



## Ubamaka Edward Wilson v. Secretary for Security and Another

FACV No. 15 of 2011

**Country:** China

**Region:** Asia

**Year:** 2012

**Court:** Court of Final Appeal of the Hong Kong Special Administrative Region

**Health Topics:** Prisons

**Human Rights:** Freedom from torture and cruel, inhuman or degrading treatment

### Facts

In 1991, the appellant, a Nigerian national, was arrested at the Hong Kong airport for drug trafficking, and subsequently sentenced to 24 years imprisonment. During this time, he applied several times to the Hong Kong and UK governments to be allowed to serve his sentence in Nigeria. However, in 1998 he desisted after becoming aware of a new law Nigeria had enacted which provided for Nigerian nationals who were found guilty of drug trafficking in a foreign country to be guilty of the offence under that law and liable to imprisonment of five years.

In 1999, a deportation order was issued by the Secretary for Security with the destination country deemed to be Nigeria. In 2006, the appellant applied to the United Nations High Commissioner for Refugees in Hong Kong for refugee status, but the application was rejected. In 2007, following his early release from prison for good behaviour, he was placed on administrative detention pending his deportation.

Following his release of recognizance in 2008, the appellant brought a case challenging his deportation and his administrative detention, citing constitutional grounds. He challenged his deportation on the grounds that, should he be returned to Nigeria, he would face a serious risk of prosecution and punishment under the Nigerian law for the same conduct – drug trafficking – which had led to his conviction and incarceration for 16 years in Hong Kong, amounting to double jeopardy and inhuman or degrading treatment.

### Decision and Reasoning

The Court rejected the applicant's claims and upheld his deportation back to Nigeria.

Section 11 of the Hong Kong Bill of Rights Ordinance (‘Ordinance’) provided that certain rights guaranteed by the Bill of Rights were not applicable to persons who had no right to enter or remain in Hong Kong. However, the court determined that the application of such immigration legislation could not prevail at all times over certain human rights provisions, including the right not to be subjected to torture. The Court reasoned that certain rights are non-derogable and absolute even when they may be in conflict with immigration legislation. Contrarily, the court did not deem the double jeopardy risk to be an absolute right.

Although the right to be free from torture was held to be nonderogable, the court determined that there was no real threat that the appellant would be subjected to torture if he was sent back to Nigeria. The appellant did not argue that there was a risk of his being subjected to torture in a Nigerian prison but instead alleged that the risk of him facing trial and imprisonment again in Nigeria for the same offence amounted to torture or cruel, inhuman and degrading treatment. The court concluded that the risk and severity criteria were not met.

### Decision Excerpts

‘In my judgement, the clear words of section 5 establish the non-derogable character of the right not to be subjected to torture or CIDTP protected by BOR Art 3 [...] Such jurisprudence shows that the absolute character of the protection against torture and CIDTP is an internationally accepted standard or, as Lord Steyn puts it, ‘a universal minimum standard’.’ Para. 114.

‘I do not think that the ‘severe mental and psychological blow’ and the severe ‘frustration’ that he might experience at the prospect of facing ‘yet another trial and imprisonment in relation to precisely the same

conduct' as found by the Judge comes anywhere near to meeting the threshold requirements discussed in Section J.2 above. Reyes J cited Soering but his Lordship does not appear to have focussed on the very high threshold of the requirements for establishing CIDTP, exemplified by instances where the mistreatment involves 'actual bodily injury or intense physical or mental suffering' or mistreatment of an intensity 'capable of breaking an individual's moral and physical resistance' emphasised in the cases cited above. Moreover, it may be that Reyes J was influenced by his erroneous belief that the appellant faced a minimum of five years' imprisonment if convicted. The Nigerian law does not prescribe any such minimum. Para. 182.

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