、申诉控告材料；不准任用受助人员担任管理工作；不准使用受助人员为工作人员干私活；不准调戏妇女”，“违反前款规定，构成犯罪的，依法追究刑事责任；尚不构成犯罪的，依法给予纪律处分。”

17. 《管理办法》颁布后，中国民政部又于 2003 年 7 月 21 日制定发布了《城市生活无着的流浪乞讨人员救助管理办法实施细则》(自 2003 年 8 月 1 日起施行)，对《管理办法》有关规定的具体理解和适用问题作了进一步明确。

18. 中国公安部先后制定颁布了《公安机关办理刑事案件程序规定》(1998 年 5 月 14 日)、《公安机关办理行政案件程序规定》(2003 年 8 月 26 日)、《公安机关办理行政复议案件程序规定》(2002 年 11 月 2 日)、《公安机关运用继续盘问规定》(2004 年 7 月 12 日)和《强制戒毒所管理办法》(2000 年 3 月 30 日)，使公安机关的各项执法活动有了更加严密的程序和标准。

19. 为禁止刑讯逼供等酷刑，最高人民检察院 2001 年 1 月 2 日专门下发了《关于严禁将刑讯逼供获取的犯罪嫌疑人供述作为定案依据的通知》，要求各级人民检察院牢固树立公正执法、文明执法的思想，坚决杜绝刑讯逼供。严格贯彻执行有关法律关于严禁刑讯逼供的规定，排除刑讯取得的证据。各级人民检察院要加大对刑讯逼供犯罪的打击力度，依法坚决追究有关人员的刑事责任。

20. 1999 年 8 月 6 日，最高人民检察院通过《关于人民检察院直接受理立案侦查案件立案标准的规定(试行)》(以下简称“《立案标准》”)，2001 年 7 月 20 日最高人民检察院又通过《人民检察院直接受理立案侦查的渎职侵权重特大案件标准(试行)》(以下简称“《重特大案件标准》”)。两项司法解释对刑法所规定的刑讯逼供、暴力取证、虐待被监管人等酷刑犯罪的立案标准以及重、特大案件的认定标准作出了明确规定，为查办酷刑案件提供了法律依据。

21. 最高人民检察院 2003 年 12 月 30 日通过了《关于人民检察院保障律师在刑事诉讼中依法执业的规定》。该规定旨在充分发挥律师在刑事诉讼中保护犯罪

嫌疑人的合法权益(包括免受酷刑)的作用，是对《中华人民共和国刑事诉讼法》(以下简称“《刑事诉讼法》”)有关条文规定的细化，使之更加明确具体。

22. 针对刑事诉讼活动中容易发生的问题和环节，最高人民检察院、最高人民法院、公安部、安全部等部门联合发布了《关于刑事诉讼法实施中若干问题的规定》(1998 年 1 月 19 日)、《关于取保候审若干问题的规定》(1999 年 8 月 4 日)、《关于依法适用逮捕措施有关问题的规定》(2001 年 8 月 6 日)、《关于适用刑事强制措施有关问题的规定》(2000 年 8 月 28 日)等规范性文件。这些规范性文件的制订和实施，对于禁止和防范滥用刑事强制措施、违法适用刑事强制措施，以及在此过程中对当事人施以酷刑具有重要意义。

23. 为在司法过程中防止和避免酷刑和其他残忍、不人道或有辱人格的待遇事件的发生，中国司法机关采取了一系列其他措施。

24. 完善监督机制，确保依法履行职责。公安部先后发布了《公安机关内部执法监督工作规定》(1999 年 6 月 11 日)、《公安机关人民警察执法过错责任追究规定》(1999 年 6 月 11 日)、《公安机关督察条例实施办法》(2001 年 1 月 2 日)和《公安机关执法质量考核评议规定》(2001 年 10 月 10 日)等内部监督规定，形成了比较系统完善的执法监督和过错责任制度。

25. 2003 年 8 月 15 日，公安部在全国公安机关部署开展超期羁押专项清理活动，到 2003 年 12 月 31 日，全部清理完毕。2005 年 10 月 31 日统计，公安机关办案环节没有超期羁押人员。

26. 2003 年 5 月，最高人民检察院决定在全国范围内开展清理和纠正超期羁押专项工作，检察机关坚持从自身做起，首先解决检察环节的超期羁押问题，并在当年 7 月实现检察环节无超期羁押。认真履行法律监督职责，督促其他政法机关开展清理工作，提出检察纠正意见 274,219 人次，促使 25,736 人得到纠正。与此同时，加强相关机制建设，11 月 24 日制发《关于在检察工作中防止和纠正超期羁押的若干规定》(以下简称《若干规定》)，建立起羁押期限告知、羁押情况通报、羁押期限届满提示、定期检查通报、超期羁押投诉和纠正以及超期羁押责任追究等制度。《若干规定》明确规定：对于滥用职权或者严重不负责任，造成犯罪嫌疑人、被告人被超期羁押的，应当追究直接负责的主管人员和其他直接责任人员的纪律责任；构成犯罪的，依照《中华人民共和国刑法》第三百九十七条关

于滥用职权罪、玩忽职守罪的规定追究刑事责任。最高人民检察院还设立专门受理检察机关超期羁押的举报电话和电子信箱，受理有关超期羁押问题的举报，自觉接受社会监督。

27. 最高人民检察院 2005 年 8 月 24 日通过了《关于进一步深化检察改革的三年实施意见》，将“改革和完善对诉讼活动的法律监督制度，切实维护司法公正，保障人权”作为未来三年检察改革的主要任务。该文件明确提出，“健全对侦查活动中刑讯逼供等违法行为的监督查处机制。依法完善在审查逮捕、审查起诉中排除非法证据的规则。最高人民检察院制定审查逮捕、审查起诉中排除非法证据的规则和关于完善查处刑讯逼供等涉嫌犯罪行为工作机制的规定。”“建立健全预防和纠正超期羁押的长效工作机制。”“探索建立检察机关发现司法工作人员在立案、侦查、起诉、审判和执行中有渎职行为或其他影响公正办案情形的可以建议有关部门更换办案人员的制度。”“健全司法工作人员渎职案件的查办和移送机制。建立侦查监督、公诉、反贪污贿赂、反渎职侵权、控告申诉检察、民行检察等业务部门之间的信息沟通机制，拓宽发现司法工作人员违法犯罪行为的渠道，建立和完善案件线索审查、调查和移送、查处的衔接与配合机制。”

28. 2003 年，人民法院全面开展纠防超期羁押案件工作，并为之采取了一系列有力措施：

29. 2003 年 7 月 29 日，最高人民法院下发了《关于清理超期羁押案件有关问题的通知》，要求各级法院进一步提高认识，高度重视超期羁押问题，积极采取有效措施，下大力气清理超期羁押案件，同时对清理超期羁押案件的期限、应采取的措施以及如何加强检查监督等均提出了具体要求。

30. 2003 年 8 月 24 日，最高人民法院就清理超期羁押案件的工作作了部署，要求各级法院把清理超审限案件(包括超期羁押的刑事案件和超审限的民事、行政案件)作为当前的一项重点工作，全面清理超审限案件，查找案件超审限原因，采取措施，在 2003 年 11 月之前，超期羁押的刑事案件要全部清理完毕；建立清理超审限案件周报制度，各高级法院每周将所辖法院超审限案件清理情况书面报送最高法院，最高法院就各地超审限案件清理情况定期通报；对于事实不清、证据不足，不能认定被告人有罪的，要坚决依法宣告无罪，不得犹豫不决。

对于最高法院所采取的措施，许多媒体都以“有罪则判，无罪放人”为标题对此作了报道，在社会各界引起强烈反响。

31. 2003 年 10 月 10 日，最高人民法院召开了全国法院进一步清理超审限案件电视电话会议，回顾了前一阶段的清理工作，肯定了已经取得的成绩，同时进一步明确了下一阶段清理工作的任务，要切实按照“依法惩罚犯罪，依法保障人权”的原则和要求，做好清理超审限刑事案件的工作。

32. 为了加强公检法机关之间的相互协调，加大解决超期羁押问题的工作力度，2003 年 11 月 12 日，最高人民法院联合最高人民检察院、公安部发布了《关于严格执行刑事诉讼法，切实纠防超期羁押的通知》，要求严格执行《刑事诉讼法》，有罪依法追究，无罪坚决放人，切实纠防超期羁押现象。

33. 2003 年 12 月 1 日，最高人民法院制定发布了《关于推定十项制度，切实防止产生新的超期羁押的通知》，通过建立超期羁押预警机制等措施，切实防止超期羁押。

34. 最高人民法院还向社会各界公布超期羁押案件举报电话，欢迎社会各界监督，并要求各高级人民法院也公布监督电话，接受社会监督。经过努力，截至 2003 年 12 月 31 日，全国法院共清理超期羁押案件 4,100 件，7658 名被超期羁押的被告人获得了判决。全国法院所有超期羁押案件全部如期清理完毕。

35. 强化外部监督，防止执法不公的问题。公安部于 2003 年 4 月 27 日发布了《公安部特邀监督员工作规定》，并设立了特邀监督员制度。依据该制度，特邀监督员可以对公安机关和公安民警履行职责、执法值勤和遵纪守法等情况实施监督，反映人民群众所检举、控告的公安机关和公安民警违法违纪行为。

36. 2003 年 9 月，最高人民检察院制定了《关于人民检察院直接受理侦查案件实行人民监督员制度的规定》，并于 2004 年 7 月 5 日修订为《关于实行人民监督员制度的规定(试行)》。人民监督员的职责是对人民检察院查办的职务犯罪案件，拟作撤销案件、不起诉处理或者犯罪嫌疑人不服逮捕决定的情形，实施监督。人民监督员发现人民检察院在查办职务犯罪案件中具有下列情形之一的，可以提出意见：

(a) 应当立案而不立案或者不应当立案而立案的；

(b) 超期羁押的；

(c) 违法搜查、扣押、冻结的；

(d) 应当给予刑事赔偿而不依法予以确认或者不执行刑事赔偿决定的；

(e) 检察人员在办案中有徇私舞弊、贪赃枉法、刑讯逼供、暴力取证等违法违纪情况的。《规定》还专门规定了人民监督员的监督程序，保证监督工作落到实处。

37. 严格责任追究，减少和杜绝酷刑案件发生。公安部历来十分重视解决刑讯逼供问题，多次召开会议，下发专门文件，强调各级公安机关在侦查办案工作中必须严格依照法定程序全面收集证据，严禁刑讯逼供，并要求对发生民警严重违法违纪案件的(包括刑讯逼供致人死亡的案件)，要视情追究直接领导的责任；必要时，追究分管领导和主要领导的责任。各级公安机关始终把防止、制止刑讯逼供案件的发生作为解决职务违法犯罪问题的重点，采取行之有效的措施，不断加大监督和查处力度。刑讯逼供案件逐年减少。

38. 1999 年，各级公安机关以贯彻实施《公安机关内部执法监督工作规定》、《公安机关人民警察执法过错责任追究规定》为契机，组织开展了多种形式的执法检查，巩固治理成果。

39. 2000 年，全国公安机关配合全国人大常委会开展了贯彻实施《刑事诉讼法》情况大检查活动，有力地促进了各地治理刑讯逼供问题工作的深入开展。2001 年 3 月 12 日，公安部召开全国公安机关治理刑讯逼供、滥用枪支警械和滥用强制措施电视电话会议，要求各地公安机关进一步巩固治理刑讯逼供工作成果，使这三种类型的案件有较大幅度的下降，力争不发生致人死亡案件。对发生上述三种类型案件的，要依法及时查处，特别是对于造成人员死亡或者伤残的，要依法严惩，并依照有关规定严格追究有关公安机关领导的责任。各地公安机关按照公安部的要求，认真开展了相关工作。一些地方公安机关还结合自身存在的突出问题，开展专项治理工作，收到了良好效果。如青海省自 1999 年开展专项整治至 2000 底，全省公安系统未发生一起刑讯逼供案件。

40. 2002 年 2 月 26 日，公安部决定在全国公安机关开展队伍突出问题专项整治工作，要求坚持依法从严治警的指导原则，重点解决包括刑讯逼供等问题，坚决查处警察违法违纪案件，严肃追究领导责任。同时，查找漏洞，规范管理，建立治本的长效机制，并且自觉接受社会各界的监督。

41. 2001 年 1 月，最高人民法院将“公正与效率”列为 21 世纪人民法院的工作主题，强调人民法院的全部司法活动要做到审判公开、程序合法、审限严格、裁判公正、依法执行。近几年来，人民法院的各项工作都紧紧围绕这一主题展开。倡导司法公正，必然要求保障犯罪嫌疑人、被告人的合法权益不受侵害，要求依法惩治刑讯逼供、暴力取证等严重侵害犯罪嫌疑人、被告人人权、妨害司法公正的酷刑行为；倡导高效司法，必然要求保障犯罪嫌疑人、被告人能得到快速的、不拖延的审判，要求禁止超法定时限的侵犯犯罪嫌疑人、被告人合法权益的羁押措施，这对于惩治和防范酷刑行为，具有重要意义。

42. 近几年来，各级法院在认真执行刑法和刑事诉讼法各项规定的基础上，认真落实《人民法院五年改革纲要》(最高人民法院于 1999 年 10 月 20 日发布)的具体要求，不断深化刑事审判方式改革。新的刑事审判方式加强了庭审的公开性，突出了法庭的中立性，进一步保障了控辨双方地位、权利的平衡性。在新的刑事审判方式下，一切侵害犯罪嫌疑人、被告人合法权益的酷刑行为更容易被揭露、证实和惩治，因此，深化刑事审判方式改革，在总体上也有利于防范各种酷刑现象的发生。

43. 2003 年 7 月，最高人民法院、最高人民检察院、公安部和司法部联合下发了《关于开展社区矫正试点工作的通知》，对罪行轻微、主观恶性较小、社会危害不大的罪犯和依法被裁定假释的罪犯等，进行社区矫正的实践探索。目前，北京、上海、天津、江苏、浙江、山东 6 个省、直辖市正在开展社区矫正的试点工作。社区矫正是与监禁矫正相对应的行刑方式，是指将符合社区矫正条件的罪犯置于社区内，由专门的国家机关在相关社会团体和民间组织以及社会志愿者的协助下，在判决、裁定或决定确定的期限内，矫正其犯罪心理和行为恶习，并促使其顺利返回社会的非监禁性刑罚执行活动。开展社区矫正试点工作，表明了中国正努力迈向刑罚轻缓化、人道化，对于防止罪犯遭受不必要的监禁性刑罚执行，具有重要意义。

第 3 条

44. 中国补充报告的第 72 段仍然有效。

45. 2000 年 12 月 28 日通过的《引渡法》对向中国提出引渡请求的条件和程序、对引渡请求的审查、决定引渡的机关、对引渡决定提出质疑的程序等作出了规定，对保障引渡的正常进行，加强惩罚罪犯方面的国际合作，确保被引渡人不遭受酷刑危险，保护个人和组织的合法权益等具有重要意义。根据《引渡法》第八条规定，如果被请求引渡人在请求国曾经遭受或者可能遭受酷刑或者残忍、不人道或者有辱人格的待遇或者处罚，中国将拒绝引渡。这些规定符合公约第三条的要求，从而可以防止和避免被请求引渡人面临酷刑危险。

46. 《引渡法》第十条规定，中国受理外国引渡请求的机关为外交部，请求国的引渡请求应当向中华人民共和国外交部提出。

47. 请求国请求引渡应当出具请求书，请求书应当载明：

(a) 请求机关的名称；

(b) 被请求引渡人的姓名、性别、年龄、国籍、身份证件的种类及号码、职业、外表特征、住所地和居住地以及其他有助于辨别其身份和查找该人的情况；

(c) 犯罪事实，包括犯罪的时间、地点、行为、结果等；

(d) 对犯罪的定罪量刑以及追诉时效方面的法律规定(第十一条)。请求国请求引渡，应当在出具请求书的同时，提供以下材料：

(一) 为了提起刑事诉讼而请求引渡的，应当附有逮捕证或者其他具有同等效力的文件的副本；为了执行刑罚而请求引渡的，应当附有发生法律效力的判决书或者裁定书的副本，对于已经执行部分刑罚的，还应当附有已经执行刑期的证明；

(二) 必要的犯罪证据或者证据材料。请求国掌握被请求引渡人照片、指纹以及其他可供确认被请求引渡人的材料的，应当提供(第十二条)。引渡请求书或者其他有关文件应当由请求国的主管机关正式签署或者盖章，并应当附有中文译本或者经中华人民共和国外交部同意使用的其他文字的译本(第十三条)。

48. 对于两个以上国家就同一行为或者不同行为请求引渡同一人的，应当综合考虑中华人民共和国收到引渡请求的先后、中华人民共和国与请求国是否存在引渡条约关系等因素，确定接受引渡请求的优先顺序(第十七条)。

49. 关于引渡请求的审查，《引渡法》第十六条第一款规定：“外交部收到请求国提出的引渡请求后，应当对引渡请求书及其所附文件、材料是否符合本法第二章第二节和引渡条约的规定进行审查”。第十八条规定：“外交部对请求国提出的引渡请求进行审查，认为不符合本法第二章第二节和引渡条约的规定的，可以要求请求国在三十日内提供补充材料。经请求国请求，上述期限可以延长十五日。请求国未在上述期限内提供补充材料的，外交部应当终止该引渡案件。请求国可以对同一犯罪再次提出引渡该人的请求。”第十九条规定：“ 外交部对请求国提出的引渡请求进行审查，认为符合本法第二章第二节和引渡条约的规定的，应当将引渡请求书及其所附文件和材料转交最高人民法院、最高人民检察院。”

50. 对于外交部转交的请求书及其所附材料，最高人民法院将根据《引渡法》第二十条的规定视情作出处理。第二十条规定：“外国提出正式引渡请求前被请求引渡人已经被引渡拘留的，最高人民法院接到引渡请求书及其所附文件和材料后，应当将引渡请求书及其所附文件和材料及时转交有关高级人民法院进行审查。外国提出正式引渡请求前被请求引渡人未被引渡拘留的，最高人民法院接到引渡请求书及其所附文件和材料后，通知公安部查找被请求引渡人。公安机关查找到被请求引渡人后，应当根据情况对被请求引渡人予以引渡拘留或者引渡监视居住，由公安部通知最高人民法院。最高人民法院接到公安部的通知后，应当及时将引渡请求书及其所附文件和材料转交有关高级人民法院进行审查。公安机关经查找后，确认被请求引渡人不在中华人民共和国境内或者查找不到被请求引渡人的，公安部应当及时通知最高人民法院。最高人民法院接到公安部的通知后，应当及时将查找情况通知外交部，由外交部通知请求国。”

51. 对请求国的引渡请求的审查，由高级人民法院进行。《引渡法》第二十二条规定：“高级人民法院根据本法和引渡条约关于引渡条件等有关规定，对请求国的引渡请求进行审查，由审判员三人组成合议庭进行。”“高级人民法院审查引渡案件，应当听取被请求引渡人的陈述及其委托的中国律师的意见。高级人民法院应当在收到最高人民法院转来的引渡请求书之日起十日内将引渡请求书副本发送被请求引渡人。被请求引渡人应当在收到之日起三十日内提出意见。”(第二十三条)。

52. 高级人民法院经审查后，应当根据第二十四条作出相应裁决。第二十四条规定：“高级人民法院经审查后，应当分别作出以下裁定：

(a) 认为请求国的引渡请求符合本法和引渡条约规定的，应当作出符合引渡条件的裁定。如果被请求引渡人具有本法第四十二条规定的暂缓引渡情形的，裁定中应当予以说明；

(b) 认为请求国的引渡请求不符合本法和引渡条约规定的，应当作出不引渡的裁定。根据请求国的请求，在不影响中华人民共和国领域内正在进行的其他诉讼，不侵害中华人民共和国领域内任何第三人的合法权益的情况下，可以在作出符合引渡条件的裁定的同时，作出移交与案件有关财物的裁定。”

53. 对于审查机关的裁定，被请求引渡人及其委托的中国律师可以在人民法院向被请求引渡人宣读裁定之日起十日内，向最高人民法院提出质疑。《引渡法》第二十五条规定：“高 级人民法院作出符合引渡条件或者不引渡的裁定后，应当向被请求引渡人宣读，并在作出裁定之日起七日内将裁定书连同有关材料报请最高人民法院复核。被请求引渡人对高级人民法院作出符合引渡条件的裁定不服的，被请求引渡人及其委托的中国律师可以在人民法院向被请求引渡人宣读裁定之日起十日内，向最高人民法院提出意见。”

54. 最高人民法院复核高级人民法院的裁定，应当根据不同情况作出处理。第二十六条规定：“ 最高人民法院复核高级人民法院的裁定，应当根据下列情形分别处理：

(a) 认为高级人民法院作出的裁定符合本法和引渡条约规定的，应当对高级人民法院的裁定予以核准；

(b) 认为高级人民法院作出的裁定不符合本法和引渡条约规定的，可以裁定撤销，发回原审人民法院重新审查，也可以直接作出变更的裁定。”

55. 例如 2001 年 6 月，法兰西共和国向中国提出引渡涉嫌犯强奸罪的法兰西共和国公民马尔丹·米歇尔的请求。中国最高人民法院依据中国《引渡法》的规定，指定云南省高级人民法院对引渡请求进行审查。云南省高级人民法院依法对该案进行审查后，裁定引渡请求符合中国《引渡法》的规定，并报请最高人民法

院核准。最高人民法院依法组成合议庭，对云南省高级人民法院作出的引渡裁定进行了复核，并于 2002 年 11 月 14 日核准云南省高级人民法院关于法国请求引渡马尔丹·米歇尔的引渡请求符合中国《引渡法》规定的准予引渡条件的裁定。

56. “最高人民法院作出核准或者变更的裁定后，应当在作出裁定之日起七日内将裁定书送交外交部，并同时送达被请求引渡人。最高人民法院核准或者作出不引渡裁定的，应当立即通知公安机关解除对被请求引渡人采取的强制措施。”(第二十八条)

57. 中国国务院决定是否引渡。第二十九条规定：“外交部接到最高人民法院不引渡的裁定后，应当及时通知请求国。外交部接到最高人民法院符合引渡条件的裁定后，应当报送国务院决定是否引渡。国务院决定不引渡的，外交部应当及时通知请求国。人民法院应当立即通知公安机关解除对被请求引渡人采取的强制措施。”

58. 中国对外缔结的引渡条约规定的可引渡的犯罪均包含涉及酷刑的犯罪。

第 4 条

59. 参见补充报告的第 74-81 段，第二次报告的第 10-17 段。第三次报告的第 14 段仍然有效。

60. 根据中国法律，酷刑为刑事罪行，实施酷刑的人和唆使与合谋的人都依法受到严惩。经 1997 年修订的中国《中华人民共和国刑法》(以下简称“《刑法》”)对此作出明确规定。

61. 关于对犯罪嫌疑人、被告人实行刑讯逼供或者使用暴力逼取证人证言的规定与惩罚。第二百四十七条规定：“司法工作人员对犯罪嫌疑人、被告人实行刑讯逼供或者使用暴力逼取证人证言的，处三年以下有期徒刑或者拘役。致人伤残、死亡的，依照本法第二百三十四条、第二百三十二条的规定定罪从重处罚。”

62. 关于对被监管人进行殴打或者体罚虐待的规定与惩罚。第二百四十八条规定：“监狱、拘留所、看守所等监管机构的监管人员对被监管人进行殴打或者体罚虐待，情节严重的，处三年以下有期徒刑或者拘役；情节特别严重的，处三年以上十年以下有期徒刑。致人伤残、死亡的，依照本法第二百三十四条、第二

百三十二条的规定定罪从重处罚。监管人员指使被监管人殴打或者体罚虐待其他被监管人的，依照前款的规定处罚。”

63. 关于共同故意犯罪。第二十五条规定：“共同犯罪是指二人以上共同故意犯罪。二人以上共同过失犯罪，不以共同犯罪论处；应当负刑事责任的，按照他们所犯的罪分别处罚。”

64. 关于教唆他人犯罪。第二十九条规定：“教唆他人犯罪的，应当按照他在共同犯罪中所起的作用处罚。教唆不满十八周岁的人犯罪的，应当从重处罚。 如果被教唆的人没有犯被教唆的罪，对于教唆犯，可以从轻或者减轻处罚。”

65. 最高人民检察院分别于 1999 年 8 月 6 日和 2001 年 7 月 20 日通过的《立案标准》及《重特大案件标准》(请参见第 14 段)，对刑法所规定的刑讯逼供、暴力取证、虐待被监管人等酷刑犯罪的立案标准以及重、特大案件的认定标准作出了具体、明确规定。根据《立案标准》的规定，刑讯逼供，手段残忍、影响恶劣的，致人自杀或者精神失常的，造成冤、假、错案的，授意、指使、强迫他人刑讯逼供的，均应予立案。

66. 《重特大案件标准》规定，刑讯逼供：

(a) 致人重伤或者精神失常的；

(b) 五次以上或者对五人以上刑讯逼供的；

(c) 造成冤、假、错案的”，为“重大案件”；

(一) 致人死亡的；

(二) 七次以上或者对七人以上刑讯逼供的；

(三) 致使无辜的人被判处十年以上有期徒刑、无期徒刑、死刑的”，为“特大案件。

第 5 条

67. 中国第三次报告的第 15-17 段仍然有效。

第 6 条

68. 中国补充报告的第 85-89 段仍然有效。

第 7 条

69. 中国补充报告的第 90 段、第三次报告的第 19 段仍然有效。

70. 中国《刑事诉讼法》第十六条规定：“对于外国人犯罪应当追究刑事责任的，适用本法的规定。”中国法律确保任何涉嫌触犯公约所述罪行的人在诉讼的所有阶段都受到公平的待遇，在此方面，中国补充报告的第 91-98 段仍然有效。

第 8 条

71. 中国《引渡法》为加强惩罚犯罪方面的国际合作，确保引渡的正常进行提供了法律基础。中国《引渡法》第六条第三款规定，引渡条约是指中华人民共和国与外国缔结或者共同参加的引渡条约或者载有引渡条款的其他条约。因此中国参加的所有多边国际公约，包括《禁止酷刑公约》，以及中国同外国缔结的双边引渡条约的有关规定都可以作为引渡方面合作的法律基础。

72. 截至 2005 年 12 月 1 日，中国已同 23 个国家签署了引渡条约，其中已生效条约 17 个。见下表：

国 家	国 名	签署日期	生效日期
1.	泰国	1993.08.26	1999.03.07
2.	白俄罗斯	1995.06.22	1998.05.07
3.	俄罗斯	1995.06.26	1997.01.10
4.	保加利亚	1996.05.20	1997.07.03
5.	罗马尼亚	1996.07.01	1999.01.16
6.	哈萨克斯坦	1996.07.05	1998.02.10
7.	蒙古	1997.08.19	1999.01.10
8.	吉尔吉斯斯坦	1998.04.27	2004.04.27
9.	乌克兰	1998.12.10	2000.07.13
10.	柬埔寨	1999.02.09	2000.12.13

国 家	国 名	签署日期	生效日期
11.	乌兹别克斯坦	1999.11.08	2000.09.29
12.	韩国	2000.10.18	2002.04.12
13.	菲律宾	2001.10.30	----
14.	秘鲁	2001.11.05	2003.04.05
15.	突尼斯	2001.11.19	----
16.	南非	2001.12.10	2004.11.17
17.	老挝	2002.02.04	2003.08.13
18.	阿联酋	2002.05.13	2004.05.24
19.	立陶宛	2002.06.17	2003.06.21
20.	巴基斯坦	2003.11.03	-----
21.	莱索托	2003.11.06	-----
22.	巴西	2004.11.12	-----
23.	西班牙	2005.11.14	-----

第 9 条

73. 中国补充报告第 100 段仍然有效。

74. 截至 2005 年 12 月 1 日，中国已同 36 个国家签署了刑事(民刑事)司法协助条约，其中已生效条约 26 个，这为缔约国之间涉及公约第四条所述的罪行的刑事诉讼的协助提供了法律基础。见下表：

国 家	国 名	签署日期	生效日期
1.	波兰	1987.06.05	1988.02.13
2.	蒙古	1989.08.31	1990.10.29
3.	罗马尼亚	1991.01.16	1993.01.22
4.	俄罗斯	1992.06.19	1993.11.14
5.	土耳其	1992.09.28	1995.10.26
6.	乌克兰	1992.10.31	1994.01.19
7.	古巴	1992.11.24	1994.03.26
8.	白俄罗斯	1993.01.11	1993.11.29

国 家	国 名	签署日期	生效日期
9.	哈萨克斯坦	1993.01.14	1995.07.11
10.	埃及	1994.04.21	1995.05.31
10.	加拿大	1994.07.29	1995.07.01
12.	希腊	1994.10.17	1996.06.29
13.	保加利亚	1995.04.07	1996.05.27
14.	塞浦路斯	1995.04.25	1996.01.11
15.	吉尔吉斯斯坦	1996.07.04	1997.09.26
16.	塔吉克斯坦	1996.09.16	1998.09.02
17.	乌兹别克斯坦	1997.12.11	1998.08.29
18.	越南	1998.10.19	1999.12.25
19.	韩国	1998.11.12	2000.03.24
20.	老挝	1999.01.25	2001.12.15
21.	哥伦比亚	1999.05.14	2004.05.27
22.	突尼斯	1999.11.30	2000.12.30
23.	立陶宛	2000.03.20	-----
24.	美国	2000.06.19	2001.03.08
25.	印度尼西亚	2000.07.24	-----
26.	菲律宾	2000.10.16	-----
27.	爱沙尼亚	2002.06.12	-----
28.	南非	2003.01.20	2004.11.17
29.	泰国	2003.06.21	2005.02.20
30.	朝鲜	2003.11.19	-----
31.	拉脱维亚	2004.04.15	2005.09.18
32.	巴西	2004.05.24	-----
33.	墨西哥	2005.01.24	-----
34.	秘鲁	2005.01.27	-----
35.	法国	2005.04.18	-----
36.	西班牙	2005.07.21	-----

第 10、11 条

75. 参见中国补充报告第 101-102 段、第二次报告的第 27-37 段、第三次报告的第 26-35 段。

76. 禁止酷刑是中国政府的一贯立场。中国政府不仅在法律上明文禁止酷刑，而且十分重视对国家公职人员，特别是对公安、检察、法院和司法行政部门的执法人员进行有关禁止酷刑的教育和宣传工作。

77. 自 1999 年提交第三次报告以来，中国公安、检察、法院和司法行政部门在禁止酷刑的宣传和教育方面采取了一系列措施。

78. 公安部自 1998 年以来，在公安民警保护人权培训方面进行了大量的工作。

79. 以各级领导干部为重点开展教育培训工作，结合国际人权标准，有针对性地开展了《宪法》、《刑法》、《刑事诉讼法》等法律的专题培训，提高领导干部的法律素质和依法管理的能力。公安部于 2003 年印发了《关于在县级公安部门和所队领导班子成员中开展端正执法思想轮训工作的通知》，开展端正执法思想的集中教育活动，结合具体工作和典型案例，大规模培训基层领导干部，教育领导干部了解国际司法最低公正标准体系，深入学习人权保障的有关内容，树立牢固的人权意识。2003 年 11 月 20 日至 22 日召开的第二十次全国公安会议提出，要重点解决包括刑讯逼供等执法突出问题，依法保障国家、集体、组织和公民个人的合法权益。

80. 将国际人权标准与执法实践相结合，组织开展全体公安民警，特别是基层和一线民警，实战训练工作，提高民警依法办案水平。建立了民警上岗和任职、晋升、实战必训制度，2003 年组织培训民警 113 万余人次。在各类训练中，把法制教育作为必训内容，要求法律课时必须达到总课时的 30%以上。

81. 重视国际人权培训与合作，以保护人权为主题，与有关国际组织和其他国家的警察部门开展合作与交流。如 2001 年 7 月与联合国人权事务高级专员办公室联合举办了“人权与警察”国际研讨会；于 2003 年 11 月至 12 月联合举办了以保护人权为主题的高级警官培训班。此外还派出多个培训团赴加拿大、法国等国家考察学习。

82. 最高人民检察院为加强对检察官的培训，专门制定了《检察人员岗位职务培训实施纲要》，《检察官培训暂行规定》，对检察官培训的内容、方式进行了规划，如任职培训、晋升培训、专项培训和其他业务培训。

83. 中国国家检察官学院和各省级检察官分院是检察官的专门培训机构，每年聘请人权问题专家，就人权保护专题给检察官授课。担负查处酷刑犯罪的渎职侵权检察部门，每年进行专项培训，以适应办案的需要。

84. 最高人民检察院于 1998 年为严肃处理群众反映强烈的违法违纪问题下发了专门文件，并明确规定：

(a) 严禁超越管辖范围办案；

(b) 严禁对证人采取任何强制措施；

(c) 立案前不得对犯罪嫌疑人采取强制措施；

(d) 严禁超期羁押；

(e) 不得把检察院的讯问室当成羁押室；

(f) 讯问一般应在看守所进行，必须在检察院讯问室进行的，要严格执行还押制度；

(g) 凡在办案中搞刑讯逼供的，先停职，再处理；

(h) 因玩忽职守、非法拘禁、违法办案等致人死亡的，除依法依纪追究直接责任人员外，对于领导严重失职渎职的，要依照法定程序给予撤职处分；

(i) 严禁截留、挪用、私分扣押款物。

85. 2003 年，最高人民检察院在全国检察机关开展了“强化法律监督，维护公平正义”的教育活动。各级检察机关紧密联系实际，自觉参与，认真听取社会各界的意见，使教育活动取得了较好的成效。通过对 2001 年以来撤案、不批捕、不起诉案件、无罪判决案件以及扣押款物情况进行重点清理和专项检查，共复查各类案件 41 万多件，对 6,643 件存在办案程序不严格、法律文书不规范等质量问题的案件进行了纠正；对违法扣押、未及时返还和上缴的扣押款物进行了清理，依法上缴和返还。对 424 名违法违纪的检察人员进行了严肃查处，其中 21 人受到刑事处罚。

86. 2004 年 3 月 19 日，最高人民检察院召开电视电话会议，要求全国的检察人员认真学习宪法修正案，牢固树立宪法意识，切实维护宪法权威，将尊重和保障人权的原则贯穿于执法办案的各个环节，严厉打击刑事犯罪，坚决查办国家机关工作人员利用职权严重侵犯公民人身权利与民主权利的犯罪案件，保障宪法赋予公民的基本权利不受侵犯。

87. 2001 年 10 月 18 日，最高人民法院颁布了《中华人民共和国法官职业道德基本准则》，要求法官做到保障司法公正，提高司法效率，保持清正廉洁，遵守司法礼仪，加强自身修养，约束业外活动。

88. 中国司法部要求监狱系统对全体监狱警官进行文明执法的教育，杜绝打骂体罚等虐待罪犯的现象。各省按照司法部要求，利用举办培训班和组织学习班相结合的办法，对绝大多数警官进行了监狱法和人权公约知识的培训。司法部已将《禁止酷刑公约》的规定及中国的有关法律、法规汇编成册，发给每个警官，要求他们认真学习掌握，严格依法办事。

89. 1999 年，司法部下发《关于在全国监狱人民警察中开展基本素质教育的通知》，经过三年努力，完成对全国监狱人民警察的培训。培训的内容主要包括法律、监狱业务和国际人权标准等国际人权公约的有关内容。

90. 2000 年 2 月，司法部编印《严格执法热情服务书》，下发全国司法行政系统，要求全体执法人员认真学习和贯彻执行。

91. 为适应监狱执法活动的要求，司法部从 2002 年开始，先后培训了全国近 700 个监狱的监狱长近 2000 人。培训班聘请的授课人员包括国内外知名专家、学者及有关部门的领导，以及中国香港特别行政区惩教署官员。通过培训，监狱长接受了法制教育、廉政教育、形势教育，提高了监狱领导层对监狱工作改革发展的重要性、紧迫性的认识，端正了业务指导思想，增强了执法执纪观念。

92. 2002 年司法部监狱局和劳动部培训就业司、中国职业鉴定中心联合下发文件，培训监狱系统国家职业资格心理咨询师。监狱系统心理咨询师的职责是防止和杜绝对监狱服刑人员实施酷刑，以及从监禁条件下对服刑人员心理健康教育、心理障碍咨询、心理疾病矫治等深层次问题提供救助。到目前为止，已培训监狱系统心理咨询师近 1000 人，为更好地开展罪犯的心理矫治工作准备了人力资源。全国近 90%的监狱开展了这项工作。

93. 2004 年，司法部组织纪念《监狱法》颁布 10 周年座谈会，进一步强调，要坚持不懈、认真贯彻执行《监狱法》，要使公正执法、文明管理、从严治警、保障罪犯合法权益等观念和意识深入人心，成为全体人民警察的准则。自 2005 年 5 月，司法部在监狱系统开展了为期半年的“规范执法行为、促进执法公正”专项整改活动。这次活动主要围绕规范执法行为、落实“三个坚决杜绝”(即坚决杜绝打骂、体罚、污辱、虐待罪犯的现象，坚决杜绝罪犯超时超强度劳动现象，坚决杜绝监狱乱收费现象)、加强监所管理、推行狱务公开 4 个重点展开。在活动开展过程中，全国监狱系统共举办不同层次的培训班 2826 期，对与本职工作相关、必须应知应会的法律法规和规章进行了学习培训，包括司法部监狱局工作人员在内的全国近 28 万名监狱人民警察参加了统一考试。

第 12 条

94. 补充报告第 113-114 段仍然有效。

95. 根据宪法和法律，中国检察机关担负着查处国家机关工作人员的渎职犯罪和利用职权实施的刑讯逼供或者暴力取证(刑法第二百四十七条)、虐待被监管人员(刑法二百四十八条)等侵犯公民人身权利、民主权利的犯罪的职责。全国各级检察机关共设有专职工作机构 3000 多个，专职人员 13,000 名左右，以确保任何实施酷刑的行为能得到迅速公正的调查。

96. 中国检察机关按以下程序查办涉及酷刑犯罪的案件：

97. 受案。根据《人民检察院刑事诉讼法规则》第一百二十条规定，人民检察院直接受理其有管辖的报案、控告、举报和犯罪嫌疑人自首的案件。

98. 初查。根据《人民检察院刑事诉讼法规则》第一百二十九条的规定，侦查部门对举报线索初查后，应当制作审查结论报告，提出处理意见，报检察长决定：认为有犯罪事实需要追究刑事责任的，提请批准立案侦查；对于认为没有犯罪事实的，事实不清，证据不足的，以及具有刑事诉讼法第十五条规定情形之一的提请批准不予立案。对于情节显著轻微，危害不大，不构成犯罪的案件，如查明行为人有违法违纪的行为，检察机关可向其主管部门提出检察建议，要求对直接责任人员给予纪律处理。

99. 立案侦查。对于立案侦查的案件，启动刑事诉讼程序，开展侦查搜集证据，必要时，经审查批准部门批准，可对犯罪嫌疑人采取拘留、逮捕等强制措施(由公安机关执行)。

100. 侦查终结。侦查部门在查清案件全部事实后，将案件材料移送审查起诉部门审查，决定是否提起公诉。

101. 提起公诉。审查起诉部门根据侦查部门移送的案件材料进行审查，认为指控犯罪事实已经查清，证据确实充分，应当提交法院审判处罚的，即依法提起公诉，并出庭支持公诉。对于犯罪情节轻微，依法不需要刑事处罚的，可以作出不起诉的决定。

102. 检察机关依照法律独立行使检察权，不受行政机关、社会团体和个人的干涉。在检察机关侦查阶段和审查起诉阶段，犯罪嫌疑人均能得到律师的法律帮助。

103. 根据《宪法》和其他法律，人民检察院是国家的法律监督机关，具体行使侦查监督、审判监督和刑罚执行监督权。中国检察机关对公安机关的侦查活动是否合法进行监督：

104. 对公安机关管辖的应当立案侦查而未立案侦查的案件，有权要求公安机关说明不立案的理由，如认为公安机关不予立案的理由不能成立，应通知公安机关立案侦查。

105. 对公安机关进入刑事诉讼程序的侦查活动是否依法进行实施监督，包括对讯问犯罪嫌疑人、询问证人、搜查等专门调查工作和采取的拘留、逮捕等强制措施。

106. 对侦查活动中发生的轻微违法行为，可以口头纠正，也可以发出《纠正违法通知书》，由所在的机关予以纪律处分，构成犯罪的，由渎职侵权检察部门立案侦查，追究刑事责任。

107. 中国各级人民检察院内部设立了专门的监所检察机构。1987 年 7 月，各地监所检察机构又在所辖区域的监狱设置了派驻机构。派驻监狱的检察机构的检察官依法独立行使检察权，并直接对派出的检察院负责，不受所驻监狱首长的领导，也不隶属所驻监狱。他们直接受理被监管人的申诉、控诉、检举，随时调查监管人员体罚殴打、虐待被监管人员的案件。

108. 自 1999 年中国提交第三次报告以来，中国检察机关依法迅速、公正地查处了大量由国家机关工作人员利用职权侵犯公民人身权利和民主权利，如刑讯逼供、暴力取证、虐待被监管人等犯罪案件，总的案件数量呈下降趋势，有关数据如下：

(a) 1999 年，因刑讯逼供，起诉 143 件；因虐待被监管人，起诉 42 件。

(b) 2000 年，因刑讯逼供，起诉 137 件；因虐待被监管人，起诉 52 件。

(c) 2001 年，因刑讯逼供，起诉 101 件；因虐待被监管人，起诉 38 件。

(d) 2002 年，因刑讯逼供，起诉 55 件；因虐待被监管人，起诉 30 件。

(e) 2003 年，因刑讯逼供，起诉 52 件；因虐待被监管人，起诉 32 件；因暴力取证，起诉 7 件。

(f) 2004 年，因刑讯逼供，起诉 53 件；因虐待被监管人，起诉 40 件；因暴力取证，起诉 4 件。

109. 为贯彻“国家尊重和保护人权”这一宪法原则，最高人民检察院 2004 年 5 月 11 日决定，利用一年时间在全国范围内开展严肃查办国家机关工作人员利用职权侵犯人权专项行动。检察机关上下动员，迅速行动，宣传发动，声势浩大，社会各界和广大公民积极响应，报导、控告侵犯人权的违法犯罪行为，检察机关集中力量查办了一批案件，其中包括一批刑迅逼供、暴力取证、虐待被监管人等犯罪案件。专项行动取得了明显阶段性成果。

第 13 条

110. 中国第三次报告的第 42-48 段仍然有效。

111. 中国《宪法》确保遭受酷刑的个人有向国家主管机关申诉的权利，同时确保申诉人或者证人不遭受恐吓或打击报复。《宪法》第四十一条第二款规定：“对于公民的申诉、控告或者检举，有关机关必须查清事实，负责处理。任何人不得压制和打击报复。”

112. 《中华人民共和国人民警察法》第四十六条规定：“公民或者组织对人民警察的违法、违纪行为，有权向人民警察机关或者人民检察院、行政监察机关检举、控告。受理检举、控告的机关应当及时查处，并将结果告知检举人、控告人。对依法检举、控告的公民或者组织，任何人不得压制和打击报复。”

113. 《监狱法》：

(a) 第二十一条规定：“罪犯对生效的判决不服的，可以提出申诉。对于罪犯的申诉，人民检察院或者人民法院应当及时处理。”

(b) 第二十二条规定：“对罪犯提出的控告、检举材料，监狱应当及时处理或者转送公安机关或者人民检察院处理，公安机关或者人民检察院应当将处理结果通知监狱”。

(c) 第二十三条规定：“罪犯的申诉、控告、检举材料，监狱应当及时转递，不得扣押。”

(d) 《看守所条例》第四十六条规定：“对人犯的上诉书、申诉书，看守所应当及时转送，不得阻挠和扣押。人犯揭发、控告司法工作人员违法行为的材料，应当及时报请人民检察院处理。”

114. 为了便于人民群众控告、申诉，同时也为了提高检察人员办案的责任心和提高办事效率，最高人民检察院于 2003 年 7 月 1 日下发了《人民检察院控告、申诉首办责任制实施办法(试行)》，规定首办责任制就是人民检察院对本院管辖的控告、申诉，按照内部业务分工，明确责任，及时办理，将包括刑讯逼供、暴力取证等案件在内的控告、申诉解决在首次办理环节的责任制度。

115. 《重特大案件标准》关于刑讯逼供、暴力取证、虐待被监管人员等国家机关工作人员侵犯公民人身权利和民主权利的案件的规定，是查办酷刑案件的法律依据之一(参见第 14 段、第 57 段)。

116. 人民法院对检察机关提起公诉的涉及酷刑的案件依法进行迅速而公正的审理，整个司法活动能够做到审判公开、程序合法、裁判公正。

117. 自 1999 年中国提交第三次报告以来，人民法院依法迅速、公正地审判一批涉及酷刑的侵犯公民人身权利的案件。总的来看，犯罪案件呈下降趋势，有关数据如下：

(a) 1999 年：

(一) 因刑讯逼供被判有罪 178 人

(二) 因暴力取证罪被判有罪 3 人

(三) 未发生因虐待被监管人的被判有罪案件

(b) 2000 年：

(一) 因刑讯逼供被判有罪 121 人

(二) 因暴力取证被判有罪 1 人

(三) 因虐待被监管人被判有罪 23 人

(c) 2001 年：

(一) 因刑讯逼供被判有罪 81 人

(二) 因暴力取证被判有罪 3 人

(三) 因虐待被监管人被判有罪 34 人

(d) 2002 年：

(一) 因刑讯逼供被判有罪 44 人

(二) 因暴力取证被判有罪 2 人

(三) 因虐待被监管人被判有罪 18 人

(e) 2003 年：

(一) 因刑讯逼供被判有罪 60 人

(二) 因暴力取证被判有罪 2 人

(三) 因虐待被监管人被判有罪 27 人

(f) 2004 年：

(一) 因刑讯逼供被判有罪 82 人

(二) 因暴力取证被判有罪 2 人

(三) 因虐待被监管人被判有罪 40 人

第 14 条

118. 中国第二次报告的第 45-53 段、第三次报告的第 50 段仍然有效。

119. 在人民法院审结的涉及国家工作人员利用职权侵犯公民人身权利案件中，凡符合《国家赔偿法》规定的，有关受害人都取得了国家赔偿。

120. 司法部《司法行政机关行政赔偿刑事赔偿办法》第五条同时规定：监狱部门及其工作人员在行使职权时，有下列侵犯人身权情形之一的，应当予以刑事赔偿：刑讯逼供或者体罚、虐待服刑人员，造成身体伤害或者死亡的；殴打或者唆使、纵容他人殴打服刑人员，造成严重后果的；侮辱服刑人员造成严重后果

的；对服刑期满的服刑人员无正当理由不予释放的；违法使用武器、警械、械具造成公民身体伤害、死亡的；其他违法行为造成服刑人员身体伤害或者死亡的。

第 15 条

121. 中国补充报告的第 120-122 段、第二次报告的第 55 段、第三次报告的第 52 段仍然有效。

122. 根据中国法律，诉讼程序中不得援引任何确属逼供作出的陈述为证据，任何以非法手段取得的证据不能作为定罪的根据。《刑事诉讼法》第 43 条规定："审判人员、检察人员、侦查人员必须依照法定程序，收集能够证实犯罪嫌疑人、被告人有罪或者无罪、犯罪情节轻重的各种证据。严禁刑讯逼供和以威胁、引诱、欺骗以及其他非法的方法收集证据。必须保证一切与案件有关或者了解案情的公民，有客观地、充分地提供证据的条件，除特殊情况外，并且可以吸收他们协助调查。"

123. 《公安机关办理刑事案件程序规定》第一百八十一条规定："讯问的时候，应当认真听取犯罪嫌疑人的供述和辩解；严禁刑讯逼供或者使用威胁、引诱、欺骗以及其他非法的方法获取供述。"《公安机关办理行政案件程序规定》第二十六条规定："公安机关必须依照法定程序，收集能够证实违法嫌疑人是否违法、违法情节轻重的证据。严禁刑讯逼供和以威胁、引诱、欺骗或者其他非法手段收集证据。以非法手段取得的证据不能作为定案的根据"。

124. 《人民检察院刑事诉讼规则》第二百六十五条明确规定，以刑讯逼供或者威胁、引诱、欺骗等非法的方法收集的犯罪嫌疑人的供述、被害人陈述、证人证言不能作为指控犯罪的根据。最高人民检察院 2001 年 1 月 2 日，下发《关于严禁将刑讯逼供获取的犯罪嫌疑人供述作为定案依据的通知》，要求各级人民检察院要严格贯彻执行有关法律关于严禁刑讯逼供的规定，明确非法证据的排除规则。最高人民检察院要求各级人民检察院必须严格贯彻执行这些规定，发现犯罪嫌疑人供述、被害人陈述、证人证言是侦查人员以非法方法收集的，应当坚决予以排除，不能给刑讯逼供等非法取证行为留下任何余地。

第 16 条

125. 中国第二次报告的第 57-62 段、第三次报告的 54-57 段仍然有效。

126. 根据中国法律，禁止酷刑的措施同样适用于对公民人格尊严不受侵犯的保障。中国《宪法》第三十九条规定：“中华人民共和国公民的人格尊严不受侵犯。禁止用任何方法对公民进行侮辱、诽谤和诬告陷害。”

127. 1998 年，公安部在全国范围内开展了创建“严格执法，文明管理”看守所的活动，向社会承诺：对犯罪嫌疑人、被告人实行文明管理，不打骂、不体罚虐待、不侮辱人格、保障犯罪嫌疑人和被告人的基本生活条件，有病及时治疗。

128. 2000 年，公安部进行全国看守所环境和秩序专项治理，极大地改善了监所的条件，为犯罪嫌疑人、被告人创造了良好的生活环境。

129. 2001 年，公安部出台了《看守所民警执勤行为规范》，明确要求民警不得刑讯逼供，或体罚、虐待、侮辱在押人员，不得殴打或者纵容他人殴打在押人员。尊重在押人员的人格和尊严，尊重少数民族、外籍在押人员的生活习惯。对在押人员不得叫绰号或者使用其他侮辱、歧视性的语言。对患病的在押人员应及时给予治疗和生活照顾。

130. 2003 年，公安部在全国看守所开展了执法大检查，重点检查是否存在打骂、体罚、虐待犯罪嫌疑人、被告人以及是否存在其他侵犯犯罪嫌疑人、被告人合法权益的行为。

131. 自 2004 年 3 月起，公安部和最高人民检察院联合在全国看守所和驻所检察室部署开展了“加强监管执法、加强法律监督、保障刑事诉讼顺利进行、保障在押人员合法权益示范单位”创建活动，要求各地看守所转变执法观念，牢固树立依法保护在押人员合法权益的意识，更加自觉地尊重和保障在押人员的人格尊严、生命健康、基本生活保障、卫生保健、会见通信、对国家机关及其工作人员批评、建议，以及检举、控告、申诉等权利。通过这次创建活动，严格规范执法和服务程序，坚决废除现行监管制度中的一些有悖人权保障的做法，建立健全在押人员合法权益保障的工作机制；坚决杜绝在看守所发生刑讯逼供行为；严格依照规定使用械具，坚决杜绝打骂、体罚、虐待在押人员行为。

132. 2000 年 11 月 15 日，最高人民法院通过了《关于审理未成年人刑事案件的若干规定》的司法解释。该项司法解释明确规定：审判未成年人刑事案件，必须坚持“教育为主、惩罚为辅的原则，执行教育、感化、挽救的方针”；审理未成年人刑事案件应当遵守刑事诉讼法中有关不公开审理的规定；应当依法保证未成年被告人获得辩护，开庭审理时不满十八周岁的未成年被告人没有委托辩护人的，人民法院应当指定承担法律援助义务的律师为其提供辩护；开庭审理前，应当通知未成年被告人的法定代理人出庭，并可以安排法定代理人或者其他成年近亲属、教师等人员与未成年被告人会见；在法庭上不得对未成年被告人使用械具，未成年被告人在法庭上可以坐着接受法庭调查、询问，只有在回答审判人员的提问、宣判时应当起立；发现有对未成年被告人诱供、训斥、讽刺或者威胁的情形时，审判人员应当及时制止；对于已收监执行的未成年犯，少年法庭可以通过多种形式与未成年犯管教所等未成年罪犯服刑场所建立联系，了解未成年罪犯的改造情况，协助做好帮教、改造工作，并可以对正在服刑的未成年罪犯进行回访考察。该司法解释对于有效地预防司法审判中对未成年人适用酷刑，保护未成年人合法权益起到了良好作用。

对委员会审议中国第三次报告的“结论和建议”提供的补充情况

关于在国内法中载入完全符合公约规定的酷刑的定义

133. 中国第三次报告的第 59-64 段对此已作出说明。

134. 中国政府确信，依照中国《刑法》，能够对酷刑的行为，包括精神折磨的行为，根据犯罪的严重性质，施以相应刑罚。

135. 中国《刑法》对于酷刑行为区别情况分别作出了规定。例如，

(a) 第二百四十七条规定：“司法工作人员对犯罪嫌疑人、被告人实行刑讯逼供或者使用暴力逼取证人证言的，处三年以下有期徒刑或者拘役。致人伤残、死亡的，依照本法第二百三十四条、第二百三十二条的规定定罪从重处罚。”

(b) 第二百四十八条规定：“监狱、拘留所、看守所等监管机构的监管人员对被监管人进行殴打或者体罚虐待，情节严重的，处三年以下有期

徒刑或者拘役；情节特别严重的，处三年以上十年以下有期徒刑。致人伤残、死亡的，依照本法第二百三十四条、第二百三十二条的规定定罪从重处罚。监管人员指示被监管人殴打或者体罚虐待其他被监管人的，依照前款的规定处罚。”

136. 根据有关司法解释，上述行为包括蓄意使受害人在肉体上，以及在精神上遭受剧烈疼痛或者痛苦的任何行为。此外，中国刑法还规定了非法搜查罪、非法拘禁罪和侮辱罪等，其犯罪主体不仅包括公职人员，而且也包括非公职人员，对国家工作人员实施的，从重处罚。

137. 由此可见，中国法律和有关法律规定完全涵盖《公约》中酷刑定义的内容。对《公约》规定的酷刑行为，中国法律都是禁止的，对违犯者均依法给予严厉处罚。

关于继续进行改革，监测新的法律和实践的统一和有效实施，并为此目的采取其他适当措施

138. 从履行公约的角度看，自 1999 年以来，中国已为此采取了一系列立法、司法和行政措施，确保法制的统一和有效实施，避免有法不依、执法不公的问题。

139. 中国修订了《宪法》，首次将“人权”一词写进《宪法》，明确规定“国家尊重和保障人权”。这是中国民主宪政和政治文明建设的一件大事，是中国人权发展史上的一个重要里程碑。人权入宪要求司法机关必须将尊重和保障人权的原则贯穿于司法活动的各个环节，保障宪法赋予公民的基本权利不受侵犯。

140. 中国修订了《刑法》和《刑事诉讼法》，明确规定“罪刑法定”、“法律面前人人平等”、“罪刑相适应”，以及未经法院依法判决，对任何人都不得确定有罪等刑事法律原则。

141. 中国制定了《引渡法》，为规范引渡程序，加强惩罚犯罪方面的国际合作，保护个人和组织的合法权益提供了法律基础。此外，中国还制定了其他相关法律，如《法律援助条例》、《城市生活无着的流浪乞讨人员救助管理办法》、《预防未成年人犯罪法》等。

142. 中国司法机关通过一系列部门规章和司法解释，加强了内部监督机制，加大了对违纪、违法犯罪干部的处罚力度，进一步规范执法活动。

143. 中国公安和检察机关还建立了外部监督机制，接受群众监督、切实防止和纠正公安、检察机关工作人员执法不公的问题。

144. “公正与效率”已成为二十一世纪人民法院工作的主题。人民法院的全部活动要做到审判公开、程序合法、审限严格、裁判公正、依法执行。这是“公正与效率”的核心。

145. 中国将继续深化改革，完善立法，规范执法活动，真诚地履行公约义务。

关于取消为任何理由要求犯罪嫌疑人在羁押中获得律师帮助之前申请许可的做法

146. 按照中国有关刑事诉讼法律的规定，除涉及国家秘密的案件外，犯罪嫌疑人、被告人在羁押中获得律师帮助是不需要申请许可的。中国《刑事诉讼法》第九十六条规定：“犯罪嫌疑人在被侦查机关第一次讯问或者采取强制措施之日起，可以聘请律师为其提供法律咨询、代理申诉、控告。犯罪嫌疑人被逮捕的，聘请的律师可以为其申请取保候审。”

147. 对于涉及国家秘密的案件，犯罪嫌疑人聘请律师，应当经过侦查机关批准。这主要是从保障刑事诉讼顺利进行、保障案件所涉国家秘密不致泄漏、维护国家安全角度考虑的。对国家秘密案件的范围法律是有明确规定的，而且是依法从严掌握。在实践中，此类案件数量很少，而且经过批准，犯罪嫌疑人仍然可以聘请律师，被聘律师也可以会见在押犯罪嫌疑人。犯罪嫌疑人获得律师帮助的权利并没有受到实质性的限制。

关于按照有关国际标准取消任何形式的行政拘留

148. 在不少国家刑法中，不仅规定有重罪、轻罪，还有大量的违警罪。而由于法律文化、法律传统方面的差异，在中国刑法中，并未规定违警罪。类似于外国刑法中的违警罪，在中国法律中被规定为行政违法行为，以警告、罚款、行政拘留等方式进行行政处罚。

149. 中国法律对于行政处罚的程序有严格的规定。《立法法》第八条规定，限制人身自由的强制措施和处罚只能通过制定法律而不是法规、规章的方式来规范。《行政处罚法》第九条规定：“限制人身自由的行政处罚，只能由法律设定。”第十六条规定：“限制人身自由的行政处罚权只能由公安机关行使。”第三十条规定：“公民、法人或者其他组织违反行政管理秩序的行为，依法应当给予行政处罚的，行政机关必须查明事实；违法事实不清的，不得给予行政处罚。”第三十一条规定：“行政机关在作出行政处罚决定之前，应当告知当事人作出行政处罚决定的事实、理由及依据，并告知当事人依法享有的权利。”第三十二条规定：“当事人有权进行陈述和申辩。行政机关必须充分听取当事人的意见，对当事人提出的事实、理由和证据，应当进行复核；当事人提出的事实、理由或者证据成立的，行政机关应当采纳。行政机关不得因当事人申辩而加重处罚。”第三十八条规定：“调查终结，行政机关负责人应当对调查结果进行审查，根据不同情况，分别作出如下决定：

(a) 确有应受行政处罚的违法行为的，根据情节轻重及具体情况，作出行政处罚决定；

(b) 违法行为轻微，依法可以不予行政处罚的，不予行政处罚；

(c) 违法事实不能成立的，不得给予行政处罚；

(d) 违法行为已构成犯罪的，移送司法机关。对情节复杂或者重大违法行为给予较重的行政处罚，行政机关的负责人应当集体讨论决定。”对行政处罚决定不服的，可以提起行政诉讼。

<u>关于确保对所有酷刑指控进行及时、全面、有效和公正的调查</u>

150. 见本报告第 94-109 段对公约第 12 条所提供的情况。

<u>关于继续加大努力，向执法官员提供国际人权标准方面的培训</u>

151. 见本报告第 75-93 段对公约第 10 至 11 条所提供的情况。

附　录：

《中华人民共和国宪法》第三十三条

《中华人民共和国刑法》

《中华人民共和国刑事诉讼法》

《中华人民共和国引渡法》

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