HCAL 77/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 77 OF 2008

BETWEEN

UBAMAKA EDWARD WILSON	Applicant
and	
SECRETARY FOR SECURITY	1st Respondent
DIRECTOR OF IMMIGRATION	2nd Respondent

Before: Hon Reyes J in Court

Date of Hearing: 5 May 2009

Date of Judgment: 5 May 2009

J U D G M E N T

I. INTRODUCTION

1. Mr. Ubamaka, a Nigerian, seeks judicial review to quash a Deportation Order made by the Secretary for Security (the Secretary) in

July 1999. He also applies for a Declaration that his administrative detention by the Director of Immigration (the Director) between December 2007 and August 2008 pending deportation was wrongful.

2. This judicial review raises 3 main issues.

3. First, Mr. Ubamaka did not apply for judicial review until July 2008. Is such a long interval between the making of the Deportation Order and the start of judicial review fatal to Mr. Ubamaka's application?

4. Second, Mr. Ubamaka has served a prison sentence here for trafficking in dangerous drugs. He was in jail from December 1991 (when first arrested) to December 2007 (when released early from prison for good behaviour).

5. Mr. Ubamaka now says that, if he is deported to Nigeria, there is a risk of "double jeopardy," that is, his being tried twice for the same or practically the same offence. If so, should the Deportation Order now be quashed as a breach of Mr. Ubamaka's fundamental human rights?

6. Third, upon release from prison in December 2007, Mr. Ubamaka was placed under administrative detention by the Director pending deportation. Mr. Ubamaka applied to be released from that detention on recognisance.

7. The application was at first refused, but was later allowed on 23 August 2008 immediately following Mr. Ubamaka's application for judicial review. Were the initial administrative detention and refusal of release unlawful?

II. BACKGROUND

8. Mr. Ubamaka was arrested upon arrival in 1991 at Hong Kong airport for possessing dangerous drugs. In 1993 he was convicted of drug trafficking and sentenced to 24 years' imprisonment.

9. Prior to July 1997, Mr. Ubamaka repeatedly applied to the Hong Kong and British Governments to be repatriated to Nigeria to serve the rest of his sentence there. He apparently feared that, on resuming sovereignty of Hong Kong, the Mainland government would introduce capital punishment for drug-related offences.

10. The application for transfer was abortive because there was then no arrangement between Hong Kong and Nigeria for a prisoner to serve the balance of a sentence in the former. It is Hong Kong Government policy that an offender will not be repatriated before a sentence is served, if the receiving jurisdiction does not provide for the offender to serve the rest of a sentence in its prisons.

11. The Secretary issued the Deportation Order on 5 July 1999. It required Mr. Ubamaka to leave Hong Kong and prohibited him from being in Hong Kong at any time thereafter. It did not specifically refer to deportation to Nigeria, but in practical terms there is no other jurisdiction to which Mr. Ubamaka can be deported.

12. The combined effect of the absence of a transfer arrangement and the Deportation Order was that Mr. Ubamaka could only be sent back to Nigeria after he had fully served his sentence here.

13. Sometime in 1998, Mr. Ubamaka became aware of Decree No.33 of 1990 promulgated by the National Drug Law Enforcement Agency.

14. The material terms of the Decree have since been incorporated into the National Drug Law Enforcement Agency Act. I shall treat the terms of the Decree and the Act as identical. Section 22 of the Act states:-

> "(1) Any person whose journey originates from Nigeria without being detected of carrying prohibited narcotic drugs or psychotropic substances, but is found to have imported such prohibited narcotic drugs or psychotropic substances into a foreign country, notwithstanding that such a person has been tried or convicted for any offence or unlawful importation or possession of such narcotic drugs or psychotropic substances in that foreign country, shall be guilty of an offence of exportation of narcotic drugs or psychotropic substances from Nigeria under this subsection.
>
> (2) Any Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances and who thereby brings the name of Nigeria into disrepute shall be guilty of an offence under this subsection.
>
> (3) Any person convicted of an offence under subsection (1) or (2) of this section shall be liable to imprisonment for a term of five years without an option of a fine and his assets and properties shall be liable to forfeiture as provided in this Act."

15. Mr. Ubamaka realised from the Decree that, if he were returned to Nigeria, he might be tried again and imprisoned in respect of the same act of possessing drugs which had led to his being jailed in Hong Kong. Such imprisonment would be regardless of any prison term served in Hong Kong.

16. As a result, at some point, Mr. Ubamaka ceased to pursue his application for repatriation to Nigeria.

17. Instead in September 2006, Mr. Ubamaka applied to the UNHCR for refugee status under the 1951 Convention Relating to the Status of Refugees. If granted, refugee status would forestall his being deported to Nigeria.

18. Further, in March 2007, on the basis of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT), Mr. Ubamaka lodged a claim with the Director against the Deportation Order. Mr. Ubamaka claimed in support of this CAT application that, on being deported to Nigeria, he risked imprisonment both pending and following trial pursuant to the Act. During such imprisonment, Mr. Ubamaka alleged that it would be common for officers to subject detainees for drug-related offences to torture and other inhuman or degrading treatment.

19. In December 2007 the UNHCR rejected Mr. Ubamaka's claim for refugee status. Mr. Ubamaka appealed. That appeal was unsuccessful. By letter dated 28 July 2008 in response to an inquiry from the Director, the UNHCR stated that Mr. Ubamaka's file "was closed on 28 July 2008 and he is no longer a person of concern to UNHCR".

20. On 29 December 2007 Mr. Ubamaka was released from prison early for good behaviour. But he was immediately placed under administrative detention by the Director pending deportation.

21. Between January and March 2008 Mr. Ubamaka repeatedly asked to be released on recognisance. This was refused by the Director in April 2008 in a short letter. That stated: "After careful consideration of all

circumstances of the case, I regret that your requests cannot be acceded to."

22. On 4 July 2008, at the request of Mr. Ubamaka's lawyers, the Director articulated the reasons for his refusal. The Director wrote:-

> "In making a decision on a request for release on recognizance, the Director of Immigration is entitled to assess all the relevant circumstances of each detention case. In this respect, the relevant circumstances include, inter alia, any security risk which a detainee may pose to the law and order of Hong Kong, the risk of his absconding and/or re-offending should he be released on recognizance and the prospect of effecting his removal within a reasonable time.
>
> You are a subject of deportation order for life and your continued presence in Hong Kong is considered undesirable. The offence committed by you was serious in nature and there is no indication that your deportation cannot be effected within a reasonable period of time. After careful consideration of all circumstances of your case and the representations that you have made, I regret that your request cannot be acceded to.
>
> Should there be any material change in the circumstances of your case, we are prepared to consider the matter again upon request."

23. On 25 July 2008 Mr. Ubamaka brought the present application for judicial review.

24. On 14 August 2008 the Director issued a letter setting out why he was "minded to refuse" Mr. Ubamaka's CAT claim.

25. The "minded to refuse" letter expressed the Director's preliminary view that "there are no substantial grounds for believing [Mr. Ubamaka] would be in danger of being subjected to torture in Nigeria if ... returned there".

26. In relation to Mr. Ubamaka's allegation of double jeopardy, the letter argues that the doctrine "does not apply with respect to the national jurisdictions of two or more states". Further, not being a person with the right to enter and remain in Hong Kong, Mr. Ubamaka could not invoke double jeopardy to challenge a decision by the Director to deport him to Nigeria.

27. In any event, the Director thought that there was "conflicting evidence" as to whether Mr. Ubamaka would be prosecuted under the Act upon being returned to Nigeria. If he were going to be tried, it would be for the offence of "bringing the name of Nigeria into disrepute" and so would be "another crime isolated from drug trafficking". There would strictly be no double jeopardy.

28. The Director took the view that "[a]ny punishment that may be lawfully imposed upon [Mr. Ubamaka] under Decree 33 of 1990 would amount to lawful sanction which is excluded from the definition of 'torture' under Article 3 of the Convention [CAT]".

29. In any event, as far as torture was concerned, the Director believed that "the pain or suffering endured by prisoners [in Nigeria] has its genesis in the poor and outdated design of the prison structure". The Nigerian government "does not intentionally inflict pain or other suffering on prisoners for a forbidden purpose under Article 1 of the Convention [CAT]".

30. The Director also pointed out that Mr. Ubamaka's position on torture in Nigerian prisons was inconsistent.

31. Before 1997, Mr. Ubamaka had been actively pressing to serve the remainder of his sentence in Nigeria. This was despite the fact that Mr. Ubamaka admits that he knew before leaving Nigeria for Hong Kong that Nigerian prison conditions were poor. It was only after he learned about the Decree that Mr. Ubamaka changed his stance. Until then, his conduct did "not appear to be that of a person who is in fear of being tortured in prison in Nigeria" for drug-related offences.

32. Finally, the Director observed:-

> "You have relied on various country information regarding the prison conditions in Nigeria in support of your claim but you said you had no personal experience of being imprisoned there. Even if there is a consistent pattern of gross, flagrant or mass violation of human rights in Nigeria, this alone does not constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon your return, there must be additional information showing that the person in question would be personally at risk. In this regard, you only said that you were assaulted by police for extortion before 1991 and that you, as a returned drug offender, would be ill-treated in Nigerian prison. These matters are insufficient to establish that you would be at personal risk of being subjected to torture if returned to Nigeria."

33. On 21 August 2008 I granted leave to apply for judicial review. On the following day, the Director consented to Mr. Ubamaka's being released upon recognisance.

34. In February 2009 Mr. Ubamaka applied for leave to review the Director's refusal to allow him legal representation in the bringing of his CAT claim. Leave was granted by Saunders J in line with *FB v. Director of Immigration and another* [2009] 1 HKC 133. In *FB,* Saunders J criticised the Director's policy of not allowing legal representation in CAT applications

35. The CAT judicial review has been adjourned sine die pending resolution of the *FB* cases, including on appeal (if any). In the meantime, the Director has undertaken not to deport Mr. Ubamaka to any country in respect of which he claims protection under the CAT.

III. DISCUSSION

A. Issue 1: Has there been inordinate delay in applying for judicial review?

36. Normally, if one is going to apply for judicial review, one should do so within at the latest 3 months of the act or decision sought to be reviewed. The Court has a jurisdiction to extend the time for bring a judicial review application. But it may refuse to grant an extension where a would-be applicant has delayed taking action for no good reason.

37. Mr. Nicholas Cooney (appearing for the Director) suggests that the delay here is of a magnitude of 9 years (that is, from the time of Deportation Order in July 1999 to the Notice for Judicial Review in July 2008). Mr. Cooney submits that there is no satisfactory explanation for "the very long delay".

38. Mr. Ubamaka relies on the following matters to account for the delay:-

(1) Having been in prison until 2007, he had limited access to lawyers for some time.

(2) He was only advised in 2006 of the possibility of review by a human rights NGO (Lord's International Family & Community Education).

(3) He applied for legal aid in 2006 upon receipt of such advice. But legal aid was not granted until June 2008.

39. Mr. Ubamaka also relies on the potential consequence to him of deportation to Nigeria (that is, being tried a second time for the same offence) as militating against the refusal of his application purely on the basis of any unsatisfactorily explained delay.

40. In relation to this issue, I would make 3 observations.

41. First, I do not regard the delay as spanning as much as 9 years as Mr. Cooney suggests.

42. Mr. Ubamaka applied to the UNHCR for refugee status and sought legal aid in 2006. In early 2007 Mr. Ubamaka took the further measure of applying to the Director for relief against the Deportation Order by lodging a claim based on the CAT.

43. These may be regarded as taking steps to seek relief against the Deportation Order. It would then be natural for Mr. Ubamaka (not having full legal advice) to exhaust those initiatives before attempting other steps.

44. It may be that, if Mr. Ubamaka had been privy to fuller legal representation, he would have been better advised to commence judicial review straightaway. But, in all the circumstances, I do not think the Mr. Ubamaka should be penalised for initially pursuing the alternative procedures which he took.

45. Second, the relevant delay is therefore July 1999 and (say) September 2006 when Mr. Ubamaka made his application to UNHCR. That is still a long time.

46. Of those 7 years, some part may be excused by the limited availability of legal advice while Mr. Ubamaka was in prison. But I do not think that the difficulty of obtaining full legal advice can account for the whole 7 year delay.

47. Without some other factor, I would agree with Mr. Cooney that the application to set aside the Deportation Order comes to late.

48. Third, in this case, there is a special factor. I think that, despite the significant time that has elapsed since the Deportation order was made, it would be wrong to dismiss Mr. Ubamaka's application offhand without considering its merits. This is because of the alleged grave consequences of sending Mr. Ubamaka back to Nigeria. We are concerned here with a question of the liberty and dignity of an individual.

49. Mr. Ubamaka contends that, having already served some 16 years in prison for an offence, he could on deportation find himself having to serve at least another 5 years for essentially the same crime. That (it is said) would be devastating to him personally.

50. If there is substantive merit in Mr. Ubamaka's application, I think it would be unjust to dismiss his application on the sole basis of delay. Because of the alleged serious consequences to him personally, I think that the Court should consider this judicial review in any event.

51. Accordingly, as a matter of discretion, I would extend the time for the bringing of this judicial review insofar as necessary.

B. Issue 2: Should the Deportation Order be quashed?

52. The effect of the Act appears to be that, upon return to Nigeria, Mr. Ubamaka may be charged with 2 offences. One is of exporting drugs and the other is of bringing Nigeria into disrepute by the export of drugs. To my mind, there is plainly a risk that, on being deported, Mr. Ubamaka would be tried for offences arising out of the same conduct for which he was sentenced in Hong Kong.

53. If found guilty, the Act provides for Mr. Ubamaka to be sentenced to at least 5 years' imprisonment. This would be despite having already completed a substantial sentence in Hong Kong and having, in the eyes of Hong Kong law, expiated his offence.

54. I am prepared to regard the foregoing as giving rise to double jeopardy. The key point is that the charge under Nigerian law, whatever it may be called, arises out of the same acts which led to Mr. Ubamaka's conviction here. Consequently, the real question for this Court is whether I should quash the Deportation Order as a result. Mr. Hectar Pun (appearing for Mr. Ubamaka) submits that I should.

55. Nonetheless, before considering Mr. Pun's submissions on that score, let me deal more specifically with the Director's submissions that there is no double jeopardy.

56. Mr. Cooney attempts to bolster the Director's argument by reference to the *travaux préparatoires* for the International Covenant on Civil and Political Rights (ICCPR).

57. Those show that there was a debate among delegates on whether the text of Art.14(7) (which deals with double jeopardy (see below)) should prohibit a state from trying someone again "for the same offence" or "for the same actions". It was suggested by some delegates that the first formula (which was eventually adopted) might allow a person to be tried "for the same actions" on a different charge.

58. I think that the *travaux* are inconclusive. For example, the expression "for the same offence" could eventually have been retained in the ICCPR because it was felt that the opposing delegates' fears were unfounded. It may have been thought that the retained words were clear enough as a prohibition against trying a person on charges based "on the same actions" for which he had previously been tried.

59. Mr. Cooney also refers me to *Van Esbroeck* [2006] 3 CMLR 6 (ECJ (2nd Chamber)).

60. There E (a Belgian) was tried in Norway for illegally importing drugs. He was then tried in Belgium for exporting the same drugs. The European Court had to consider whether the prohibition against double jeopardy in Art.54 of the Convention Implementing the Schengen Agreement (CISA) applied to the Belgian proceedings.

61. The Court noted that CISA Art.54 prohibited a person from being tried again in a member state for "the same acts" for which he had

been tried previously. The Court observed that there was a difference between Art.54 and ICCPR Art.14(7) which proscribed being tried again for "the same offence". Since the import of the drugs by E into Norway was the consequence of their export by him from Belgium, the Court held that Art.54 applied.

62. I do not think that it follows from *Van Esbroeck* that the words "for the same offence" in ICCPR Art.14(7) would lead to a different result, if the question was whether the Belgian proceedings against E should be quashed under the ICCPR. The ICCPR wording may possibly be more ambiguous than that in CISA. But that would not preclude ICCPR Art.14(7), on its true construction, from having the same effect as CISA Art.54.

63. In particular, the distinction between ICCPR Art.14(7) and CISA Art.54 highlighted in *Van Esbroeck* strikes me as a highly artificial distinction with little substantive justification. It all seems a matter of semantics. But where basic human rights are at stake, the application of a covenant should depend on a generous construction of its text in light of its objectives. Fundamental rights should not depend on semantics.

64. It is common in many jurisdictions for one act to give rise to various offences at law. There is then a danger of undermining the "no double jeopardy" principle, if one can get around the prohibition by the expedient of charging a different offence in relation to the conduct for which a person has already been tried.

65. Mr. Cooney notes that the Nigerian Constitution provides (s.36(9)):-

> "No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior."

66. Mr. Cooney's suggestion is that, in light of the Nigerian Constitution, there can be no real risk of Mr. Ubamaka being tried twice. But it seems to me that the validity of such an inference is doubtful.

67. If Mr. Cooney is right, why (one might ask) does s.12 of the Act remain in effect? It is unclear, for instance, whether the Nigerian Constitution only prohibits being tried again "for the same offence," as opposed to being tried again for a different offence based on "the same acts". In other words, do the Nigerian Courts have regard to the technical distinction which Mr. Cooney has been inviting me to adopt?

68. I am also troubled by the words "save upon the order of a superior court". What precisely does that mean? For instance, can a Nigerian prosecutor invite "a superior court" to authorise a prosecution for the same offence, despite the injunction in the Constitution?

69. Finally, Mr. Cooney faintly submits that the Nigerian Government does not in practice bring prosecutions under the Act. Assume then that the Nigerian Government has not prosecuted every case which it could have under s.12 of the Act. That does not guarantee in any practical

sense that Mr. Ubamaka will not be prosecuted upon being returned to Nigeria.

70. Given that the Hong Kong Court looks at substance not form, I conclude that there is a practical risk of double jeopardy here.

B.1 HKBORO Art.111(6) and ICCPR Art.14(7)

71. In support of Mr. Ubamaka's case, Mr. Pun first deploys Hong Kong Bill of Rights Ordinance (Cap.383) (HKBORO) Art.11(6) and ICCPR Art.14(7).

72. HKBORO Art.11(6) declares:-

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong."

73. But HKBORO s.11 further provides:-

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

74. As a Nigerian, Mr. Ubamaka is not a person having the right to enter or remain in Hong Kong. It follows that, even if there is a risk of double jeopardy to Mr. Ubamaka in the sense of his being tried again in Nigeria, HKBORO Art.11(6) cannot be the basis of striking down the Deportation Order.

75. The Deportation Order is expressed on its face to have been made by the Director:-

> "in exercise of the powers conferred on the Chief Executive by section 20(1)(a) of the Immigration Ordinance (Cap.115) and delegated to [her] pursuant to section 63 of the Interpretation and General Clauses Ordinance (Cap.1)".

76. The Deportation Order, as an application of immigration legislation, is not capable of being affected by HKBORO Art.11(6). See *Hai Ho Tak v. AG and Director of Immigration* [1994] 2 HKLR 202 (CA); *Chan To Foon v. Director of Immigration* [2001] 3 HKLRD 109 (Hartmann J) at 120A-122F, 125F-127J.

77. ICCPR Art.14(7) provides:-

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

78. But, the application of ICCPR Art.14(7) in Hong Kong is subject to a similar limitation as HKBORO Art.11(6).

79. Basic Law Art.39 implements the provisions of the ICCPR only to the extent that the ICCPR was "applied to Hong Kong" prior to the handover of sovereignty in 1 July 1997.

80. When the UK Government originally extended the ICCPR to Hong Kong, it did so with a reservation as follows:-

> "The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may

> deem necessary from time to time and, accordingly, the acceptance of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories."

81. Hong Kong being a UK dependent territory at the time, the reservation also applied to Hong Kong. The same reservation has been maintained by Basic Law Art.39.

82. It follows that ICCPR Art.14(7) cannot be used to strike down the Deportation Order.

83. In the case of Art.14(7) there is an additional difficulty. The jurisprudence of the Human Rights Committee suggest that the article only provides protection from double jeopardy within a particular state. The article does not prevent prosecutions for the same offence in different states.

84. This is apparent, for example, from a Decision of the Human Rights Committee (Communication No.204/1986). There A submitted that he should not be extradited to Italy for trial in relation to an offence for which he had served a sentence in Switzerland.

85. The Committee rejected A's communication. Instead it accepted the Italian Government's submission that Art.14(7) "prohibits doable jeopardy only with regard to an offence adjudicated in a given state". The Article "does not guarantee *non bis in idem* [freedom from trial twice for the same offence] with regard to the national jurisdiction of two

or more States". See also United Nations Human Rights Committee General Comment No.32 (2007) §57.

86. Mr. Pun suggests that, purely as a matter of common law, I should quash the Deportation Order. This is because the common law itself is against a person being placed in double jeopardy. However, on this, I agree with Mr. Cooney that the common law prohibition does not prevent deportation. It is simply available as a defence against a second prosecution in the Hong Kong court.

B.2 HKBORO Art.3, ICCPR Art.7 and CAT Art.3

87. Mr. Pun additionally relies on HKBORO Art.3, ICCPR Art.7 and CAT Art.3.

88. HKBORO Art.3 and ICCPR Art.7 are to all intents identical. They provide:-

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...."

89. CAT Art.3 states:-

> "1. No State Party shall expel, return ('refouler') or extradite a person to another Sate 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."

90. CAT Art.1 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 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."

91. It is apparent from the definition of "torture" in CAT Art.1 that CAT Art.3 is not applicable here. A person who is tried twice for the same offence is not in an analogous position to someone on whom a state official intentionally inflicts physical or mental pain.

92. Being tried again for an offence in another jurisdiction may cause a person anguish, perhaps great anguish. But it seems to me that such mental state would be incidental to a lawful sanction being imposed in the second jurisdiction. It is expressly excluded by the last sentence in the CAT definition of "torture" just quoted.

93. Nevertheless, Mr. Cooney fairly points out that CAT Art.16(1) may be apposite as a possible support for Mr. Ubamaka's case. That article provides:-

> "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...."

94. Mr. Cooney also very properly accepts that the reservations to the application of the HKBORO and ICCPR in relation to immigration legislation do not apply where HKBORO Art.3 and ICCPR Art.7 are concerned. This is because the injunction against inflicting torture or other forms of inhuman or degrading treatment are peremptory norms of customary international law. It is not possible for a state to derogate from those norms.

95. Thus, for example, in relation to ICCPR Art.7, United Nations Human Rights Commission General Comment No.20 (1992) §3 comments:-

> "The text of article 7 allows of no limitation.... The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."

96. United Nations Human Right Commission General Comment No.24 (1994) §8 explains the rationale for the special status of peremptory norms thus:-

> "Reservations that offend peremptory norms would not be compatible with the object and purpose of the [ICCPR]. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject person to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own

> culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be."

97. General Comment No.24 §18 specifies the consequence of a reservation by a state which is wider than what the ICCPR permits. It states:-

> ".... The normal consequence of an unacceptable reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

98. The net result is that HKBORO Art.3, ICCPR Art.7 and CAT Art.16(1) raise the question whether deporting Mr. Ubamaka to Nigeria, despite a real risk of double jeopardy, amounts to cruel, inhuman or degrading treatment. Mr. Cooney observes that no authority directly deals with this question.

99. Mr. Pun cites a footnote to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Van Esbroeck* as a pointer to how I should approach the question. The Advocate General states:-

> "It could also be argued that the *ne bis in idem* principle protects the dignity of the individual vis-à-vis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence."

100. Mr. Cooney submits that the Advocate General's comment goes too far. It seems to say that, by itself, exposure to double jeopardy amounts to inhuman and degrading treatment. That cannot be so, since as we have seen the ICCPR (for example) allows derogation from Art.14(7).

101. Mr. Cooney submits that I should adopt the approach of the European Court of Human Rights in *Soering v. UK* Application No. 14038/88, 7 July 1989.

102. That involved Art.3 of the European Convention on Human Rights (which is in similar terms to the articles being considered here). The Court stated (at §89):-

> "What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case... Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights...."

103. Soering (a German) was born in 1966. He murdered 2 persons in 1985 in Virginia. He was arrested in Britain in 1986 pending extradition to the United States. There was a likelihood that, if extradited, Soering would face the death penalty.

104. In deciding whether or not extradition to Virginia would constitute cruel and inhuman treatment, the Court took into account the following factors (among others):-

(1) length of detention prior to execution of a death sentence (typically, 6 to 8 years);

(2) conditions on death row;

(3) Soering's age and mental state at the time when he committed the crime, including evidence that he was suffering from mental instability;

(4) the possibility of extradition to (and trial in) Germany where there was no death penalty.

105. The Court concluded (at §111):-

> "[I]n the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, the applicant's extradition to the United Stats would expose him to a real risk of treatment going beyond the threshold set by Article 3...."

106. I agree that the Advocate General's view is too broad. It seems to me that the approach in *Soering* is preferable. One must consider all relevant circumstances. There can be no hard and fast rule applicable in all situations. The risk of double jeopardy must undoubtedly be a factor, perhaps even a weighty factor. But it is not conclusive on its own.

107. The Court must look at all the relevant facts of a given case in an attempt to balance between the interests of the community (including international comity) and those of the individual (especially one's dignity as a human person). In every case, the Court asks itself whether the treatment which threatens to be inflicted upon a person is of such a severity as to amount to the debasement or degradation of one's status as a human being.

108. In the present case, Mr. Pun stresses the following:-

(1) Mr. Ubamaka committed his offence when he was 27 years old. He is now 45 years old.

(2) Mr. Ubamaka has been in prison for his offence for some 16 years. He has expiated his crime.

(3) Although he incurred 11 disciplinary reports between 1994 and 2002, Mr. Ubamaka thereafter made an effort to turn his

life around. He attended religious gatherings and became a model prisoner.

(4) To be returned to Nigeria, only to risk being detained, tried and sentenced to at least 5 years' imprisonment in relation to the same offence, would self-evidently constitute a severe mental and psychological blow to Mr. Ubamaka. The threat alone of such a future could well induce fear and anguish in him as a human being.

109. Mr. Cooney, on the other hand, argues that Mr. Ubamaka is simply making bare assertions about his likely mental state. There is (Mr. Cooney says) no hard evidence to support these.

110. In my view, having regard to the number of years Mr. Ubamaka has already spent in prison, it would obviously be severely frustrating to him as an individual and his efforts to improve himself to have to face yet another trial and imprisonment in relation to precisely the same conduct.

111. Mr. Ubamaka has paid his "dues" to society by reason of his long imprisonment here. He has turned a new leaf and is a different person from the younger self who foolishly committed a crime. In all the circumstances, to deport Mr. Ubamaka at some point in the future to face the real risk of re-trial in Nigeria would, I think, be a cruel blow, amounting to inhuman treatment of a severity proscribed by the HKBORO, ICCPR and CAT.

112. Mr. Cooney submits that, if I arrive at such a conclusion, I should still not quash the Deportation Order. This is because (Mr. Cooney

argues) technically I am not reviewing an act or decision involving double jeopardy or inhuman treatment. I am only being asked (Mr. Cooney says) to review a Deportation Order in respect of which, prior to this late judicial review, Mr. Ubamaka never raised issues of double jeopardy or inhuman treatment.

113. I do not accept the argument. I do not think that the Court is as constrained as Mr. Cooney contends. Again the Court must look to the practical reality and substance of the present situation.

114. The Deportation Order could not be executed immediately because of a lack of transfer arrangement between Hong Kong and Nigeria. Mr. Ubamaka had to serve his sentence, before the Deportation Order could be executed. During all that time, up to and including his release, the Deportation Order hung over him like a sword of Damocles. The Deportation Order had (and has) a continuing effect on his life, in particular his ability to move about as he pleased following release.

115. In those circumstances, the Court is entitled to take account of all relevant circumstances, including those now prevailing at the time of this judicial review, in assessing whether the Deportation should remain in force in relation to Mr. Ubamaka. One has to consider and re-consider the situation in light of material events as and when they unfold.

116. I do not think that anyone can legitimately claim to be taken by surprise by the way that this application has proceeded. The Notice of Judicial Review signalled that double jeopardy and inhuman treatment were to be issues before the Court. The Director could (if he wished) by affidavit state such reasons (even additional reasons) in justification of the

Deportation Order as he wished. As for evidence, it was open to the parties (including the Director) to put in such material on the issues of double jeopardy and inhuman treatment as might have been deemed appropriate.

117. There is no impediment or unfairness to the Court dealing with the substantive issues as all along made known to the Government. On the contrary, far from there being an impediment, Mr. Cooney has on behalf of the Director coped ably, arguing all issues in a measured and balanced manner that has greatly assisted the Court.

118. For the above reasons, in consequence of my conclusion on the application of HKBORO Art.3, ICCPR Art.7 and CAT Art.16, I consider that the Deportation Order should be quashed. In my judgment, it would be unlawful (in the sense of being contrary to those articles) now to act upon the Deportation Order by returning Mr. Ubamaka to Nigeria.

C. Issue 3: Was administrative detention unlawful?

119. Mr. Ubamaka was administratively detained after his release from prison in December 2007. He applied to be released on recognisance in early January 2008. But that was refused and he was not released on recognisance until after he applied for judicial review in late August 2008. Thus, he was administratively detained for a period of about 8 months. He seeks a Declaration that such detention was unlawful.

120. Mr. Cooney contends that the question of the unlawfulness of Mr. Ubamaka's detention is now academic, since he has been free on recognisance since late August 2008. On this I do not agree. If the

detention were unlawful, Mr. Ubamaka may be entitled to make a civil claim against the Government for false imprisonment. Thus, it cannot be said that this issue has no meaningful consequence.

121. As we have seen, the Director justified his refusal to release Mr. Ubamaka on the following principal grounds:-

(1) Given the seriousness of the offence which he was convicted, Mr. Ubamaka posed a threat to law and order in Hong Kong.

(2) There was a risk of Mr. Ubamaka absconding.

(3) Mr. Ubamaka's deportation could be effected within a reasonable time.

122. In my view, none of the reasons given by the Director for his refusal are valid.

123. There is no evidence that, upon release from prison, Mr. Ubamaka continued to pose a threat to law and order here. It is true that the offence which he had committed some 16 years ago was a serious one. But the prison reports suggested that he was a reformed man in 2008. Indeed, towards the end of his prison term, his behaviour was regarded as sufficiently exemplary as to earn him early release into society.

124. Given that Mr. Ubamaka was applying to remain here and not to be deported, it would be odd if he were to abscond. That would put an end to any prospect of being allowed to stay here. He would be more likely (and it would plainly be in his self-interest) to comply with any conditions of release, rather than disappear. There was no evidence of a real risk of Mr. Ubamaka absconding.

125. No grounds are stated for the Director's belief that deportation could be effected within a reasonable time. No particular time period in which deportation was expected to be effected was stated. Mr. Ubamaka had made his claims in relation to refugee status in March 2006 and in relation to the CAT in March 2007. He had been interviewed several times prior to his release. More interviews were apparently scheduled for April 2008. But until August 2008 no indication appears to have been given to him as to approximately when he might expect a decision.

126. In the circumstances, the Director's reasons for detention seem to me inadequate. There was no transparency about the likely length of such detention.

127. While he has a power to detain Mr. Ubamaka pending deportation, that power must only be exercised over a reasonable period and with proper justification. See *Ex parte Hardial Singh* [1984] 1 WLR 074 (Woolf J). In particular, the grounds and procedure for such detention must be certain and accessible to a detainee. See *A v. Director of Immigration* [2008] 4 HKLRD 752 (CA).

128. In my judgment then, Mr. Ubamaka's detention between his release from prison in December 2007 and his release on recognisance in August 2008 was unlawful.

IV. CONCLUSION

129. The Deportation Order is quashed. Deporting Mr. Ubamaka at this time or in the future under the Deportation Order would violate HKBORO Art.3, ICCPR Art.7 and CAT Art.16(1).

130. There will be a Declaration that Mr. Ubamaka's detention between 27 December 2007 and 23 August 2008 was unlawful.

131. In the hearing before me, Mr. Pun has studiously confined his submissions on the CAT to the anguish that would afflict Mr. Ubamaka if he were tried a second time in Nigeria. I note, however, that Mr. Ubamaka has also based his CAT claims on the possibility of ill-treatment by prison officers in Nigeria.

132. Those latter allegations of Mr. Ubamaka may or may not form part of the matters to be determined in the parallel judicial review for which Saunders J has given leave. Indeed, such parallel proceedings may or may not be academic in consequence of my decision here.

133. For the avoidance of doubt, this Judgment should not be taken as having decided anything in relation to Mr. Ubamaka's alternative CAT claim of possible physical or mental torture or inhuman treatment from officers in Nigerian prisons. Nor should I be taken as having made any ruling on whether the parallel judicial review is or is not rendered academic by this Judgment.

134. I shall hear the parties on costs and consequential orders.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr Hectar Pun, instructed by Messrs Tso Au Yim & Yeung, for the Applicant

Mr Nicholas Cooney, instructed by the Department of Justice, for the Respondents