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CACV 59/2010

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

CIVIL APPEAL NO. 59 OF 2010

(ON APPEAL FROM HCAL NO. 31 OF 2009)

BETWEEN

CH Applicant

And

DIRECTOR OF IMMIGRATION Respondent

Before: Hon Hartmann and Fok JJA and To J in Court

Date of Hearing: 14 September 2011

Date of Judgment: 14 September 2011

Date of Handing Down Reasons for Judgment: 26 September 2011

R E A S O N S F O R J U D G M E N T

Hon Hartmann JA (giving the Reasons for Judgment of the Court):

1. By notice of motion dated 27 June 2011, the applicant sought leave to appeal this Court's judgment of 18 April 2011 to the Court of Final Appeal. The application was made pursuant to s. 22(1)(b) of the Court of Final Appeal Ordinance, Cap. 484, on the basis that questions of great general or public importance or otherwise questions that should be submitted to the Court of Final Appeal for decision arise in the appeal. Having heard submissions, we dismissed the application.

2. The applicant, CH, came to Hong Kong on 12 July 2008. He was in possession of a Cameroonian passport and was permitted to remain here as a visitor for a period of 14 days, his last permitted day in Hong Kong being 26 July 2008.

3. On 26 July, CH approached the Immigration Department to seek an extension of his permission to remain in Hong Kong. He did so on the basis that he could then lodge a claim under the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3(1) of the Convention directs that:

> "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 subject to torture."

4. In accordance with the Director of Immigration's prevailing policy, a claim for protection made under the Convention will not be entertained while a claimant remains lawfully in Hong Kong and therefore free to leave the Territory for any destination he chooses. In the result, CH's application for an extension of his permission to remain in Hong Kong as a visitor was refused.

5. CH did not leave Hong Kong the following day nor – being now unlawfully in Hong Kong – did he surrender himself so that he could lodge a claim under the Convention. He was however arrested a few weeks later and a week after that was released on recognisance.

6. CH has since launched a claim under the Convention. In accordance with the Director's policy, CH will not be removed from Hong Kong until his claim has been finally determined.

7. In March 2009, CH instituted the present proceedings. Both before the Court of First Instance and before this Court, his application was

heard in conjunction with the application of another claimant under the Convention, BK.

8. Both before the Court of First Instance and this Court two issues arose for determination. They were described in this Court's judgment (paragraphs 15 and 16) as follows:

> "First, is the Director, as a matter of policy, lawfully entitled to decline to investigate any claim made under Art. 3(1) of the Convention for so long as the claimant is lawfully permitted to remain in Hong Kong?
>
> Second, is the Director, as a matter of policy, lawfully entitled to refuse an extension of permission to remain in Hong Kong to a person who wishes to make a claim under Art. 3(1) of the Convention or has already made such a claim?"

9. Both at first instance and before this Court, the two questions were answered in the affirmative, namely, that the Director is so entitled.

10. Before us, the principal argument was that the two aspects of the Director's policy were rigidly applied, allowing for no exceptions no matter how pressing the humanitarian circumstances. It was our judgment that neither aspect of the policy was absolute. Accordingly, if the circumstances so demanded, exceptions could be made.

11. It should be said that CH has only ever mounted a challenge in respect of the second issue described above, namely, whether the Director, as a matter of policy, is lawfully entitled to refuse an extension of permission to remain in Hong Kong to a person who seeks to make a claim under the Convention.

12. In CH's notice of motion, the first issue said to be of great general or public importance or otherwise deserving of determination by the Court of Final Appeal has been stated in the following terms:

> "Whether the Director of Immigration's decision that the applicant, being a claimant under the Convention and an asylum seeker, must leave Hong Kong was unlawful in that it was an attempt to *refoule* in violation of Art. 3(1) of the Convention and the obligation of *non-refoulement* of refugees under customary international law, the International Covenant on Civil and Political Rights ('ICCPR') and the Convention and Protocol relating to the status of refugees."

13. In respect of this issue, as formulated, two observations should be made.

14. First, before this Court it was never suggested that any form of order of removal, let alone one constituting an attempt at *refoulement* was made by the Director nor did CH in his application for leave to apply for judicial review challenge any such suggested order. This Court in its judgment (paragraph 10) said:

> "… neither [CH or BK] have been at risk of being removed to the State where, in terms of their claims, they say they are at substantial risk of being tortured until the issue of such risk is finally resolved. That has never been disputed."

15. In short, this appears to be an entirely new issue.

16. Second, at no time before this Court (nor it seems the Court of First Instance), did CH seek to argue that the Director's decision offended any obligation of *non-refoulement* under customary international law, the ICCPR or the Refugee Convention. Those matters have not been canvassed.

17. The second issue in the notice of motion, the one relevant to the applicant's claim, is stated in the following terms:

> "Whether the refusal of the Director to accept a claim from a person seeking protection under the Convention when it is made during the currency of the person's limit of stay is in conflict with the duty to assess such claims in accordance with high standards of procedural fairness."

18. Mr Parker, counsel for CH, submitted that the Director's policy not to entertain a claim made during the time when a claimant is lawfully in Hong Kong is in conflict with his duty to assess all claims under the Convention in accordance with the highest standards of procedural fairness. The point made was that there may well be a need to record and preserve evidence of recent ill-treatment. It was our finding, however, that the policy, as formulated by the Director, would in appropriate circumstances allow for the recording and preservation of such evidence and that there was therefore no issue of a lack of procedural fairness.

19. Insofar as Mr Parker sought to argue that there was a need to record and preserve evidence of recent ill-treatment by reference to a letter from the Archbishop of Douala dated 23 February 2008, it was never suggested by CH's solicitors in their letter dated 25 July 2008 (which CH took with him when he attended at the Immigration Department the day before his limit of stay was due to expire) that there was any evidence of recent ill-treatment that needed to be recorded or preserved. Hence, the Court's judgment at paragraph 48 noted that there was no basis on the facts of BK and CH's appeals to challenge the contention that the Director's policy was sufficiently flexible to admit of exceptions.

20. As briefly as the complexity of the issues properly permits, it was for these reasons that we dismissed the application.

(M.J. Hartmann) Justice of Appeal	(Joseph Fok) Justice of Appeal	(Anthony To) Judge of the Court of First Instance

Mr Timothy Parker, instructed by Messrs Barnes & Daly, for the Applicant

Mr Anderson Chow SC, instructed by Department of Justice, for the Respondent