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* [1] ("**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.

[1] 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*[2] 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*[3].

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.

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[2] [2009] 2 HKLRD 346
[3] (2004) 7 HKCFAR 187