



THE  
**LAW SOCIETY**  
OF HONG KONG  
香港律師會

**An outline of topics in the second report of the HKSAR for the  
United Nations Human Rights Council Universal Periodic Review**

**The Law Society of Hong Kong's Submissions on the  
Convention Against Torture and Other Cruel, Inhuman and Degrading  
Treatment or Punishment (CAT)**

1. This paper provides an overview of previous submissions made by the Law Society of Hong Kong in relation to the CAT.

**Refugee Status Determination (RSD)**

2. The Law Society suggested that the Administration should introduce a coherent and comprehensive system for contemporaneous assessment of both torture claims made under CAT and claims for refugee status filed with the United Nations High Commissioner for Refugees (UNHCR) under the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention). As the Refugee Convention does not apply to Hong Kong the Government has stated that it has no obligation to admit persons seeking refugee status or to handle RSD applications.
3. The Law Society has also made the following observations:
  - (a) The UNHCR assessment process is not amenable to judicial scrutiny. Having one standard for the screening of a person under the CAT and another for RSD by a body immune from challenge in the Courts is a serious anomaly.
  - (b) There have been many cases where claimants have made refugee and CAT claims, or where claimants have made a CAT claim first, and when this fails launched a refugee claim, or vice versa. The increase in the number of such claims and the UNHCR's lack of resources increases the burden on the UNHCR. It gives such claimants "2 bites at the cherry". Many claimants who fail under the CAT cannot

be removed from Hong Kong because they immediately put in an application to the UNHCR in order to prolong their presence in Hong Kong.

(c) Since the HKSAR must interview all CAT claimants, if a decision on RSD can be made based on the same interview process, the HKSAR can take control of the entire process and put in place a comprehensive legislative framework. This would include:

- basic screening legislation, including the establishment of an independent tribunal
- legislation governing immigration status pending a decision
- legislation on related issues such as provision of social assistance during the process.

4. The Administration has only introduced a scheme for CAT claims and has refused to conduct a complete review of the system to include asylum seekers. Some claimants have exploited weaknesses between the two systems and exploit poor decision-making by making legal challenges. The Law Society believes the current system prevents a holistic approach which results in unnecessary duplication and waste of resources. The Administration should reconsider its position regarding the extension of the Refugee Convention so as to speed up the RSD process.

#### **Ability of claimants to seek employment**

5. There are refugees in Hong Kong who may have no prospect of resettlement, yet they are not permitted to work in Hong Kong. Similarly, the plight of those successful CAT claimants (and stateless individuals) has not been considered. It is preferable to allow this group to be allowed to take up employment and engage in business and thus contribute to society rather than leave them in a state of near destitution or reliant on government assistance.

#### **Immigration (Amendment) Bill 2011**

6. The Administration introduced the Immigration (Amendment) Bill 2011 into the Legislative Council on 13 July 2011, in order to provide a statutory framework for determining claims made by persons in Hong Kong for protection under Article 3 of CAT against expulsion, return or extradition of the claimant to countries in which

they would be in danger of being subjected to torture. The Bill was passed by the Legislative Council on 13 July 2012.

### **Court of Final Appeal judgment in Ubamaka**

7. On 21 December 2012 the Court of Final Appeal (CFA) handed down its judgment in *Ubamaka Edward Wilson v. Secretary for Security and Director of Immigration* (FACV 15/2011). (Ubamaka)
8. Article 3 of the Bill of Rights states: “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*” (referred to as CIDTP in the CFA judgment).

In this case, the Secretary for Security and the Director of Immigration had asserted that claims under Article 3 did not have to be considered before removing a person from Hong Kong, citing a reservation in section 11 of the Hong Kong Bill of Rights Ordinance relating to decisions affecting “*entry into, stay in and departure from*” the HKSAR.

9. The CFA found that the right not to be subjected to torture and CIDTP was absolute and that the Director of Immigration’s reservation was not intended to and could never detract from this prohibition.
10. In response to the CFA judgment, the Law Society issued a statement (attached) dated 18 February 2013, highlighting that as a result of the *Ubamaka* judgment, CAT claimants may also seek protection under Article 3 of the Bill of Rights, in addition to CAT claims and claims under the Refugee Convention, effectively allowing them to have a “third bite of the cherry”. The Law Society invited the Administration to state whether it will consider combining the tests for torture, CIDTP and RSD so as to put in place a fair and legally comprehensive system to meet its obligations under the applicable laws.
11. The United Nations Human Rights Council is invited to take note of the Law Society’s observations on the administration of the CAT in Hong Kong.

**The Law Society of Hong Kong**

**2 April 2013**

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## **Law Society of Hong Kong**

### **Statement**

#### *Court of Final Appeal Judgment*

*on the case of*

*Ubamaka Edward Wilson v Secretary for Security and Director of Immigration*

1. On 21 December 2012 the Court of Final Appeal (“CFA”) handed down its judgment in *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration*<sup>1</sup> (“CFA judgment”).

#### **Background**

2. Mr. Ubamaka, a convicted drug trafficker of Nigerian origin, was sentenced to 24 years of imprisonment. He was subsequently released after serving two-thirds of his sentence and was then immediately placed under administrative detention under Section 32 of the Immigration Ordinance pending his deportation from Hong Kong. He brought judicial review proceedings to challenge the validity of the Director of Immigration’s deportation order on constitutional grounds under Article 3 of the Hong Kong Bill of Rights (“**Bill of Rights**”) in the Hong Kong Bill of Rights Ordinance (“**HKBORO**”, Chapter 383 of The Laws of Hong Kong). Mr. Ubamaka claimed he would face imprisonment again, if he was deported to Nigeria, in relation to the same offence for which he had already served his sentence in Hong Kong, thus he was facing “double jeopardy” for the same crime.
3. The CFA unanimously dismissed his appeal.

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<sup>1</sup> FACV 15/2011

4. Mr. Ubamaka has made claims:
- a) to the United Nations High Commission on Refugees (“UNHCR”) under the United Nations Refugee Convention (“Refugee Convention”), which claim has failed;
  - b) under Article 3 of the Bill of Rights, which claim has also failed as a result of the CFA judgment; and
  - c) under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which claim is being separately pursued.

#### **Point highlighted by CFA judgment**

5. Article 3 of the Bill of Rights states:
- “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”* (referred to as “CIDTP” in the CFA judgment).
6. Of note in relation to the conduct of the Ubamaka case, the Secretary for Security and the Director of Immigration had asserted that claims under Article 3 of the Bill of Rights did not have to be considered before removing a person from Hong Kong. The Administration relied on a reservation in section 11 of the HKBORO relating to decisions affecting “*entry into, stay in and departure from*” the HKSAR, in effect claiming the Director of Immigration’s decisions on the right to enter and remain in Hong Kong could be made and executed without regard to the protections afforded by the Bill of Rights.
7. Even though Mr. Ubamaka failed in his appeal, the CFA’s judgment provided an analysis of the Article 3 of the Bill of Rights and section 11 on immigration legislation in the HKBORO.
8. The CFA found that the right not to be subjected to torture and CIDTP was absolute – it is a “*universally minimum standard*” – and that the Director of Immigration’s reservation was not intended to and could never detract from this prohibition. The suggestion made by the Secretary of Security and the Director of Immigration referred to in paragraph 6 above was described by the CFA as “*deeply unattractive*”.

#### **Law Society’s position**

9. When the Administration introduced its administrative scheme to process claimants under CAT, the Law Society advocated that the Administration should take a sensible and pragmatic step and adopt a comprehensive and procedurally

fair system of assessment. It was noted many claimants made applications under CAT and separately to the UNHCR under the Refugee Convention. The Law Society has pointed out that the decision to focus only on the CAT in the Immigration (Amendment) Ordinance 2012 means many claimants have “*two bites of the cherry*”; one under the CAT and the other under the Refugee Convention.

10. The Administration had to re-screen hundreds of CAT claimants by offering them free legal representation as a result of another earlier judgment in *FB v Director of Immigration & Anor*<sup>2</sup> which found that the system then in place was procedurally unfair and not in compliance with the CFA’s previous ruling in *Secretary for Security v Prabakar*<sup>3</sup>.
11. As a result of the Ubamaka case, it now appears that CAT claimants may also seek protection under Article 3 of the Bill of Rights, effectively getting a “*third bite of the cherry*”.
12. The Law Society considers that it is desirable and in the best interest of Hong Kong to have in place a sound and non-porous screening system. The Law Society invites the Administration to advise the community of its views of the impact of the Ubamaka judgment and state whether it will consider combining the tests for torture, CIDTP and refugee status determination so as to put in place a fair and legally comprehensive system to meet its obligations under the applicable laws.

**18 February 2013**

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<sup>2</sup> [2009] 2 HKLRD 346

<sup>3</sup> (2004) 7 HKCFAR 187