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保安局

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The Government of the
Hong Kong Special Administrative Region
Security Bureau

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9 May 2012

Mrs Sharon Tong
Principal Council Secretary 2
Council Business Division
Legislative Council Secretariat
Legislative Council Complex
Central
Hong Kong

Dear Mrs Tong,

Supplementary Information on
Immigration (Amendment) Bill 2011

Clause-by-clause scrutiny was complete at the meeting on 30 April. I write to provide supplementary information to assist the Committee to conclude scrutiny of the Bill.

Response to deputations' views

2. Our response to views of deputations is set out at Annex I for Members' reference. Indeed, these views and our response were largely set out in the paper CB(2)1859/11-12(02), and we stand ready to brief Members the proposals therein in detail.

Other supplementary information

3. The Committee has requested for our written response to other issues which is set out below -

(a) At present, the Immigration Department (ImmD) will arrange qualified interpreters for interviews with all claimants. The role of interpreters at a screening interview has been set out in the interviewing protocol.

(b) If a claimant disagrees with the decision of the ImmD or the Appeal Board to revoke his substantiated claim, he may receive publicly funded legal assistance through the Duty Lawyer Service to handle his case.

(c) As regards remuneration for Appeal Board members, we propose drawing reference to the remuneration level for Magistrates (about $800 per hour).

(d) A Member mentioned a report in the press whereby it was said that a claimant was removed from Hong Kong and subsequently being tortured. Whilst we do not comment on individual cases, under both the administration mechanism and provisions in the Bill, if an immigration officer believes that a claimant will face a torture risk if removed to another country, the ImmD will provide non-refoulement protection to that claimant.

(e) Section 43A of the Bill provides that any person who disturbs the proceedings of the Appeal Board commits an offence. Similar provisions can be found in the existing law of Hong Kong, including those in relation to the statutory Administrative Appeals Board and the Municipal Services Appeals Board. Those provisions have also created similar offences to ensure that the Boards will operate in an effective manner without disturbance. This arrangement is consistent with the principles underlying the Bill of Rights and will not affect a claimant's right to make representations to the Appeal Board on his appeal. Other common law jurisdictions, such as the United Kingdom and New Zealand, have also put in place similar arrangements for their appeal boards alike.

(f) Regarding transitional provisions, as we have explained at the meeting on 30 April, any decision on a torture claim under the existing administrative scheme or after enactment and commencement of the Bill will be subject to a claimant's right to apply for leave for judicial review if a decision is reached in an unfair manner procedurally or otherwise. This position will not be affected by transitional provisions in Schedule 4. On the contrary, transitional provisions will ensure that

claimants' rights will be protected under the statutory scheme after enactment and commencement of the Bill, and that all claims will be processed in a fair and effective manner under the statutory scheme by reducing procedural abuse.

Judgments and reports

4. The Court's judgments in *Prabakar v. Secretary for Security* (FACV 16/2003) and *MA & Ors v. Director of Immigration* (HCAL 10, 73, 75, 81 & 83/2010) can be found here (English only) (Annexes II and III) –

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. The latest report submitted by China under the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment can be found here (Annex IV) –

http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2629/P020081125530136523711.pdf

Amendments

6. As explained in the paper which we provided to the Committee on 27 April, after careful consideration of the Committee's views, we will propose to amend the Bill. We will separately provide these amendments as soon as possible.

Yours sincerely,

(W H CHOW)
for Secretary for Security

Immigration (Amendment) Bill 2011

Response to deputations' views

Views	Response
Section 37W added: Restrictions on persons claiming non-refoulement protection in Hong Kong	
This Clause invites claimants to break the law (overstaying) before they would become eligible for lodging torture claim and seeking legal assistance. The Administration should not restrict claims to be lodged only when claimants are subject to removal.	Non-refoulement protection under Article 3 of the CAT only applies to a person who is subject to removal. The Court confirmed in *BK & CH v the Director of Immigration* (CACV 59 & 60/2010) that such application is in compliance with the CAT.
Section 37Y added: Submission of torture claim form	
The timeframe for returning the torture claim form ("claim form") should be extended. Failing to return the claim form should not be treated as withdrawal of the torture claim.	To shorten time which claimants spend on waiting for personal data, the Immigration Department ("ImmD") has expedited procedures to provide claimants (upon their consent) with their personal data on the same day when the claim form is served. This will reduce time which claimants need to wait for their personal data. Moreover, ImmD will amend guidance notes to remind claimants that they may submit supplementary documents after the submission of claim forms. Information required in the claim form mainly includes personal information and experience already known to claimants. Where necessary, claimants may apply for extension of time for submission of the claim form. With reference to overseas experience, no other country gives claimants more than 28 days for submission of the claim forms. With the above measures introduced, the Administration is of the view that the 28-day timeframe as stated in the Bill is reasonable and should be maintained.

Section 37ZC added: Medical examination	
It should not be a condition precedent that the physical or mental condition of the claimant "is in dispute" before a medical examination could be conducted.	Taking as a consideration of a claim, in the event that the ImmD (or the Appeal Board) and the claimants have no dispute over the claimed physical or mental condition (i.e. the ImmD or the Appeal Board has accepted a claimant's description as fact), there is no need to arrange medical examination for claimants.
Medical examination should not be handled by the ImmD or government doctors.	Under existing arrangement, ImmD does not participate in the selection of the medical practitioner to perform the examination and in the process of the examination to ensure fairness.
Lawyers should be able to communicate directly with medical professionals on a fully confidential basis without involving the ImmD.	The ImmD would not request the medical practitioner who performs the medical examination to disclose the examination result unless with the claimant's consent.
Section 37ZD added: Credibility of claimant	
If decision is made in a skewed manner or in the absence of balancing procedural safeguards (e.g. without calling for any explanation of such behaviour from the claimant), it would result in injustice. The Clause should be removed from the Bill.	The circumstances which immigration officers may consider as damaging to the credibility of a claimant are set out in section 37ZD to enhance transparency in the process of making such considerations. In general, the ImmD would request claimants to provide reasons for their behaviour. It is clearly set out in this section that the ImmD will only take the prescribed behaviour as damaging the claimant's credibility if the claimant "cannot provide reasonable excuse".
Section 37ZH added: Order in which claims are processed	
ImmD should establish a system to decide the order in which torture claims are to be processed.	The ImmD had reminded claimants pending screening twice (in 2010 and 2011 respectively) that they might request to have their claims processed earlier if necessary. At present, all claimants may request for their cases to be handled with priority when lodging their claims. Moreover, the ImmD will accord priority to cases involving claimants under detention, claims which have been lodged for a longer time, as well as other special cases (e.g. cases involving children).

Section 37ZI added: Decision on torture claim	
Screening criteria should be clearly spelled out in the Bill.	We agree to this suggestion and will amend section 37ZI. Drawing reference to Article 3(2) of the CAT, we will set out in the Bill that the ImmD must take all relevant factors into consideration in screening, including whether a there exists a consistent pattern of gross, flagrant or mass violations of human rights in the torture risk State.
Section 37ZL added: Revocation of decision to accept torture claim etc.	
Substantiated claims should not be revoked.	Non-refoulement protection under Article 3 of the CAT does not require State parties to grant resident status to claimants. As such, where circumstances set out in section 37ZL(2) exists, revocation of substantiated claims should be considered. Under the Bill, before a decision is made to revoke a substantiated torture claim, claimants will be given written notice of the proposed revocation with detailed reasons. The claimant concerned may, within 14 days, raise objection and provide the reasons of the objection for consideration by the ImmD. If ImmD decides to revoke the substantiated claim, the ImmD should give the claimant a written notice stating the detailed reasons and the right to appeal. There was a suggestion that for claims accepted by the Appeal Board to be substantiated, if there exists any substantial change in the circumstances in future which warrants consideration of revoking the original decision, such revocation should be considered by the Appeal Board instead of empowering the ImmD to decide on all cases which may need to be revoked. We agree to this suggestion and will amend section 37ZL and other provisions relating to the functions and procedures of the Appeal Board.

Sections 37ZO to 37ZS and Schedule 1A added: Torture Claim Appeal Board	
The Bill prevents the Appeal Board from raising questions relating to the claims. If a claimant makes an arguable case, the ImmD should assist the claimant and allow the Appeal Board to establish its own understanding of the countries involved.	According to Paragraph 18 of Schedule 1A, the Appeal Board has absolute power to review the merits of the case, including the consideration of all information that the ImmD has taken into account in deciding the claim, evidence relates to matters that have occurred after the decision was made and evidence that cannot be reasonably obtained before the decision was made. Moreover, at the request of the Appeal Board, the ImmD will assist in searching country information.
It is unfair to have only one member in the Appeal Board.	When appointing the members of the Appeal Board, the Chief Executive will ensure that all members meet the required qualifications and possess the ability to handle appeals. Moreover, the Bill specifies that the Chairperson of the Appeal Board may, base on individual case circumstances, select three members to handle special case. We believe that the Bill strikes an appropriate balance between effective handling of cases and ensuring fairness.
Claimants should be allowed to lodge appeals against the ImmD's decision not to re-open a withdrawn claim and not to accept a subsequent claim.	For claims withdrawn in the course of the process, screening has not yet been completed. Given that, we agree to the above suggestion and will amend sections 37ZE, 37ZG and other provisions relating to the functions and procedures of the Appeal Board. If the ImmD rejects the request for re-opening a withdrawn claim, the claimant may request for a review and the Appeal Board will make the final determination. As regards cases whereby the screening process has been completed, we consider that if the claimant's request to make a subsequent claim is rejected by the ImmD, it is not necessary for the Appeal Board to review the decision. This serves to prevent procedural abuse in case some claimants make repeated requests for subsequent claims or review without sufficient grounds.

Section 37ZV added: Claimant of substantiated claim may apply for permission to take employment etc.	
Some deputations are of the view that permission to work should be granted to all substantiated claimants, or even to all claimants awaiting screening. Some deputations are of the view that permission to work should not be granted to claimants even if their claims have been substantiated.	The court had held that under "exceptional" circumstances, the Director should give discretionary approval for work applications of persons of substantiated claims. The added section is consistent with the Court's decision.
Section 37ZW added: Claimant not ordinarily resident in Hong Kong	
Claimants of substantiated claims should be allowed to take up residence in Hong Kong.	Article 3 of CAT does not require State parties to grant resident status to claimants. If a claim is substantiated, the claimant will be provided with non-refoulement protection but not the right of abode in Hong Kong.
Section 42 amended: False statements, forgery of documents and use and possession of false documents	
Criminalizing false statements should be done with great caution (e.g. claimants making false statements due to trauma should not be prosecuted).	Extending the scope of section 42 of the Immigration Ordinance to include torture claimants serves to prevent acts such as making false statements and forgery of documents from violating the immigration control. This arrangement is consistent with ImmD's practice in exercising other statutory powers.
Section 43A added: Disturbing proceedings of Torture Claims Appeal Board	
It should not be a criminal offence to "disturb or interfere" with the proceedings of the Appeal Board, which is too vague.	We have to ensure the appeal proceedings are conducted effectively without disturbance. In other common law jurisdictions (the United Kingdom, New Zealand), there are similar regulations.
Immigration Regulations – New Form 8 (RECOGNIZANCE) amended	
The new clause may lead to prosecution of claimants due to some innocent reasons (e.g. attending screening interviews with the ImmD on a wrong date). Section (1)(b) of the new form is open-ended.	Failure to comply with the reporting condition stated in the recognizance form would not result in prosecution. Moreover, the conditions of recognizance that could be imposed by staff of the ImmD are clearly set out in the Sections 36(1A) and (1B).

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

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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

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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

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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

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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

UNITED NATIONS

CAT

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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Fourth periodic reports of States parties due in 2004

Addendum* **

CHINA

[Original: Chinese]
[14 February 2006]

* For the initial report of China, see CAT/C/7/Add.5; for its consideration, see CAT/C/SR.50; CAT/C/SR.51 and Official Records of the General Assembly, forty-fifth session, Supplement No. 45 (A/45/44), paras. 471-502.

For the second periodic report, see CAT/C/20/Add.5; for its consideration, see CAT/C/SR.251, 252/Add.1 and 254 and Official Records of the General Assembly, fifty-first session, Supplement No. 51 (A/51/44), paras. 138-150.

For the third periodic report, see CAT/C/39/Add.2; for its consideration, see CAT/C/SR.414, 417 and 421 and Official Records of the General Assembly, fifty-fifth session, Supplement No. 55 (A/55/44), paras. 106-145.

** In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

CONTENTS

Preface

1. This report comprises the fourth and fifth reports of the People's Republic of China, as submitted in accordance with Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "the Convention").

2. In December 1989, China submitted the initial report (CAT/C/7/Add.5) on the implementation of the Convention, and in October 1992 submitted a supplementary report (CAT/C/7/Add.14) (hereafter "the supplementary report"). The third report (CAT/C/3/9/Add. 2) was submitted in 1999, and was accepted in 2000 for consideration by the United Nations Committee Against Torture (hereafter "the Committee").

3. China's initial report, supplementary report, and second and third reports explained in detail the organization of China's governmental system and administrative, legislative and judicial bodies, its legal structure, and the concrete legal provisions and implementations in respect of preventing torture. The present report reports on the measures taken and the progress achieved in regard to implementation of Part 1 of the Convention since the submission of the third report in 1999, and gives a detailed introduction of China's implementation of the Convention in respect of concerns raised by the Committee during its consideration of the previous report and in its "Conclusions and Recommendations".

4. Part 2 of this report deals with implementation of the Convention in the Hong Kong Special Administrative Region of China, whilst Part 3 deals with implementation in the Macau Special Administrative Region. These parts are compiled by the Hong Kong Special Administrative Region and the Macau Special Administrative Region respectively.

PART I

1. New measures and progress relating to the implementation of the Convention

Article 2

5. Paragraphs 64-71 of China's supplementary report, Paragraphs 6-7 and 85 of the second report, and Paragraphs 6-10 of the third report remain effective. Since the submission of the third report in 1999, China has taken further effective legislative, administrative and judicial measures to prevent acts of torture.

6. On 14 March 2004, the Second Session of China's Tenth National People's Congress passed an amendment to the Constitution of the People's Republic of China (hereafter "the Constitution"), which clearly stipulated that "the state respects and protects human rights" (Article 33). The Constitution determines principles for the respecting and protection of human rights, and establishes the prominent position given to the protection of human rights in China's legal system and in its national development strategy. It thus opens up extensive prospects for the full development of human rights in China, and is beneficial to their promotion. From the perspective of preventing torture, the inclusion of human rights in the Constitution will further promote the development of concepts, systems and action relating to protection of the legitimate rights and interests of criminal suspects, defendants and criminals. It is thus beneficial to the adoption of further measures to implement the various requirements of the Convention.

7. In order to protect social order, safeguard public security, protect the legitimate rights and interests of citizens, legal persons and other organizations, standardize and ensure that public security organs and the people's police carry out their security administration duties according to the law, on 28 August 2005, the Seventeenth Meeting of the Standing Committee of the Tenth National People's Congress passed the Law of the People's Republic of China on Administrative Penalties for Public Security. This law gives public security organs and the people's police the necessary powers to carry out their security administration duties, whilst at the same time imposing stricter regulation in respect of how police powers are used. In addition, it establishes a special regulation covering the supervision of law-enforcement, strengthens standards and supervision in regard to the actions of the people's police in carrying out the law, and lays down provisions that should be followed and acts that are prohibited when public security organs and the people's police are dealing with cases involving social order. It also clearly defines legal responsibility pertaining in cases where these provisions have been violated, in order to prevent citizens' legitimate rights and interests from being harmed through inappropriate use or even downright misuse of these powers. For instance, Article 21 of the said law stipulates: "Persons who commit acts which offend against the administration of public order and who should be punished by administrative detention in accordance with this law shall not be so punished if one of the following situations obtains:

(a) They have reached age 14 but have not yet reached age 16;

(b) If they have already reached age 16 but have not yet reached age 18 and this is their first offence against administration of public order;

(c) If they are aged 70 or above;

(d) If they are pregnant or are breast-feeding an infant of less than one year old."

8. Article 79 stipulates: "Public security organs and the people's police should carry out investigations of public order cases in accordance with the law. The use of torture to extort a confession and the collection of evidence through such methods as threatening, enticing or cheating are strictly forbidden. Evidence collected by illegal means is not to be used as the basis for punishment."

9. Article 112 stipulates: "Public security organs and the people's police shall deal with public order cases lawfully, fairly, strictly and efficiently; they shall enforce the law in a responsible way and not practice favouritism or engage in irregularities."

10. Article 113 stipulates: "When public security bodies and the people's police are dealing with public order cases, they are forbidden to beat, maltreat or insult the person who has offended against the administration of public order."

11. Article 114 stipulates: "When public security bodies and the people's police are dealing with public order cases, they should consciously accept the scrutiny of society and its citizens. When public security bodies and the people's police are dealing with public order cases, where the law is not strictly enforced or where there are violations of the law or breaches of discipline, any unit or individual has the right to report the case to the public security organs or to the people's procuratorate or an administrative procuratorial body, and to bring charges; the body that has received the complaint or charge should deal with it in a timely fashion according to their duty."

12. On 28 December 2000, the Nineteenth Meeting of the Standing Committee of the Ninth National People's Congress passed the Extradition Law of the People's Republic of China (hereafter "Extradition Law"). According to Article 8 of the Extradition Law, when a foreign country submits an extradition request to the People's Republic of China, extradition should be refused if it is possible that the person sought will be liable to criminal prosecution or punishment on the grounds of race, religion, nationality, gender, political views or status, or if the person sought might receive unfair treatment during the judicial process on these same grounds, or if the said person has previously been subjected to torture in the requesting country or may be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The above provisions in essence transfer the provisions in Article 3 of the Convention into domestic legal requirements, and have an important significance in respect of preventing subjects of extradition requests from being tortured in the country in question.

13. On 28 June 1999, the Tenth Meeting of the Standing Committee of the Ninth National People's Congress passed the Law of the People's Republic of China on the Prevention of Juvenile Delinquency (hereafter "the Law on the Prevention of Juvenile Delinquency"). This law makes provisions regarding such issues as education for the prevention of juvenile delinquency, prevention of juvenile misbehaviours, rectification and treatment of serious juvenile misbehaviours, juveniles' self-protection against crimes, prevention of juveniles from committing criminal offences again, and related legal responsibilities.

14. In accordance with Article 44 of the Law on the Prevention of Juvenile Delinquency, when investigating the criminal responsibility of juvenile delinquents, the guidelines of enlightenment, persuasion and reformation and the principle of taking enlightenment as the dominant factor while making punishment subsidiary shall be adhered to. When handling cases involving juvenile delinquency, judicial organs shall guarantee that juveniles exercise their litigation rights, and get legal assistance, and enlighten them on the legal system in accordance with the physiological and psychological characteristics of juveniles and the circumstances under which they commit the criminal offenses. Trials of criminal cases involving juvenile delinquency in a people's court shall be conducted by a juvenile court formed, in accordance with law, by judges who are familiar with the physical and mental characteristics of juveniles or of such judges and people's assessors. No cases involving criminal offenses committed by juveniles who have reached the age of 14 but are under the age of 16 shall be heard in public. Generally, no cases involving criminal offenses committed by juveniles who have reached the age of 16 but are under the age of 18 shall be heard in public either. For cases involving criminal offenses committed by juveniles, no names, dwelling places, photos, nor materials from which people can tell who the juveniles are may be disclosed in news reports, films and television programs and publications. (Article 45) Juveniles who are detained or arrested or who are serving their sentences shall be jailed, administered and educated separately from adults. During the period when juvenile delinquents are serving their sentences, the executing organ shall enforce legal education and conduct vocational and technical training among them. For juvenile delinquents who have not finished compulsory education, the executing organ shall ensure that they continue to receive such education. (Article 46). These stipulations are of benefit to the prevention of use of torture and other cruel, inhuman or degrading treatment upon juveniles.

15. On 16 July 2003, the Fifteenth Session of the Standing Committee of the State Council passed the Regulations on Legal Aid (hereafter "the Regulations"). The Regulations give clear stipulations in respect of the scope, criteria and implementation process for legal aid, as well as the rights and obligations of the various parties involved in legal aid and their legal responsibilities. In this way, it provides an important legal basis for standardization of legal aid work. With regard to implementation of related provisions in the Convention, Articles 11 and 12 of the Regulations are of particular importance. According to Article 11 of the Regulations, in the following circumstances, a citizen involved in a criminal lawsuit may apply to the legal aid body for legal aid on the grounds of economic hardship:

(a) If the criminal suspect, for reasons of economic hardship, has not employed a lawyer after the first interrogation by the investigative body or from the day that compulsory measures are adopted;

(b) If the victim and their legal representative or close relative in public prosecution cases, because of economic hardship, has not enlisted a process attorney from the day of the case being transferred for examination and prosecution;

(c) Private prosecutors and their representatives in private prosecutions who, because of economic hardship, have not enlisted a process attorney from the day when the case is accepted for hearing by the people's court. However, in the following circumstances, when the people's court assigns a defender for the accused, the legal aid body shall provide legal aid and does not need to investigate the economic circumstances of the accused: when a public prosecutor is attending court in a public prosecution case and the defendant has not enlisted a defender; when

the defendant is blind, deaf, dumb, or juvenile and has not enlisted a defender; or when there is a possibility that the defendant may be sentenced to death but he has not enlisted a defender (Article 12).

16. On 18 June 2003, the Twelfth Session of the Standing Committee of the State Council passed Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities (hereafter "the Administrative Measures", implemented on 1 August 2003), abolishing the system of internment and repatriation. Article 14 Paragraph 6 of the Administrative Measures clearly stipulates that: "Workers at help-stations shall consciously respect the relevant rules and provisions of the laws, regulations and policies of the state, and are not allowed to detain or covertly detain persons receiving help; they are not allowed to beat, inflict corporal punishment on, or maltreat those receiving help or instigate others to do so; they are not allowed to swindle, blackmail or misappropriate the belongings of persons receiving help; they are not allowed to withhold the daily necessities provided for those receiving help; they are not allowed to withhold the credentials or prosecution and appeal documents of those receiving help; they are not allowed to appoint the person receiving help to undertake administrative work; they are not allowed to use the person receiving help to undertake private work for personnel; they are not allowed to take liberties with women"; "those violating the aforementioned regulations such as to constitute a crime, shall be investigated for criminal responsibility according to the law; where such violations are still insufficient to constitute a crime, disciplinary action will be taken in accordance with the law."

17. After the promulgation of the Administrative Measures, China's Ministry of Civil Affairs on 21 July 2003 further formulated and promulgated the Implementation Rules for the Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities (implemented from 1 August 2003), which are designed to provide further clarifications on the understanding and application of certain provisions in the Administrative Measures.

18. China's Ministry of Public Security has formulated and promulgated a series of regulations to ensure that the various law-enforcement activities of the public security organs have even stricter procedures and standards. These regulations are: Procedural Provisions for the Handling of Criminal Cases by Public Security Organs (14 May 1998), Procedural Provisions for the Handling of Administrative Cases by Public Security Organs (26 August 2003), Provisions on the Procedures for the Handling of Administrative Review Cases by Public Security Bodies (2 November 2002), Provisions on Application of Further Interrogation by Public Security Organs (12 July 2004), and Measures for the Administration of Compulsory Drug Addiction Treatment Centres (30 March 2000).

19. To prohibit the use of torture to extort confessions, on 2 January 2001, the Supreme People's Procuratorate specially issued the Notice on the Strict Prohibition of the Use of Criminal Suspects' Confessions Extorted by Torture as Evidence for Deciding Cases, requesting people's procuratorates at all levels to firmly establish a culture of just and civilized law-enforcement, and to put a decisive stop to the use of torture to extort confessions. They must rigorously carry out the relevant legal stipulations regarding the strict prohibition of the use of torture to extort confessions, and must exclude any evidence that may have been extracted by torture. People's procuratorates at all levels must greatly intensify their efforts in striking at the crime of extorting confessions through torture, and they should decisively investigate the criminal responsibility of the personnel in question, in accordance with the law.

20. On 6 August 1999, the Supreme People's Procuratorate passed the Regulations on Criteria for Filing Cases Directly Accepted, Filed and Investigated by the People's Procuratorates (Trial) (hereafter "the Criteria on the Filing of Cases"). On 20 July 2001, the Supreme People's Procuratorate passed the Criteria for Serious and Especially Serious Cases Involving Dereliction of Duty and Right-Violations Directly Accepted, Filed, and Investigated by the People's Procuratorates (Trial) (hereafter the "Criteria on Serious and Especially Serious Cases"). These two judicial interpretations explained the criteria for filing cases relating to crimes involving extortion of confessions by torture, use of violence to extort testimony, and mistreating of the person under supervision, as laid down in the regulations, as well as the criteria for defining serious and especially serious cases, thus providing a legal basis for the investigation and handling of torture cases.

21. On 30 December 2003, the Supreme People's Procuratorate passed the Regulations of People's Procuratorates to Ensure the Lawful Practice of Lawyers in Criminal Procedures. These regulations were aimed at strengthening the role of lawyers in criminal prosecutions in regard to protecting the legitimate rights and interests of criminal suspects (including not being tortured), and were a more detailed treatment of provisions in related clauses of the Code of Criminal Procedure of the People's Republic of China (hereafter "the Code of Criminal Procedure"), thus making is more explicit and concrete.

22. With regard to problems and links that may easily arise in criminal prosecution activities, the Supreme People's Procuratorate, the Supreme People's Court, the Ministry of Public Security and the Ministry of Security jointly issued the following standardized documents: Regulations on Certain Questions in the Implementation of the Code of Criminal Procedure (19 January 1998), Regulations on Certain Questions Regarding Bailing out for Summons (4 August 1999), Regulations on Questions Relating to the Lawful Application of Arrest Measures (6 August 2001), and Regulations on Questions Relating to the Application of Criminal Compulsory Measures (28 August 2000). The formulation and implementation of these standardized documents have important significance for the prohibition and prevention of misuse or illegal application of criminal compulsory measures and the use of torture during this process upon the party concerned.

23. To prevent and obviate the occurrence of torture and other cruel, inhuman or degrading treatment during the judicial process, China's judicial bodies have adopted a range of other measures.

24. Perfecting supervision mechanisms and ensuring the carrying out of duties in accordance with the law. The Ministry of Public Security has issued a series of internal supervision regulations: Regulations on the Work of Internal Supervision of Law-Enforcement in Public Security Organs (11 June 1999), Regulations on Investigation of Responsibility for Law-Enforcement Errors Committed by People's Police in Public Security Organs (11 June 1999), Measures for the Implementation of the Regulations on Supervision of Public Security Organizations (2 January 2001), and the Rules on Examination and Appraisal of Public Security Organs' Law Enforcement Quality (10 October 2001). Together these form a relatively systematic and comprehensive system for the supervision of law enforcement and responsibility for errors.

25. On 15 August 2003, the Ministry of Public Security arranged and initiated a special extended detention clear-up activity in public security organs nationwide. By 31 December 2003 the full clear-up was completed. According to the statistics for 31 October 2005, links in the public security organs dealing with cases did not have any persons under extended detention.

26. In May 2003, the Supreme People's Procuratorate decided to begin a special nationwide initiative to clear up and correct the problem of extended detention. The procuratorial bodies determined to begin with themselves, and to first solve the question of extended detention among the various procuratorial links. In July of that year they effected a situation in which procuratorial links had no cases of extended detention. They earnestly carried out their legal supervision duties, and urged other government and judicial organs to initiate clear-up drives, giving opinions on procuratorial correction 274,219 times and urging the correction of 25,736 people. At the same time, they strengthened construction of relevant mechanisms, and on 24 November issued Certain Provisions Regarding the Prevention and Correction of Extended Detention in Procuratorial Work (hereafter "Certain Provisions"), establishing such systems as notification of the time-limit for detention, reporting the conditions of detention, indicating when the detention time-limit has been reached, regular inspection reports, complaints and rectification procedures for extended detention, and investigation of responsibility for extended detention. The Certain Provisions clearly stipulate that: with regard to misuse of official powers or serious neglect of responsibilities leading to the extended detention of criminal suspects or defendants, there shall be an investigation into the disciplinary responsibility of the person in charge directly responsible and of others directly responsible; where the actions constitute a crime, criminal responsibility will be investigated in accordance with the regulations relating to the crimes of misuse of official powers and dereliction of duty as set out in Article 397 of the Penal Code of the People's Republic of China. The Supreme People's Procuratorate has also established a special hotline and email address to receive reports of extended detention by the procuratorial bodies, to consciously ensure public monitoring.

27. On 24 August 2005, the Supreme People's Procuratorate passed the Opinion on the Three-Year Implementation of Further Reforms in the Procuratorate, which outlined the reform and perfecting of the legal supervision system in litigation, the practical safeguarding of judicial fairness, and the protection of human rights as the major tasks for the next three years of procuratorial reform. The document explicitly proposed: "perfecting the mechanisms for supervision, investigation and handling of such illegal practices as extorting confessions through torture in the course of investigative activities; and perfecting, in accordance with the law, the rules on exclusion of illegal evidence in the scrutinizing of arrests and prosecutions. The Supreme People's Procuratorate formulates rules on the exclusion of illegal evidence in the scrutinizing of arrests and prosecutions, and makes provision for mechanisms to deal with such acts of criminality as extorting confessions by torture." "Establishing and perfecting lasting effective mechanisms for the prevention and correction of extended detention." "Exploring the establishment of a system by which it would be possible to recommend that relevant departments change the persons dealing with a case, where a procuratorial organ discovers that judicial personnel have shown dereliction of duty or other circumstances influencing fairness during the filing, investigation, prosecution, trial and implementation of a case." "Perfecting a mechanism for the handling and transfer of cases of dereliction of duty on the part of judicial personnel. Establishing mechanisms for the sharing of information between professional departments such as those involved in investigation and supervision, public prosecutions, anti-corruption and bribery work, anti-dereliction and anti-rights-infringement work, investigation of charges and

appeals, and civil and administrative procuratorial work; broadening the channels for the exposing of illegal and criminal acts on the part of judicial personnel; and establishing and perfecting linked and supporting systems for the scrutinizing, investigation, transfer and handling of clues in cases."

28. In 2003, the people's courts undertook a comprehensive correction of extended detention cases, and in this regard adopted a whole range of powerful measures.

29. On 29 July 2003, the Supreme People's Court issued the Notice of the Supreme People's Court on Relevant Issues Concerning Clearing up Cases of Extended Detention, which required that courts at all levels further enhance their understanding of the issue, give high priority to the problem of extended detention, actively take effective measures and put maximum effort into clearing up cases of extended detention. At the same time, it raised specific requirements with regard to the measures to be adopted in regard to clearing up the deadlines of extended detention cases and in regard to the issue of how to strengthen procuratorial supervision.

30. On 24 August 2003, the Supreme People's Court made arrangements for carrying out the task of clearing up cases of extended detention, requesting that courts at all levels make the clearing up of cases exceeding the judicial time-limit (including criminal cases involving extended detention and civil and administrative cases exceeding the judicial time-limit) an immediate priority. It required that a comprehensive clear-up of such cases be undertaken, involving the investigation and uncovering of the reasons for cases exceeding the time-limit as well as the adopting of measures; by November 2003, criminal cases involving extended detention had to be entirely cleared up. A weekly reporting system was established for cases exceeding the time-limit, under which each higher court must report in writing each week to the Supreme Court regarding the situation in respect of clearing up such cases in courts under their authority, with the Supreme Court then making a regular report on the situation as a whole. In cases where the facts were not clear, where evidence was insufficient and where it was not possible to determine the guilt of the accused, a verdict of innocent should be resolutely declared in accordance with the law, without hesitation or indecision. With regard to the measures adopted by the Supreme Court, various media sources reported on this with the headline "If guilty, pass sentence; if innocent, set free", leading to a vigorous response from all sectors of society.

31. On 10 October 2003, the Supreme People's Court convened a video-conference of courts nationwide on the question of a further clear-up of cases exceeding the judicial time-limit. This reviewed the previous clear-up process and confirmed the results achieved thus far, whilst at the same time making clear the tasks to be undertaken in the next clear-up exercise. The work of clearing up criminal cases exceeding the judicial time-limit was to be done in strict adherence to the principles and requirements of "punishing crime according to the law and safeguarding human rights according to the law".

32. In order to strengthen coordination between public security, procuratorial and court bodies, and to strengthen efforts in regard to solving the problem of extended detention, on 12 November 2003, the Supreme People's Court together with the Supreme People's Procuratorate and the Ministry of Public Security issued a Circular of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Strictly Abiding by the Code of Criminal Procedure and Earnestly Redressing and Preventing Extended

Detentions, demanding the strict implementation of the Code of Criminal Procedure, with the guilty being held responsible in accordance with the law and the innocent being resolutely released, thus practically correcting and preventing the phenomenon of extended detention.

33. On 1 December 2003, the Supreme People's Court issued the Notice of the Supreme People's Court on Introducing Ten Measures to Practically Prevent New Extended Detention from Occurring, with a view to practically preventing cases of extended detention through such measures as the establishment of an extended detention early warning mechanism.

34. The Supreme People's Court also publicized in all sectors of society the establishment of a hotline for reporting cases of extended detention, welcoming supervision by the public. Through much hard work, by 31 December 2003, courts nationwide had cleared up a total of 4,100 extended detention cases, with 7,658 defendants under extended detention being given a decision. All extended detention cases in courts nationwide were successfully cleared up as scheduled.

35. Strengthening external supervision to prevent and eliminate the problem of unjust law-enforcement. On 27 April 2003, the Ministry of Public Security issued Regulations of the Ministry of Public Security on the Work of Specially Invited Supervisors, and established a system of specially invited supervisors. Under this system, specially appointed supervisors can undertake supervision of the way in which public security organs and people's police carry out their duties, enforce the law and respect discipline and the law, and can make known illegal or undisciplined behaviour on the part of the public security organs and people's police as reported and accused by members of the general public.

36. In September 2003, the Supreme People's Procuratorate formulated the Regulations on Implementation of the System of People's Supervisors for Cases Directly Accepted and Investigated by the People's Procuratorates, and on 5 July 2004 this was revised as the Regulations on Implementation of the System of People's Supervisors (Trial). The duty of people's supervisors is to undertake supervision of cases involving occupational crime which have been investigated by the people's procuratorate but where there is an intention to quash the case or not handle it by bringing charges, or where the criminal suspect does not accept arrest. People's supervisors may raise objections when they find that one of the following circumstances obtains in an occupational crime case dealt with by a people's procuratorate:

(a) where a case should have been filed for investigation but was not, or where a case was filed for investigation when it should not have been;

(b) extended detention;

(c) illegal searches, withholding and freezing of property;

(d) where criminal compensation should have been given but was not authenticated in accordance with the law, or where no decision was given on criminal compensation;

(e) where a procurator, in dealing with a case, has engaged in fraudulent practices for personal gain, taking bribes and bending the law, extorting confessions through torture,

extracting evidence by violence, and other such illegal or undisciplined practices. The Regulations also specifically stipulate the supervisory procedures of the people's supervisors, to ensure that their work can be carried out successfully.

37. Rigorous investigation of criminal responsibility, to reduce and put an end to the occurrence of torture cases. The Ministry of Public Security has continually given full importance to solving the problem of extorting confessions through torture, and has convened conferences on a number of occasions, issuing specific documents on the subject. It has stressed that all public security organs, when investigating cases, must gather comprehensive evidence in strict accordance with legal procedure, and that the use of torture to extort confessions is strictly forbidden. It has further required that in cases involving serious violation of the law or violation of discipline on the part of the people's police (including cases in which the use of torture to extort a confession has led to death), the responsibility of the immediate supervisor must be ascertained according to the circumstances; where necessary, the responsibility of the supervisor in charge or the main supervisor will be ascertained. Public security organs at all levels are required at all times to place the emphasis on preventing and stopping cases involving extortion of confessions through torture, as a means to solve the problem of occupational violations of the law. They must take effective measures and continually increase their efforts in supervision and in handling cases. Cases involving extortion of confession through torture have decreased year on year.

38. In 1999, public security organs at all levels organised and initiated various forms of law-enforcement inspection, consolidating their achievements in regard to rectification, as part of the thorough implementation of the Regulations on the Work of Internal Supervision of Law-Enforcement in Public Security Organs and the Regulations on Investigation of Responsibility for Law-Enforcement Errors Committed by People's Police in Public Security Organs.

39. In 2000, public security organs nationwide and the Standing Committee of the National People's Congress initiated a large-scale inspection activity in regard to the thorough implementation of the Code of Criminal Procedure, forcefully encouraging all areas to take further their work to rectify the problem of extorting confessions through torture. On 12 March 2001, the Ministry of Public Security held a video-conference on rectifying the use of torture to extort confessions, misuse of firearms or police instruments, and misuse of compulsory measures. They requested public security organs in all areas to further consolidate on their achievements in regard to rectifying the use of torture to extort confessions, to ensure a substantial decline in these three types of cases, and to strive to ensure that cases resulting in death do not arise. Where cases of the above three types arise, they are to be promptly dealt with in accordance with the law, and particularly in cases leading to death or injury of the party involved, strict punishment should be applied in accordance with the law, with responsibility on the part of the relevant public security organ's supervisor being ascertained strictly in accordance the relevant regulations. Public security organs in all areas, in accordance with the demands of the Ministry of Public Security, earnestly embarked on the necessary work. Some local public security organs also initiated special rectification work targeting salient problems specific to themselves, with good results. In Qinghai province, for example, a special rectification drive was launched from 1999 to the end of 2000, and in the public security system for the whole province, not a single case of extorting confessions through torture occurred.

40. On 26 February 2002, the Ministry of Public Security decided to initiate a rectification drive to rectify the salient problems among the police ranks of public security organs nationwide, requiring that the guiding principle of strict correction of the police in accordance with the law be adhered to, and that emphasis be placed on solving such problems as the extortion of confessions by torture; they required further the resolute investigation and handling of cases of police violation of discipline or the law, and the serious investigation of the responsibility of supervisors. At the same time, organs were required to investigate loopholes, standardize administration, establish lastingly effective mechanisms for tackling problems, and consciously accept the supervision of all sectors of society.

41. In January 2001, the Supreme People's Court declared that the guiding theme for the work of the people's courts in the 21st Century would be "fairness and efficiency", stressing that all judicial activities of the people's courts must achieve the following: trials must be open, procedures legal, trial periods rigorously adhered to, judgments fair and implementation carried out according to the law. In the last few years, the work of the people's courts has closely adhered to this guiding theme. Promoting judicial fairness inevitably requires the guarantee that the legitimate rights and interests of criminal suspects and defendants are not harmed, and requires the punishment and correction in accordance with the law of the use of torture to extort confessions, the use of violence to extract testimony, and other such acts of torture that seriously harm the human rights of criminal suspects and defendants and that impair judicial fairness. The promotion of high judicial efficiency inevitably requires the guarantee that the cases of criminal suspects and defendants will be tried quickly and without delay, and requires the forbidding and cessation of detention measures that exceed the legally prescribed time-period and which thus harm the legitimate rights and interests of criminal suspects and defendants. This has important significance for the punishment, correction and prevention of acts of torture.

42. In the last few years, people's courts at all levels have been assiduously putting into practice the concrete requirements of the Five-Year Reform Plan of the People's Courts (issued on 20 October 1999), and have been reforming the format of criminal trials, on the basis of implementing the various regulations of the Penal Code and Code of Criminal Procedure. The new format of criminal trials strengthens the openness of trials and places emphasis on the neutrality of the court, thus further assuring equality in the status and rights of the prosecution and the defence. Under this new format, any acts of torture that harm the legitimate rights and interests of criminal suspects and defendants can more easily be exposed, verified and punished. Therefore, the deepening of reforms in the format of criminal trials has, overall, been beneficial in preventing the occurrence of various acts of torture.

43. In July 2003, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly issued the Circular on the Launching of Experimental Community Correction Work, with a view to implementing a practical investigation of community correction as a punishment for criminals whose crimes are minor or were committed with less malicious intent and who are of no major harm to society, as well as criminals who have already been granted bail in accordance with the law. At present, six provinces and cities under the direct control of the central government, namely Beijing, Shanghai, Tianjin, Jiangsu, Zhejiang and Shandong, have initiated experimental community correction work. Community correction is a form of sentencing that is the counterpart to correction through incarceration. It refers to a form of non-custodial punishment by which a criminal who meets the conditions for community correction is placed in the community, and,

under the auspices of a specialized state agency and with the assistance of relevant community groups, non-governmental organizations and social volunteers, undergoes correction of his criminal mentality and his bad behavioural tendencies, within a period of time fixed by judgment, ruling or decision, and which also facilitates his smooth reintegration into society. The initiation of this experimental community correction work demonstrates that China is currently working hard to move towards the relaxation and humanization of punishment, and has important significance in regard to preventing criminals from receiving unnecessary custodial punishments.

Article 3

44. Paragraph 74 of China's supplementary report remains effective.

45. The Extradition Law, which was passed on 28 December 2000, makes provisions concerning such issues as the conditions and procedures relating to extradition requests made to China, investigation of extradition requests, bodies deciding extradition, and procedures for challenging extradition decisions, and is of important significance in regard to ensuring that extraditions are properly carried out, strengthening international cooperation in regard to punishment of criminals, ensuring that the person extradited is not subject to the threat of torture, and protecting the legitimate rights and interests of individuals and organizations. As stipulated in Article 8 of the Extradition Law, if the person sought has ever been subjected to torture or may be subjected to torture or cruel, inhuman or degrading treatment or punishment in the requesting country, then China will refuse extradition. These stipulations meet the needs of Article 3 of the Convention, and hence can prevent and obviate the danger that the person sought may face torture.

46. Article 10 of the Extradition Law stipulates that the organ responsible for accepting and handling extradition requests is the Ministry of Foreign Affairs of the People's Republic of China, and that the request for extradition made by the requesting state shall be submitted to the said ministry.

47. When the requesting state makes an extradition request, it shall write a letter of request, which shall specify:

(a) The name of the requesting authority;

(b) The name, sex, age, nationality, category and number of identification documents, occupation, characteristics of appearance, domicile and residence of the person sought and other information that may help to identify and search for the person;

(c) Facts of the offence, including the time, place, conduct and outcome of the offence; and

(d) Legal provisions on adjudgement, measurement of penalty and prescription for prosecution. (Article 11). A letter of request for extradition submitted by the Requesting State shall be accompanied by:

(i) Where extradition is requested for the purpose of instituting criminal proceedings, a copy of the warrant of arrest or other document with the same

effect; where extradition is requested for the purpose of executing criminal punishment, a copy of a legally effective written judgment or verdict, and where part of a punishment has already been executed, a statement to such an effect; and

(ii) The necessary evidence of the offence or evidentiary material. The Requesting State shall provide the photographs and fingerprints of the person sought and other material in its control which may help to identify that person. (Article 12). The letter of request for extradition and other relevant documents submitted by the Requesting State shall be officially signed or sealed by the competent authority of the Requesting State and be accompanied by translations in Chinese or other languages agreed to by the Ministry of Foreign Affairs of the People's Republic of China. (Article 13).

48. Where two or more states request extradition of the same person for the same or different conducts, the order of priority of the request for extradition shall be determined upon considering the factors such as the time when those requests for extradition are received by the People's Republic of China and the fact whether there are extradition treaties between the People's Republic of China and the Requesting States to go by. (Article 17).

49. With regard to examination of the extradition request, Article 16 Paragraph 1 of the Extradition Law stipulates: "Upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and material conform to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties." Article 18 stipulates: "Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State does not conform to the provisions of Section 2 in Chapter II of this Law or the provisions of extradition treaties, it may ask the Requesting State to furnish supplementary material within 30 days. The time limit may be extended for 15 days at the request of the Requesting State. If the Requesting State fails to provide supplementary material within the time limit mentioned above, the Ministry of Foreign Affairs shall terminate the extradition case. The Requesting State may make a fresh request for extradition of the person for the same offence." Article 19 stipulates: "Where the Ministry of Foreign Affairs, after examination, believes that the request for extradition submitted by the Requesting State conforms to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties, it shall transmit the letter of request for extradition and the accompanying documents and material to the Supreme People's Court and the Supreme People's Procuratorate."

50. With regard to the letter of request and accompanying documents transmitted by the Ministry of Foreign Affairs, the Supreme People's Court will deal with them according to the situation and in accordance with the stipulations made in Article 20 of the Extradition Law. Article 20 stipulates: "Where the person sought is detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material it has received to the Higher People's Court concerned for examination. Where the said person is not detained for extradition before a foreign state makes a formal request for extradition, the Supreme People's Court shall, after receiving the letter of request for extradition and the accompanying

documents and material, notify the Ministry of Public Security to search for the person. Once finding the person, the public security organ shall, in light of the circumstances, subject that person to detention or residential surveillance for extradition and the Ministry of Public Security shall notify the Supreme People's Court of the fact. Upon receiving the notification of the Ministry of Public Security, the Supreme People's Court shall, without delay, transmit the letter of request for extradition and the accompanying documents and material to the Higher People's Court concerned for examination. Where, after searching, the public security organ is certain that the person sought is not in the territory of the People's Republic of China or it cannot find the person, the Ministry of Public Security shall, without delay, notify the Supreme People's Court of the fact. The latter shall, immediately after receiving the notification of the Ministry of Public Security, notify the Ministry of Foreign Affairs of the results of the search, and the Ministry of Foreign Affairs shall notify the Requesting State of the same."

51. Examination of an extradition request by the requesting country is undertaken by the Higher People's Court. Article 22 of the Extradition Law stipulates: "The Higher People's Court shall, in accordance with the relevant provisions of this Law and of extradition treaties regarding conditions for extradition, examine the request for extradition made by the Requesting State, which shall be conducted by a collegial panel composed of three judges." "When examining an extradition case, the Higher People's Court shall hear the pleadings of the person sought and the opinions of the Chinese lawyers entrusted by the person. The Higher People's Court shall, within 10 days from the date it receives the letter of request for extradition transmitted by the Supreme People's Court, serve a copy of the letter to the person. The person shall submit his opinions within 30 days from the date he receives the copy." (Article 23).

52. Having examined the request for extradition, the Higher People's Court shall, according to Article 24, render a decision. Article 24 stipulates: "After examination, the Higher People's Court shall:

(a) where the request for extradition made by the Requesting State is regarded as being in conformity with the provisions of this Law and of extradition treaties, render a decision that the request meets the conditions for extradition. Where the person whose extradition is requested falls under the category for postponed extradition according to Article 42 of this Law, it shall be so specified in the decision; or

(b) where the request for extradition made by the Requesting State is regarded not as being in conformity with the provisions of this Law and of extradition treaties, render a decision that no extradition shall be granted. Upon request by the Requesting State, the Higher People's Court may, on condition that other proceedings being conducted in the territory of the People's Republic of China are not hindered and the lawful rights and interests of any third party in the territory of the People's Republic of China are not impaired, decide to transfer the property related to the case, while rendering the decision that the request meets the conditions for extradition.

53. With regard to the decision rendered by the examining organ, the person sought and his appointed Chinese lawyers may, within ten days of the decision being read to the person sought, submit to the Supreme People's Court to challenge the decision. Article 25 of the Extradition Law stipulates: "After making the decision that the request meets the conditions for extradition or the decision that no extradition shall be granted, the Higher People's Court shall have it read

to the person sought and, within seven days from the date it makes the decision, submit the decision and the relevant material to the Supreme People's Court for review. Where the person sought refuses to accept the decision made by the Higher People's Court that the request meets the conditions for extradition, he and the Chinese lawyers entrusted by him may, within 10 days from the date the People's Court has the decision read to the person, submit their opinions to the Supreme People's Court."

54. When the Supreme People's Court reviews the decision made by the Higher People's Court, it should handle the matter according to the differing circumstances. Article 26 stipulates: "The Supreme People's Court shall review the decision made by the Higher People's Court and shall do the following respectively:

(a) where it believes that the decision made by the Higher People's Court conforms to the provisions of this Law and of extradition treaties, it shall approve it; and

(b) where it believes that the decision made by the Higher People's Court does not conform to the provisions of this Law and of extradition treaties, it may quash it and send the case back to the People's Court which has originally reviewed it for fresh review, or modify the decision directly."

55. For instance, in June 2001, the Republic of France submitted an extradition request for Martin Michel, a citizen of the Republic of France suspected of rape. In accordance with the provisions of the Extradition Law, China's Supreme People's Court assigned the Higher People's Court of Yunnan Province to examine the extradition request. After the Higher People's Court of Yunnan Province had examined the case, they rendered a decision that the request complied with the stipulations of the Extradition Law, and then submitted the case to the Supreme People's Court for review. The Supreme People's Court, in accordance with the law, organised a collegial panel to review the decision rendered by the Higher People's Court of Yunnan Province. On 14 November 2002, they approved the decision of the Higher People's Court of Yunnan Province that the French request for the extradition of Martin Michel complied with the permitted conditions of extradition as stipulated in China's Extradition Law.

56. "After making the decision of approval or modification, the Supreme People's Court shall, within seven days from the date it makes the decision, transmit the letter of decision to the Ministry of Foreign Affairs and, at the same time, serve it on the person sought. After approving the decision or making the decision that no extradition shall be granted, the Supreme People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought." (Article 28).

57. The State Council of China decides whether or not to extradite. Article 29 stipulates: "After receiving the decision made by the Supreme People's Court that no extradition shall be granted, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. Upon receiving the decision made by the Supreme People's Court that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition. Where the State Council decides

not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the compulsory measures against the person sought."

58. In the foreign extradition treaties to which China is a signatory, the crime of torture is in all cases stipulated as an extraditable crime.

Article 4

59. See Paragraphs 74-81 of the supplementary report and Paragraphs 10-17 of the second report. Paragraph 14 of the third report is still effective.

60. According to Chinese law, torture is a criminal offence, and those inflicting torture or instigating or conspiring in torture are all severely punished in accordance with the law. The Penal Code of the People's Republic of China, amended in 1997 (hereafter "the Penal Code") makes clear stipulations on this.

61. With regard to the regulations and punishments pertaining to the use of torture to extort a confession from a criminal suspect or defendant, or the use of violence to extort testimony from a witness, Article 247 stipulates: "Any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law."

62. With regard to the regulations and punishments pertaining when a prisoner is beaten or is mistreated by corporal punishment, Article 248 stipulates: "Any policeman or other officer of an institution of confinement like a prison, a detention house or a custody house who beats a prisoner or maltreats him by subjecting him to corporal punishment, if the circumstances are serious shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law. If any policeman or other officer who instigates a person held in custody to beat or maltreat another person held in custody by subjecting him to corporal punishment, the policeman or officer shall be punished in accordance with the provisions of the preceding paragraph."

63. In regard to joint intentional crimes, Article 25 stipulates: "A joint crime refers to an intentional crime committed by two or more persons jointly. A negligent crime committed by two or more persons jointly shall not be punished as a joint crime; however, those who should bear criminal responsibility shall be individually punished according to the crimes they have committed."

64. With regard to instigating others to commit a crime, Article 29 stipulates: "Anyone who instigates another to commit a crime shall be punished according to the role he plays in a joint

crime. Anyone who instigates a person under the age of 18 to commit a crime shall be given a heavier punishment. If the instigated person has not committed the instigated crime, the instigator may be given a lighter or mitigated punishment."

65. On 6 August 1999 and 20 July 2001, the Supreme People's Procuratorate respectively passed the Criteria on the Filing of Cases and the Criteria on Serious and Especially Serious Cases (see Paragraph 14). These made concrete and clear stipulations regarding the criteria for filing cases and criteria for the defining of serious and especially serious cases involving crimes of torture such as the use of torture to extort confessions, the use of violence to extort testimony, and maltreatment of the person under supervision, as provided for in the Penal Code. According to the provisions of the Criteria on the Filing of Cases, cases shall be filed in all cases where torture is used to extort confessions, where cruel methods are used to malicious effect, where suicide or mental derangement results, where injustices, false or erroneous trials result, or where a person has authorized, instructed or forced another to extort confession through torture.

66. The Criteria on Serious and Especially Serious Cases stipulate, in respect of use of torture to extort confessions, that serious and especially large cases are those which:

(a) lead to serious injury or mental derangement;

(b) involve the use of torture to extort a confession five or more times or in relation to five or more persons;

(c) which are unjust, false, or erroneous. "Especially serious cases" are those which:

(i) result in death;

(ii) involve the use of torture to extort a confession seven or more times or in relation to seven or more persons;

(iii) cause an innocent person to be sentenced to ten or more years imprisonment, life imprisonment, or the death penalty.

Article 5

67. Paragraphs 15-17 of China's third report remain effective.

Article 6

68. Paragraphs 85-89 of China's supplementary report remain effective.

Article 7

69. Paragraph 90 of China's supplementary report and Paragraph 19 of the third report remain effective.

70. Article 16 of China's Code of Criminal Procedure stipulates: "Provisions of this Law shall apply to foreigners who commit crimes for which criminal responsibility should be

investigated." Chinese law guarantees that any person suspected of committing the crimes described in the Convention will receive fair treatment at all stages of the litigation process, and in this respect, Paragraphs 91-98 of China's supplementary report remain effective.

Article 8

71. China's Extradition Law provides the legal basis for the enhancement of international cooperation in punishing crime and the guaranteeing of a normal extradition process. Article 6 Paragraph 3 of the Extradition Law stipulates that an extradition treaty refers to a treaty on extradition, which is concluded between the People's Republic of China and a foreign state or to which both the People's Republic of China and a foreign state are parties, or any other treaty which contains provisions in respect of extradition. Therefore, all the multilateral international conventions to which China is a party, including the Convention Against Torture, and the relevant provisions of the bilateral extradition treaties which China has signed with other countries, can all serve as the legal basis for cooperation in respect of extradition.

72. As of 1 December 2005, China had signed extradition treaties with 23 countries, of which 17 have already come into force. See the following table:

Country	Name of Country	Date of Signing	Date of Entry into Force
1.	Thailand	1993.08.26	1999.03.07
2.	Belarus	1995.06.22	1998.05.07
3.	Russia	1995.06.26	1997.01.10
4.	Bulgaria	1996.05.20	1997.07.03
5.	Romania	1996.07.01	1999.01.16
6.	Kazakhstan	1996.07.05	1998.02.10
7.	Mongolia	1997.08.19	1999.01.10
8.	Kyrgyzstan	1998.04.27	2004.04.27
9.	Ukraine	1998.12.10	2000.07.13
10.	Kampuchea	1999.02.09	2000.12.13
11.	Uzbekistan	1999.11.08	2000.09.29
12.	South Korea	2000.10.18	2002.04.12
13.	Philippines	2001.10.30	-
14.	Peru	2001.11.05	2003.04.05
15.	Tunisia	2001.11.19	-
16.	South Africa	2001.12.10	2004.11.17
17.	Laos	2002.02.04	2003.08.13
18.	UAE	2002.05.13	2004.05.24
19.	Lithuania	2002.06.17	2003.06.21
20.	Pakistan	2003.11.03	-
21.	Lesotho	2003.11.06	-
22.	Brazil	2004.11.12	-
23.	Spain	2005.11.14	-

Article 9

73. Paragraph 100 of China's supplementary report remains effective.

74. As of 1 December 2005, China had signed criminal (combined civil and criminal) judicial assistance treaties with 36 countries, or which 26 treaties have already come into force. These provide the legal basis for assistance between the signatory states in regard to criminal prosecutions relating to crimes described in Article 4 of the Convention. See the following table:

Country	Name of Country	Date of Signing	Date of Entry into Force
1.	Poland	1987.06.05	1988.02.13
2.	Mongolia	1989.08.31	1990.10.29
3.	Romania	1991.01.16	1993.01.22
4.	Russia	1992.06.19	1993.11.14
5.	Turkey	1992.09.28	1995.10.26
6.	Ukraine	1992.10.31	1994.01.19
7.	Cuba	1992.11.24	1994.03.26
8.	Belarus	1993.01.11	1993.11.29
9.	Kazakhstan	1993.01.14	1995.07.11
10.	Egypt	1994.04.21	1995.05.31
11.	Canada	1994.07.29	1995.07.01
12.	Greece	1994.10.17	1996.06.29
13.	Bulgaria	1995.04.07	1996.05.27
14.	Cyprus	1995.04.25	1996.01.11
15.	Kyrgyzstan	1996.07.04	1997.09.26
16.	Tajikistan	1996.09.16	1998.09.02
17.	Uzbekistan	1997.12.11	1998.08.29
18.	Vietnam	1998.10.19	1999.12.25
19.	South Korea	1998.11.12	2000.03.24
20.	Laos	1999.01.25	2001.12.15
21.	Colombia	1999.05.14	2004.05.27
22.	Tunisia	1999.11.30	2000.12.30
23.	Lithuania	2000.03.20	-
24.	USA	2000.06.19	2001.03.08
25.	Indonesia	2000.07.24	-
26.	Philippines	2000.10.16	-
27.	Estonia	2002.06.12	-
28.	South Africa	2003.01.20	2004.11.17
29.	Thailand	2003.06.21	2005.02.20
30.	North Korea	2003.11.19	-
31.	Latvia	2004.04.15	2005.09.18
32.	Brazil	2004.05.24	-
33.	Mexico	2005.01.24	-
34.	Peru	2005.01.27	-
35.	France	2005.04.18	-
36.	Spain	2005.07.21	-

Articles 10 and 11

75. See Paragraphs 101-102 of China's supplementary report, Paragraphs 27-37 of the second report, and Paragraphs 26-35 of the third report.

76. The prohibition of torture has been a consistent position of the Chinese government. The Chinese government has not only proclaimed by law the prohibition of torture but has also placed full importance on education about and publicizing of prohibition of torture for state functionaries, in particular law-enforcement personnel in the public security, procuratorial, court and judicial administrative departments.

77. Since the submission of the third report in 1999, China's public security, procuratorial, court and judicial administrative departments have adopted a series of measures for publicity and education in regard to the prohibition of torture.

78. Since 1998, the Ministry of Public Security has carried out a substantial amount of work in regard to training public security people's police in the protection of human rights.

79. Initiating education and training, with the focus on leading cadres at all levels. In the light of international human rights standards, special targeted training about the Constitution, Penal Code and Code of Criminal Procedure has been established, to raise the legal competence of leading cadres, as well as their ability to manage things according to the law. In 2003, the Ministry of Public Security issued the Circular on the Launching of Rotational Training in Correct Thinking on Law-Enforcement for Members of Leadership Teams in Public Security Departments at County Level, launching intensive educational activities to correct thinking on law-enforcement, using actual instances and typical cases to provide large-scale training for base-level leading cadres and to educate leading cadres to understand the system of the minimum standards of fairness in international justice, and to study in depth the relevant contents of human rights protection and establish a firm awareness of human rights. The Twelfth National Public Security Conference, held from 20 to 22 November 2003, proposed that priority must be placed on solving such salient problems of law-enforcement as the use of torture to extort confession, as well as on safeguarding the legitimate rights and interests of the state, collectives, groups and individual citizens.

80. Integrating international human rights standards with law-enforcement practice, organising and launching action-training for the entire public security people's police, especially police at the grass-roots and front-line, raising the level of the people's police in handling cases. A compulsory training system has been established for people's police, which applies to recruitment, service, promotion and on-the-ground action, and in 2003 training was organised for more than 1.13 million people's police. In these various types of training, education on the legal system was a compulsory component, with the requirement that law courses must take up at least 30 percent of the total course time.

81. Emphasising training and cooperation in regard to international human rights, with the theme of human rights protection, and initiating cooperation and exchange with relevant international organizations and police departments in other countries. For example, in July 2001, an international symposium on "human rights and the police" was jointly organised with the Office of the United Nations High Commissioner for Human Rights, whilst from November to

December 2003, a high-level police officer training class was jointly organised on the theme of human rights protection. In addition to this, a number of training groups were also sent to countries including Canada and France for observation and study.

82. In order to strengthen training for procurators, the Supreme People's Procuratorate specially formulated the Plan for the Implementation of Occupational Training for Procurators and the Provisional Regulations on the Training of Procurators, which mapped out the content and format of procurator training, for instance service-related training, promotional training, training on special issues, and other occupational training.

83. China's National Procurators' College and its provincial-level campuses are the specialized training bodies for procurators, and each year they invite human rights experts to give classes on the subject of human rights protection. Procuratorial departments responsible for investigating and handling dereliction of duty and rights violations involving crimes of torture organize special training each year, to adapt to the needs of case-handling.

84. In 1998, the Supreme People's Procuratorate issued a document aimed at seriously addressing the problem of legal and disciplinary violations that had been vigorously reported by the public. It clearly stipulated the following:

(a) it is strictly forbidden to overstep the bounds of jurisdiction when handling cases;

(b) it is strictly forbidden to employ any coercive measures in regard to a witness;

(c) before a case is filed, coercive measures are not to be employed in regard to criminal suspects; 4) extended detention is strictly forbidden;

(d) a procuratorate or interview room is not to be used as a detention room;

(e) interviews in general should be carried out in a custody house, and if they must be carried out in an interview room of a procuratorate, then a remand system must be strictly implemented;

(f) all those who have used torture to extort a confession in handling a case will be dealt with after having first been suspended from their duties;

(g) in cases where dereliction of duty, illegal detention or illegal handling, etc., has resulted in death, in addition to investigation of the person directly responsible in accordance with the law and discipline, where a leader shows serious dereliction of duty, he will be removed from his position in accordance with legally prescribed procedure;

(h) it is strictly forbidden to withhold, embezzle, or set aside funds for private gain.

85. In 2003, the Supreme People's Procuratorate launched an educational activity in procuratorial bodies nationwide, which aimed at "strengthening legal supervision, protecting fairness and justice." Procuratorial bodies at all levels linked this in closely with their actual practice, consciously participated and assiduously listened to opinions from different sectors of society, with the result that this educational activity achieved relatively good results. Through major clearing-up and special investigation of quashed cases, unauthorized arrests, unprosecuted

cases, cases judged innocent, as well as instances of withholding funds, a total of 410,000 cases were reviewed, and 6,643 cases in which quality-related problems such as insufficiently rigorous procedures and non-standard legal documents existed were corrected. A clear-up was undertaken of cases involving illegal withholding of funds and failure to return or turn in funds on time, and the said funds were duly turned in and returned in accordance with the law. A strict investigation of 424 procuratorial personnel involved in illegal or undisciplined behaviour was undertaken, and of these, 21 received a criminal punishment.

86. On 19 March 2004, the Supreme People's Procuratorate convened a video-conference. It required that procurators nationwide should earnestly study the amendments to the constitution, firmly establish an awareness of the constitution, earnestly safeguard the authority of the constitution, make respect for and safeguarding of human rights a central principle running through all the various links in the law-enforcement and case-handling process, vigorously combat criminal crimes, steadfastly investigate and deal with cases of crime in which the personnel of state organs had used their position to seriously infringe citizens' rights of person and democratic rights, and ensure that the fundamental citizens' rights provided by the constitution are not infringed.

87. On 18 October 2001, the Supreme People's Court promulgated the Basic Code of Professional Ethics for Judges of the People's Republic of China, which requires that judges must safeguard judicial fairness, raise judicial efficiency, uphold clean, honest and just practices, respect judicial protocol, enhance their personal development and limit their extra-judicial activities.

88. China's Ministry of Justice requires that the prison system carry out education in civilized law-enforcement for all prison officers, to eradicate the occurrence of crimes of cruelty such as maltreatment and corporal punishment. In accordance with the requirements of the Ministry of Justice, each province employs appropriate means such as holding training sessions and organising study groups, to provide training in prison law and human rights conventions for the vast majority of officers. The Ministry of Justice has compiled the regulations of the Convention Against Torture and China's relevant laws and regulations into a booklet which it has issued to every officer, requiring that they earnestly study and master its contents, and that they conduct themselves in strict accordance with the law.

89. In 1999, the Ministry of Justice issued the Circular on the Launching of Basic Education to Improve the Quality of People's Police in the Prison Service Nationwide, having, after three years of hard work, completed its nationwide training of people's police prison staff. The training generally included the relevant contents of international human rights treaties, such as legal and prison-related professional standards and international human rights standards.

90. In February 2000, the Ministry of Justice compiled a Note on Rigorous Law-Enforcement with Enthusiastic Service, which was issued to the entire national judicial administrative system, requiring that all law-enforcement personnel earnestly study and thoroughly implement it.

91. To meet the requirements of prison law-enforcement activities, the Ministry of Justice, starting in 2002, trained nationwide almost 2000 prison wardens in almost 700 prisons. For the training courses, lecturers were appointed, including famous experts, scholars and heads of related departments from mainland China, together with officials from the Correctional Services

Department of the Hong Kong Special Administrative Region. Through the training, the prison wardens received instruction in the legal system, honest administration, and related general knowledge, and this raised the understanding among the leading echelons in the prison sector with regard to the importance and urgency of developing prison reform; it corrected the guiding work philosophy, and strengthened the conception of the enforcement of law and discipline.

92. In 2002, the Bureau of Prisons of the Ministry of Justice, the Department of Training and Employment of the Ministry of Labour and the Chinese Employment Certification Centre jointly issued a document on training national professionally qualified prison counsellors. The duty of these counsellors is to prevent and eradicate the use of torture upon inmates and, within the conditions of imprisonment, to provide help for inmates in regard to such underlying issues as education on psychological health, consultation on psychological barriers, and correction of psychological illnesses. To date, almost 1000 national professionally qualified prison counselors have been trained, providing the human resources to begin the work of psychological correction of criminals. Nationwide, almost ninety percent of prisons have begun such work.

93. In 2004, the Ministry of Justice organised a symposium in commemoration of the tenth anniversary of the promulgation of the Prison Law, stressing further that the Prison Law must be implemented in an unstinting and thorough fashion, and that fair law-enforcement, civilized administration, strict control of the police, protection of the legitimate rights and interests of criminals, and a consciousness rooted in the hearts of the people must be made the guiding standards of the entire people's police. From May 2005, the Ministry of Justice launched a special reform and consolidation activity in the prison system, which lasted half a year, and had the theme of "standardizing law-enforcement behaviour, promoting fair law-enforcement". This activity was chiefly concerned with initiating work in four key aspects: standardizing law-enforcement behaviour, putting into practice the "three resolutely eradicates" (namely, resolutely eradicate the problems of beating, corporal punishment, degradation and mistreatment; resolutely eradicate the problem of criminals doing excessively strenuous work for an excessive time; and resolutely eradicate the problem of prisons indiscriminately charging fees), strengthening prison administration, and promoting openness in prison business. In the course of launching this activity, the prison system nationwide held 2,846 training programmes at different levels, carrying out training in the relevant legal rules and regulations that personnel must thoroughly understand. Some 280,000 people's police prison staff nationwide, including staff in the Bureau of Prisons of the Ministry of Justice, took part in a unified examination.

Article 12

94. Paragraphs 113-114 of the supplementary report remain effective.

95. According to the Constitution and relevant laws, the procuratorial bodies have the responsibility to investigate and deal with staff of state organs who commit dereliction of duty, or abuse their power to extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses (Article 247 of the Penal Code) and physically abuse inmates under their supervision (Article 248 of the Penal Code), for violations of citizens' rights of person and democratic rights. Procuratorates at various levels have set up more than 3000 special procuratorial bodies nationwide, with about 13,000 full-time staff, in an effort to ensure fair and prompt investigation into acts of torture.

96. The Chinese procuratorial bodies follow the following procedures for investigating and handling criminal cases of torture.

97. Accepting a case: According to Article 120 of the Supreme People's Procuratorate Rules on the Criminal Process for People's Procuratorates, the people's procuratorates directly accept reports, complaints, charges and criminal suspects' confessions.

98. Preliminary investigation: According to Article 129 of the Supreme People's Procuratorate Rules on the Criminal Process for People's Procuratorates, the investigative departments will follow up on reported cases and carry out preliminary investigations. They shall produce an investigation report and propose recommendations for review and approval by the chief procurator. For cases where responsibility has been ascertained for criminal acts that justify criminal charge, it should be recommended that a case be formally filed for investigation; for cases with no criminal evidence, or with obscure or inadequate evidence, or involving any of the circumstances stipulated by Article 15 of the Code of Criminal Procedure, it should be recommended that the cases be dismissed; for cases involving evidently minor offences, causing only moderate damage that does not justify criminal charges but where the offenders have violated laws and discipline, it should be recommended that the procuratorial body inform the supervisor of the offender for disciplinary punishment.

99. Cases filed for investigation: For cases filed for investigation, the criminal procedure process will be activated to carry out investigation and gather evidence and, when necessary and with the approval of competent authorities, detain or arrest (by public security organs) the criminal suspect.

100. Termination of investigation: after having completed investigations of all relevant facts of the cases, the investigative departments will transfer the case files to litigation departments for a decision on public prosecution.

101. Public prosecution: the litigation departments will review case files submitted by the investigative departments. For cases with verified investigative results on the criminal acts and ascertained and adequate evidence to justify litigation to a court, the litigation departments will institute a public prosecution in accordance with the law and provide support in the court for the prosecution. For cases involving minor offences and not punishable by criminal law, the litigation departments can decide not to initiate a prosecution.

102. Procuratorial bodies exercise independent prosecution rights provided by law, free from interference from administrative bodies, social organizations and individuals. During the periods of investigation and litigation reviews by the procuratorial bodies, all criminal suspects have access to legal assistance provided by lawyers.

103. According to the Constitution and other relevant laws, the people's procuratorates are legal supervisory bodies of the State, exercising the rights to supervise investigations, trials and the execution of criminal punishment. The procuratorates supervise and maintain the legality of the investigations of the public security organs in the following ways.

104. For cases that should be filed for investigation but which have not been registered by the police, the procuratorates have the right to demand explanation from the public security organs as to the reasons for not filing the case. Should the reasons be deemed untenable, the procuratorates should instruct the public security organs to register the cases for investigation.

105. The procuratorates monitor the legality of the investigations carried out by the public security organs as part of the criminal procedural process. The activities being monitored include specific investigative operations such as interrogation of suspects, interviewing witnesses, searches, etc. as well as compulsory measures such as detentions and arrests.

106. For minor violations of the law in the process of investigations, the procuratorates can either give an oral warning or issue a Note on Rectifying Illegal Actions for disciplinary punishment by the supervisory police authority of the incumbent. Should the acts of violations constitute a crime, the procuratorial departments in charge of dereliction of duty and abuse of power cases should file the incidents as cases for investigation and press criminal charges.

107. All levels of the people's procuratorates have instituted special procuratorial agencies in institutions of confinement. In July 1987, those special agencies opened resident offices in the prisons under their respective authority. The resident procurators exercise independent procuratorial rights and report directly to the procuratorates. They do not work under the leadership of the chief warden nor are their offices affiliated to the prisons where they reside. They accept reports, complaints and charges directly from the inmates and carry out investigations into incidents of corporal punishment, beating and abuse of inmates as the cases arise.

108. Since 1999, when China submitted the third report, the procuratorates have investigated and handled large amounts of criminal cases of personnel of state organs abusing their power and violating citizens' rights of person and democratic rights, including the use of torture to extort confessions, the use of violence to extort testimony from a witness and maltreatment of inmates. The total number of such cases is on the decline, a trend supported by the following statistics.

(a) 1999:

No. of criminal charges on the use of torture to extort confession:	143
No. of criminal charges on maltreatment of inmates:	42

(b) 2000:

No. of criminal charges on the use of torture to extort confession:	137
No. of criminal charges on maltreatment of inmates:	52

(c) 2001:

No. of criminal charges on the use of torture to extort confession:	101
No. of criminal charges on maltreatment of inmates:	38

(d) 2002:

No. of criminal charges on the use of torture to extort confession:	55
No. of criminal charges on maltreatment of inmates:	30

(e) 2003:

No. of criminal charges on the use of torture to extort confession:	52
No. of criminal charges on maltreatment of inmates:	32
No. of criminal charges on the use of violence to extort testimony from witnesses:	7

(f) 2004:

No. of criminal charges on the use of torture to extort confession:	53
No. of criminal charges on maltreatment of inmates:	40
No. of criminal charges on the use of violence to extort testimony from witnesses:	4

109. In order to uphold the constitutional principle that “the state respects and protects human rights”, the Supreme People’s Procuratorate decided on 11 May 2004 to launch a year-long nationwide campaign to investigate and prosecute personnel of state organs who abuse their power and violate human rights. The whole procuratorial system was mobilized to act swiftly and to raise public awareness. All circles of society and the people responded positively to the campaign, by filing reports and complaints against the criminal acts of human rights violations. The procuratorial bodies pooled resources together in investigating and handling a batch of cases, including criminal cases of the use of torture to extort confession, the use of violence to extort testimony from witnesses and the maltreatment of inmates. The campaign achieved remarkable results for the designated period of time.

Article 13

110. Paragraphs 42-48 of China’s third report remain effective.

111. China’s Constitution safeguards the right of victims of torture to file complaints to competent state authorities while at the same time protecting them or witnesses from being threatened or revenged against. Article 41 Paragraph 2 of the Constitution stipulates that: “In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them.”

112. Article 46 of the People’s Police Law of the People’s Republic of China stipulates: “A citizen or an organization shall have the right to make exposure of or accusation against a people’s policeman’s violation of law or discipline to a people's police organ, a people’s procuratorate or an administrative supervisory organ. The organ that accepts the exposure or accusation shall investigate and deal with the case without delay and notify the person or organization that made the exposure or accusation of the conclusion of the case. No person may suppress or retaliate against the citizen or organization that makes an exposure or accusation according to law. ”

113. The Prison Law stipulates the following:

(a) Article 21: “If a prisoner is not satisfied with the effective judgment, he may file a petition. A people’s procuratorate or a people’s court shall without delay handle the petitions filed by prisoners.”

(b) Article 22: “A prison shall without delay handle the complaints or accusations made by prisoners, or transfer the above material to a public security organ or a people's procuratorate for handling. The public security organ or the people's procuratorate shall inform the prison of the result of its handling.”

(c) Article 23: “A prison shall transfer without delay the petitions, complaints and accusations made by prisoners and shall not withhold them.”

(d) Article 46 of the Rules on Custody Houses stipulates that: “custody houses should submit without delay petitions for appeal of the inmates and should not obstruct their submission or withhold them. Written accusations and materials exposing illegal actions of judicial personnel prepared by the inmates should be submitted to the people’s procuratorates without delay.”

114. In order to facilitate the filing of accusations and appeals by the general public and to improve accountability and efficiency of the procuratorial staff, the Supreme People’s Procuratorate on 1 July 2003 issued Rules (Trial) of the People’s Procuratorate on the Implementation of a First-link Responsibility System. The Rules stipulate that the first-link responsibility system means that the people’s procuratorates should handle accusations and appeals within their mandates in a timely fashion and with clearly defined internal division of work and lines of responsibilities. The system aims to solve accusations and appeals, including cases of the use of torture to extort confessions and the use of violence to extort testimony from witnesses, on the first instance of accepting and handling them.

115. The Criteria for Serious and Especially Serious Cases contain stipulations on cases of violations of citizens’ rights of person and democratic rights by personnel of state organs, including cases of the use of torture to extort confessions, the use of violence to extort testimony from witnesses and the maltreatment of inmates. These stipulations constitute one of the bases for the investigation and handling of torture cases (see also Paragraph 14 and Paragraph 57).

116. The people’s courts hold trials on public prosecution cases of torture filed by the people’s procuratorates in a prompt and just fashion. The whole judicial process can achieve the goals of open trials, law-binding procedures and fair judgments.

117. Since 1999, when China submitted the third report, the procuratorates have investigated and handled a batch of criminal cases of human rights violations involving torture by personnel of state organs. In general, the total number of such cases is on the decline, a trend supported by the following statistics.

(a) 1999:

(i) No. of people sentenced on account of the use of torture to extort confession: 178

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 3

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 0

(b) 2000:

(i) No. of people sentenced on account of the use of torture to extort confession: 121

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 1

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 3

(c) 2001:

(i) No. of people sentenced on account of the use of torture to extort confession: 81

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 3

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 34

(d) 2002:

(i) No. of people sentenced on account of the use of torture to extort confession: 44

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 2

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 18

(e) 2003:

(i) No. of people sentenced on account of the use of torture to extort confession: 60

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 2

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 27

(f) 2004:

(i) No. of people sentenced on account of the use of torture to extort confession: 82

(ii) No. of people sentenced on account of the use of violence to extort testimony from witnesses: 2

(iii) No. of people sentenced on account of criminal charges on maltreatment of inmates: 40

Article 14

118. Paragraphs 45-53 of the second report of China and Paragraph 50 of the third report remain effective.

119. Upon conclusion of the cases of violations of human rights of citizens by personnel of state organs by abusing their power, all victims who conform to stipulations of the State Compensation Law have received compensation from the state.

120. Article 5 of the Measures on Administrative Compensation and Criminal Compensation by Judicial and Administrative Bodies provides that criminal compensation will be made in the following cases of violations of citizens' rights of person by prison institutions and their staff when carrying out their duties and using their power: the use of torture to extort confessions or corporal punishment, maltreatment of inmates, causing bodily harm or death; beating or instigating and condoning others to beat inmates, causing serious consequences; humiliation of inmates, causing serious consequences; unjustified refusal to release inmates who have served the full term of their sentence; illegal use of weapons, police instruments and devices, causing bodily harm or death of citizens; other illegal acts, causing bodily harm or death of inmates.

Article 15

121. Paragraphs 120-122 of the supplementary report, Paragraph 55 of the second report and Paragraph 52 of the third report of China remain effective.

122. According to Chinese law, no statements ascertained to have been obtained by means of extortion should be used in the litigation process. No evidence obtained by illegal means should be used as the basis for conviction. Article 43 or the Code of Criminal Procedure stipulates: "Judges, procurators and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect's or defendant's guilt or innocence and the gravity of his crime. It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means. Conditions

must be guaranteed for all citizens who are involved in a case or who have information about the circumstances of a case to objectively and fully furnish evidence and, except in special circumstances, they may be brought in to help the investigation."

123. Article 181 of the Procedural Provisions for the Handling of Criminal Cases by Public Security Organs stipulates: "During interrogations, the statements and explanations of the suspects should be carefully listened to; the use of torture to extort confessions or the use of threats, enticement, cheating and other illegal means to obtain confessions are strictly prohibited." Article 26 of the Procedural Provisions for the Handling of Administrative Cases by Public Security Organs stipulates: "Public security organs must strictly follow legal procedures in collecting evidence that can prove whether a suspect has violated the law and identify the gravity of the violations. The use of torture to extort confessions or the use of threats, enticement, cheating and other illegal means to obtain evidence are strictly prohibited."

124. Article 265 of the Rules of Criminal Litigation for the People's Procuratorates clearly stipulates that confessions of suspects, statements of victims and witnesses extorted by torture or by the use of threats, enticement, cheating and other illegal means cannot be used as the basis for accusations. On 2 January 2001, the Supreme People's Procuratorate issued the Circular on the Strict Prohibition of the Use of Confessions of Suspects Extorted by the use of Torture as the Basis for Determining Crimes. The Circular requires that all levels of the people's procuratorates must strictly follow and implement legal stipulations on the strict prohibition of the use of torture to extort confessions and clarify rules of exclusion of illegal evidence. The Supreme People's Procuratorate asks that all level of the people's procuratorates strictly follow the legal stipulations and resolutely screen out suspects' confessions and statements of victims and witnesses that are found to be obtained by illegal means. No leeway should be allowed with regard to the use of torture to extort confessions and other such illegal means of obtaining evidence.

Article 16

125. Paragraphs 57-62 of China's second report and Paragraphs 54-57 of the third report remain effective.

126. According to Chinese law, measures for the prohibition of torture equally apply to the protecting of citizens' personal dignity from being violated. Article 39 of China's Constitution stipulates that: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited."

127. In 1998, the Ministry of Public Security launched a nationwide activity to create custody-houses in which there is "strict law-enforcement and civilized management", pledging to society that criminal suspects and defendants would be managed in a civilized manner, and that they would not be beaten, mistreated by the use of corporal punishment, or have their personal dignity insulted; the basic living conditions of criminal suspects and defendants would be guaranteed, and if they were ill, then they would be treated promptly.

128. In 2000, the Ministry of Public Security carried out a special improvement of the conditions and order of custody-houses nationwide, greatly improving the conditions of institutions of confinement, and creating a good living environment for criminal suspects and defendants.

129. In 2001, the Ministry of Public Security published Regulations on the Behaviour of People's Police on Duty in Custody-houses, which explicitly required that the people's police were not to use torture to extort confessions or to use corporal punishment or cruel or degrading treatment upon those in custody; not should they beat or incite others to beat those in custody. They must respect the personal and human dignity of those in custody, and they must respect the living customs of member of ethnic minorities and foreign nationals in custody. They must not address the detainee using nicknames or other degrading or prejudiced language. Those detainees who are suffering from illness should be given treatment and appropriate care promptly.

130. In 2003, the Ministry of Public Security launched a major investigation of law-enforcement in custody-houses nationwide, investigating in particular whether there was any beating, corporal punishment or cruel treatment being used on criminal suspects and defendants, and whether there were any acts which violated the legitimate rights and interests of the same.

131. From March 2004, the Ministry of Public Security and the Supreme People's Procuratorate jointly arranged and launched an activity in custody-houses and resident procuratorial offices nationwide, which aimed to establish "model units exemplifying the ideals of strengthening supervisory law-enforcement, strengthening legal supervision, guaranteeing the smooth passage of criminal prosecution cases, and protecting the legitimate rights and interests of detainees". They required that custody-houses in all areas transmit law-enforcement concepts and firmly establish an awareness of the protection of detainees' legitimate rights and interests in accordance with the law, in order to more consciously respect and guarantee such rights as the personal dignity and health of detainees, their basic living standards, healthcare, the right to meet and to correspond, to make criticisms and recommendations to state organs and their staff, and to report to or accuse or appeal against such organs. Through this activity, they should rigorously standardize the procedures of law-enforcement and service, resolutely eliminate practices within the supervision system that run counter to the guaranteeing of human rights, establish and perfect a mechanism for the guaranteeing of detainees' legitimate rights and interests, resolutely eradicate the practice of extorting confessions through torture in custody-houses, use police instruments in strict accordance with the law, and determinedly root out the practice of using beating, corporal punishment or cruel treatment upon detainees.

132. On 15 November 2000, the Supreme People's Court passed the judicial interpretation of the Rules of the Supreme People's Court Concerning the Trial of Juvenile Criminal Cases. The said judicial interpretation clearly stipulates that, in the trial of criminal cases involving juveniles, the principles of "taking enlightenment as the dominant factor while making punishment subsidiary, and enlightenment, persuasion and reformation" must be adhered to. When hearing criminal cases involving juveniles, the provisions of the Code of Criminal Procedure relating to closed hearings should be adhered to. It should be ensured that juvenile defendants receive a defense counsel in accordance with the law, and that when opening the court for the hearing, if juvenile defendants who are less than eighteen years of age have not appointed a defense counsel, the People's Court should appoint a lawyer to take on the duty of giving legal assistance as their defense lawyer. Before a hearing begins in court, the legally

appointed representative of a juvenile defendant should be instructed to appear in court, and arrangements may also be made for a legal representative or other adult such as a close relative or teacher to meet with the juvenile defendant; in the courtroom, it is not permissible to use any police instruments upon a juvenile defendant, and a juvenile defendant may be seated when he is examined and questioned; only when responding to questions from the judge and to the pronouncement of the judge should the defendant stand. Where it is discovered that methods such as trapping into a confession, rebuking, ridiculing or threatening have been used in connection with a juvenile defendant, the judge should immediately put a stop to it. With regard to juvenile offenders who have already been imprisoned, the youth court can establish contact through a variety of means with a juvenile offenders' reformatory or other juvenile detention centre, so as to understand the situation regarding the reform of the offender, and can give assistance in the work of help, education and reform; it can also make return visits and investigations of juvenile offenders who are in the process of serving their sentence. The said judicial interpretations have a good effect in regard to effectively preventing the use of torture upon juveniles during judicial hearings and protecting the legitimate rights and interests of juveniles.

PART II

2. Supplementary information provided in response to the "Conclusions and Recommendations" of the Committee's consideration of the third report

With regard to the incorporation into China's domestic law of a definition of torture that fully complies with the definition detailed in the Convention.

133. Paragraphs 59-64 of China's third report have already given explanations on this matter.

134. The Chinese government firmly believes that, in accordance with China's Penal Code, it is able to apply the appropriate punishment for acts of torture, including mental cruelty, according to the seriousness of the crime.

135. China's Penal Code makes different provisions for different situations involving acts of torture. For example:

(a) Article 247 provides that: "Any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law."

(b) Article 248 provides that: "Any policeman or other officer of an institution of confinement like a prison, a detention house or a custody house who beats a prisoner or maltreats him by subjecting him to corporal punishment, if the circumstances are serious shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law. Any policeman or other officer who instigates a person held in

custody to beat or maltreat another person held in custody by subjecting him to corporal punishment, the policeman or officer shall be punished in accordance with the provisions of the preceding paragraph."

136. According to the relevant judicial interpretations, the aforementioned acts include any act that calculatedly causes the victim to undergo severe corporal or mental pain or distress. In addition, China's Penal Code stipulates that in the case of crimes such as illegal searching, illegal detention and degrading behaviour, the criminal subjects not only include people in public employment but also non-public personnel, and that where it applies to state functionaries, then a heavier punishment is given.

137. From this it can be seen that China's laws and related legal regulations entirely cover the contents of the definition of torture contained in the Convention. The acts of torture provided for in the Convention are all prohibited under Chinese law, and severe punishment is applied in accordance with the law to all those who perpetrate such acts.

With regard to continuing the process of reform, monitoring the uniform and effective implementation of new laws and practices and taking other measures as appropriate to this end.

138. From the perspective of implementing the Convention, since 1999, China has taken a series of legislative, judicial and administrative measures on this account, to ensure the uniform and effective implementation of the legal system, and to obviate the problems of not proceeding according to the law and unfair law-enforcement.

139. When China amended its Constitution, it incorporated the words "human rights" for first time in the Constitution, explicitly stating that "the state respects and protects human rights." This is a major event in the construction of China's democratic constitutional government and civilized political culture, and it is an important milestone in the history of human rights development in China. The inclusion of human rights in the Constitution requires that judicial organs must place the principle of respect for and protection of human rights at the heart of all links in the judicial process, to ensure that the fundamental rights provided to citizens in the Constitution are not violated.

140. China's amended Penal Code and Code of Criminal Procedure expressly stipulate such principles of criminal law as "crime and punishment are determined by the law", "everyone is equal before the law", "the punishment must fit the crime", and the principle that no-one is to be judged guilty until a verdict has been given in a court of law and in accordance with the law.

141. China has formulated the Extradition Law, which provides the legal basis for a standardized extradition process, the enhancement of international cooperation in punishing crime and the protection of the legitimate rights and interests of individuals and organizations. In addition, China has also formulated other related laws, such as the Regulations on Legal Aid, the Measures for the Administration of Relief for Vagrants and Beggars without Assured Living Sources in Cities, and the Law on Prevention of Juvenile Delinquency.

142. China's judicial organs have, through a series of departmental regulations and judicial interpretations, strengthened the mechanisms of internal supervision and have increased the severity of punishments for cadres who infringe discipline or the law, thus further standardizing law-enforcement activities.

143. China's public security and procuratorial organs have also established external supervision mechanisms, to receive supervision from the general public and to earnestly prevent and correct the problem of unfair law-enforcement on the part of public security and procuratorial staff.

144. "Fairness and efficiency" has become a guiding theme for the People's Courts in the 21st Century. All activities of the People's Courts must achieve the following: trials must be open, procedures legal, trial periods rigorously adhered to, judgments fair and implementation carried out according to the law. This is at the heart of "fairness and efficiency".

145. China will continue to deepen its reforms, perfect its legislation, standardize its law-enforcement, and sincerely carry out the duties of the Convention.

With regard to abolishing the requirement of applying for permission before a suspect can have access for any reason to a lawyer whilst in custody.

146. According to the related provisions of China's Code of Criminal Procedure, excepting cases involving state secrets, criminal suspects and defendants in custody do not need to apply for permission in order to get the help of a lawyer. Article 96 of China's Code of Criminal Procedure provides that: "A criminal suspect may, after the first interrogation by the investigatory organ or from the day of the compulsory measures to be taken, retain a lawyer to provide him/her with legal consultancy or act on his/her behalf to make petition or complaints. The lawyer retained by the arrested criminal suspect may apply for the suspect for bailing out for summons."

147. In cases which involve state secrets, the retaining of a lawyer by the criminal suspect should go through the approval of the investigatory organ. This is principally done in consideration of guaranteeing the smooth passage of criminal litigation, ensuring that the state secrets in question are not divulged, and protecting national security. The law makes clear provisions with regard to the scope of cases involving state secrets, which is strictly controlled in accordance with the law. In practice, these cases are very few in number, and after having gone through approval, the criminal suspect may still retain a lawyer, whilst the same lawyer can meet with the criminal suspect in custody. The rights of the criminal suspect to get the help of a lawyer are not therefore subject to any substantive restrictions at all.

With regard to abolishing all forms of administrative detention, in accordance with the relevant international standards.

148. In the criminal law of many countries, there are provisions not only for felonies and misdemeanours, but also for a large number of police offences. However, owing to differences in legal culture and legal traditions, in Chinese criminal law, there is no provision for police offences. Offences similar to police offences in foreign criminal law are regulated in Chinese law as administrative illegal acts, and administrative penalties are given in forms such as warnings, fines, or administrative detention.

149. Chinese law has strict provisions in respect of procedures for administrative penalties. Article 8 of the Law on Legislation stipulates that compulsory measures and penalties that restrict personal freedom can only be standardized through formulated laws and not through the form of legal regulations or rules. Article 9 of the Law on Administrative Penalty stipulates: "Administrative penalty involving restriction of freedom of person shall only be created by law." Article 16 stipulates: "The power of administrative penalty involving restriction of freedom of person shall only be exercised by the public security organs." Article 30 stipulates: "Where citizens, legal persons or other organizations violate administrative order and should be given administrative penalty according to the law, administrative organs must ascertain the facts; if the facts about the violations are not clear, no administrative penalty shall be imposed." Article 31 stipulates: "Before deciding to impose administrative penalties, administrative organs shall notify the parties of the facts, grounds and basis according to which the administrative penalties are to be decided on and shall notify the parties of the rights that they enjoy in accordance with the law." Article 32 stipulates: "The parties shall have the right to state their cases and to defend themselves. Administrative organs shall fully heed the opinions of the parties and shall reexamine the facts, grounds and evidence put forward by the parties; if the facts, grounds and evidence put forward by the parties are established, the administrative organs shall accept them. Administrative organs shall not impose heavier penalties on the parties just because the parties have tried to defend themselves." Article 38 stipulates: "After an investigation has been concluded, leading members of an administrative organ shall examine the results of the investigation and make the following decisions in light of different circumstances:

(a) to impose administrative penalty where an illegal act has really been committed and for which administrative penalty should be imposed, in light of the seriousness and the specific circumstances of the case;

(b) to impose no administrative penalty where an illegal act is minor and may be exempted from administrative penalty according to law;

(c) to impose no administrative penalty where the facts about an illegal act are not established; or

(d) to transfer the case to a judicial organ where an illegal act constitutes a crime. Before imposing a heavier administrative penalty for an illegal act which is of a complicated or grave nature, the leading members of an administrative organ shall make a collective decision through discussion." If the decision on administrative penalty is not accepted, then an administrative prosecution may be brought.

With regard to ensuring the prompt, thorough, effective and impartial investigation of all allegations of torture.

150. See Paragraphs 86-101 of this report on the situation in regard to Article 12 of the Convention.

With regard to continuing and intensifying efforts to provide training courses on international human rights standards for law enforcement officers.

151. See Paragraphs 86-101 of this report on the situation in regard to Articles 10 to 11 of the Convention.

Appendices:

Constitution of the People's Republic of China, Article 33

Penal Code of the People's Republic of China

Code of Criminal Procedure of the People's Republic of China

Extradition Law of the People's Republic of China
