UBAMAKA EDWARD WILSON v. SECRETARY FOR SECURITY AND ANOTHER [2012] HKCFA 87; (2012) 15 HKCFAR 743; [2013] 2 HKC 75; FACV 15/2011 (21 December 2012)

FACV No. 15 of 2011

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 15 OF 2011 (CIVIL)

(ON APPEAL FROM CACV NO. 138 OF 2009)

Between :

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

Before : Chief Justice Ma, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Tang PJ and Lord Walker of Gestingthorpe NPJ

Dates of Hearing: 4 to 6 December 2012

Date of Judgment : 21 December 2012

J U D G M E N T

Chief Justice Ma:

1. Among other important issues, this appeal addresses the effect of s.11[1] of the Hong Kong Bill of Rights Ordinance Cap 383 ("HKBORO") when seen against non-derogable and absolute rights contained in Article 3 of the Bill of Rights[2] (we are concerned only with the aspect of

cruel, inhuman or degrading treatment or punishment). I am in agreement with the judgment of Ribeiro PJ and with the conclusion (on the facts) that the present appeal should be dismissed.

2. I wish only to emphasize one point in his judgment. The width of s.11 of HKBORO (preserving the effect of any immigration legislation governing entry into, stay in and departure from Hong Kong when generally seen against the Bill of Rights) must be qualified, as a matter of statutory interpretation, by what is contained in the other parts of that Ordinance. Reference is made in the judgment of Ribeiro PJ to s.5. The conclusion (in para 115 below) that s.11 "must be understood to exclude the application of HKBORO and BOR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong except insofar as the non-derogable and absolute rights protected by BOR Art 3 are engaged", is therefore a principled one, dependent on a true and purposive construction of the relevant statutory provisions. It is also consistent with an approach that recognizes the importance placed in Hong Kong on non-derogable and absolute rights. The approach of the respondents that a person (not having the right to be in Hong Kong) was liable to be deported to a place even where it could manifestly be demonstrated that he would be subject to cruel, inhuman or degrading treatment or punishment in that place, was a deeply unattractive submission.

Mr Justice Chan PJ:

3. I agree with the judgment of Mr Justice Ribeiro PJ and would like to add just a few words on the construction of s.11 of the BORO.

4. Section 2(2) of the BORO provides that the BOR is subject to Part III which includes s.11. Section 11 disapplies the BORO in the case of persons who have no right to enter and remain in Hong Kong, but this is restricted to the exercise of the Director's powers and discretions under immigration legislation governing entry into, stay in and departure from Hong Kong.

5. One of the central issues in this case is the scope of this reservation. Notwithstanding the language of s.11, I do not accept that it can have the effect (as submitted by the Director) of denying persons having no right to enter and remain in Hong Kong all the rights under the BOR. Section 11 must be construed in its context, adopting a generous and purposive approach. (See *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.)

6. The context relevant to the construction of s.11 includes the purpose and object of the BORO. This Ordinance was enacted for the purpose of implementing a treaty obligation by incorporating into the domestic law of Hong Kong the provisions of the ICCPR as applied to Hong Kong and is aimed at providing for the protection of these fundamental human rights, which are now entrenched by BL art 39. The relevant context also includes the other provisions in the BORO, in particular s.5, and the nature and substance of the rights which are to be affected.

7. Some of the rights protected by the BOR are, by reason of their nature and the consequence of their violation, absolute while other rights are, either expressly or by implication, susceptible to lawful restrictions which must satisfy the necessity and proportionality requirements. In the present case, we are only dealing with art 3 (the right to freedom from **torture** or cruel,

inhuman or degrading treatment or punishment) which is absolute. In *Soering v United Kingdom* (1989) 11 EHRR 439, para.88, the European Court of Human Rights (having regard to art 15 of the European Convention on non-derogation) referred to art 3 of the European Convention (the equivalent of BOR art 3) as an "absolute" prohibition on **torture**, etc. Similarly, in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para.40, Lord Steyn described this right as "absolute". In the BORO, s.5 (which reflects ICCPR art 4 and the European Convention art 15) provides that art 3 (among other rights) is not derogable even in times of public emergency threatening the life of the nation. This highlights the importance of art 3 as an absolute and non-derogable right. In my view, this is a very material consideration in the construction of s.11.

8. Thus, when s.11 is construed in its context, I do not believe that it could have been the intention of the legislature that persons having no right to enter and remain in Hong Kong, while undoubtedly subject to immigration controls, would, by s.11, be deprived of the absolute right under art 3 which is also stated as non-derogable under s.5. Such a construction would be contrary to the purpose and object of incorporating ICCPR into our domestic law and incompatible with s.5.

9. I should add that it does not necessarily follow from the conclusion that s.11 does not preclude reliance on art 3 by persons having no right to enter and remain in Hong Kong that persons within this category can rely on the other rights which are also stated as non-derogable under s.5(2). There can be reasons for their inclusion in s.5(2) (e.g. art 7 may be considered as irrelevant to the legitimate control of the state of national emergency and art 15 as impossible for derogation, see General Comment No. 24). Whether these persons can rely on these other rights notwithstanding s.11 has to be decided according to the circumstances of each case.

Mr Justice Ribeiro PJ :

10. This appeal raises important issues concerning the constitutional validity, scope and effect of the reservation concerning immigration legislation contained in section 11 of the Hong Kong Bill of Rights Ordinance[3] ("HKBORO"). In particular, it raises issues regarding the effect of that reservation in relation to those articles of the Bill of Rights ("BOR") which provide protection against double jeopardy and against cruel, inhuman or degrading treatment or punishment. The appellant seeks to challenge the validity of a deportation order made against him, invoking those rights.

A. The course of events

11. On 11 December 1991, the appellant, a Nigerian national, travelled to Hong Kong from Nepal and was arrested at the airport for drug trafficking. He was then aged 27. He was convicted and sentenced to 24 years' imprisonment.

12. While serving his sentence, he unsuccessfully made several applications to the Hong Kong and British Governments to be allowed to serve his sentence in Nigeria. However, in 1998 he desisted when he learned of a new law in Nigeria, namely, section 22 of the National Drug Law Enforcement Agency Act ("the Nigerian law"),[4] which provides as follows:

(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 of 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.

Persons convicted are made liable to imprisonment for a term of five years without option of a fine and their assets made liable to forfeiture.

13. On 5 July 1999, the Secretary for Security ("the Secretary") issued a deportation order against the appellant under section 20(1)(a) of the Immigration Ordinance.[5] Although no destination is specified, it is clear that deportation under the order would be to Nigeria.

14. As the date of his release neared, the appellant applied on 7 September 2006 to the United Nations High Commissioner for Refugees in Hong Kong claiming refugee status, citing fear of being subjected to double jeopardy by prosecution under the Nigerian law. His application was rejected in December 2007. In March 2007, he also lodged a claim under the Convention Against **Torture** which is being separately pursued.

15. On 27 December 2007, the appellant was released from prison for good behaviour after having served two-thirds of his sentence. He was, however, immediately placed in administrative detention under section 32 of the Immigration Ordinance pending his removal from Hong Kong.

16. On 25 July 2008, the appellant brought judicial review proceedings to challenge the validity of both the deportation order and his administrative detention on constitutional grounds.

17. He was released on recognizance on 23 July 2008, a few days after the Court of Appeal had held in a different case[6] that detention under section 32 violated BOR Art 5(1)[7] because the grounds and procedure for detention were not sufficiently certain and accessible.

B. The grounds of the challenge

18. The appellant challenges the deportation order on the basis that, if deported to Nigeria, he will 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. Execution of the deportation order, he submits, would violate his constitutionally protected rights against being subjected to double jeopardy and against being subjected to cruel, inhuman or degrading treatment or punishment ("CIDTP").

19. The provisions in the BOR relied on by the appellant have the status of constitutionally

guaranteed rights by virtue of Article 39 of the Basic Law which materially provides:

"Article 39

The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

20. It will be necessary to consider more closely the provisions of Article 39, but for the present, it suffices to note that the appellant's first ground of challenge (" the double jeopardy ground") is founded on Article 11(6) of the BOR which reflects Article 14(7)[8] of the International Covenant on Civil and Political Rights ("ICCPR")[9] and provides:

"BOR Art 11(6)

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."

21. The second ground of challenge – based on the prohibition of cruel, inhuman or degrading treatment or punishment ("the CIDTP ground") – is founded on Article 3 of the BOR which reflects Article 7[10] of the ICCPR and relevantly states:

"BOR Art 3

No one shall be subjected to **torture** or to cruel, inhuman or degrading treatment or punishment…"

22. A third ground which is sought to be raised involves the contention that a rule prohibiting *refoulement* (a compulsory return) to face CIDTP constitutes a norm of customary international law ("CIL") which has been incorporated into the common law of Hong Kong and provides an independent basis for nullifying the deportation order. I shall call this "the CIL ground".

23. The appellant's challenge to the lawfulness of his detention need not be dealt with on this appeal. Reyes J[11] held that such detention was unlawful because he was bound by the Court of Appeal's decision in *A (**Torture** Claimant) v Director of Immigration*.[12] Both in the Court of Appeal[13] and before this Court, the respondents have not sought to upset that conclusion. The Court was informed, however, that the correctness of the abovementioned decision is subject to challenge in a pending case.[14] Judgment was in fact handed down by the Court of Appeal on the first day of the hearing of this appeal. This Court was not addressed on it and I say nothing about that decision in this judgment. It is unnecessary to discuss criticisms made in the Court of Appeal of certain alternative grounds relied on by Reyes J.

C. The decisions in the Courts below

C.1 The double jeopardy ground

24. Both Reyes J[15] and the Court of Appeal[16] accepted that if deported to Nigeria, the appellant would face what was termed "practical double jeopardy".

25. Fok J[17] (with whom the other members of the Court of Appeal agreed), citing *Yeung Chun Pong v Secretary for Justice* in the Court of Appeal,[18] distinguished between two aspects of the rule against double jeopardy. First, there is the common law *autrefois convict* (or *autrefois acquit*) plea in bar which is a defence against a subsequent prosecution and which only arises in the narrowly defined situation where the elements of the second offence are the same as or included in the original offence. Secondly, there is the wider common law rule against double jeopardy whereby the Court has power to stay proceedings as an abuse of process if the subsequent charge involves an attempt to re-prosecute a person previously convicted or acquitted on the same or substantially the same facts. That distinction has been accepted in this Court.[19]

26. While the Court of Appeal held that the appellant's situation did not give rise to a plea of *autrefois convict*, it was accepted that his circumstances brought him within the wider double jeopardy concept since any potential liability under the Nigerian law would arise out of substantially the same facts relating to his drug-trafficking as had led to his conviction and punishment in Hong Kong.

27. Notwithstanding that conclusion, Reyes J[20] and the Court of Appeal[21] both decided that the appellant could not in law invoke the protection of BOR Art 11(6) against execution of the deportation order because such protection has been precluded by section 11 of HKBORO which provides:

"As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation." (**[illegible]**section 11")

28. The appellant was a person "not having the right to enter and remain in Hong Kong" so that the deportation order, having been made under section 20(1)(a) of the Immigration Ordinance, was held to be unaffected by the provisions of HKBORO, including BOR Art 11(6).

29. Reyes J[22] and the Court of Appeal[23] were again *ad idem* in holding that a second reason for concluding that the appellant could not rely on BOR Art 11(6) was that its provisions only provide protection against double jeopardy within a single state or jurisdiction and do not operate transnationally.

30. Contrary to Reyes J's view, the Court of Appeal held that a third reason exists for concluding that BOR Art 11(6) does not avail the appellant. It decided that BOR Art 11(6) prohibits:

"...a subsequent prosecution for the same offence and not one for the same actions, thereby restricting the protection to a situation in which the strict plea of *autrefois acquit* or *autrefois*

convict would be available but not to one in which the wider principle of double jeopardy would be available."[24]

31. Reyes J, had rejected this narrower view on the basis that protections under the Covenant should receive a generous construction.[25]

C.2 The CIDTP ground

32. As we have seen, BOR Art 3 lays it down that "No one shall be subjected to **torture** or to cruel, inhuman or degrading treatment or punishment…"

33. Reyes J and the Court of Appeal[26] were both of the view that there is no basis in the present case for suggesting that the appellant faces any risk of **torture**. As Reyes J stated (having considered the definition of "torture" contained in the Convention Against **Torture**[27]):

"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."[28]

34. Mr Richard Gordon QC, appearing[29] for the appellant, does not seek to suggest otherwise. The case has therefore been argued on the footing that, given the risk of prosecution under the Nigerian law, deporting the appellant to Nigeria would amount to CIDTP prohibited under BOR Art 3.

35. Reyes J recorded a concession made on behalf of the respondents that Section 11 does not displace reliance on BOR Art 3 as follows:

"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."[30]

36. His Lordship therefore went on to consider the facts and concluded that execution of the deportation order exposing the appellant to a risk of being re-prosecuted and punished under the Nigerian law would constitute CIDTP. I return later[31] to a consideration of those facts.

37. The Court of Appeal reversed Reyes J on two grounds, one legal and the other factual. It held first, that as a matter of law, the concession had been wrongly made and that Section 11 precludes reliance on BOR Art 3. While it was clear that prohibition of **torture** was itself *jus cogens*, the Court of Appeal held that it had not been established that the same is true of the prohibition against CIDTP, much less true in relation to *refoulement* to CIDTP.[32] The Court of Appeal went on to hold that even if the prohibitions stipulated by BOR Art 3 are *jus cogens* as a matter of CIL, section 11 still prevails, excluding reliance on that Article by persons who have no right to enter and remain in Hong Kong in circumstances covered by the section. It held that this was so because the Court, operating at the domestic level, is bound to apply Article 39 of the

Basic Law and section 11 regardless of what the position might be on the international plane.[33]

38. Secondly, the Court of Appeal disagreed with Reyes J on the facts and held that the appellant's circumstances did not disclose anything approaching the level of ill-treatment necessary to constitute CIDTP. It accordingly held that BOR Art 3 did not avail the appellant in his challenge to the deportation order.

C.3 The CIL ground

39. The CIL ground involving the asserted existence of a CIL norm prohibiting *refoulement* to face CIDTP[34] was not raised below. It is sought to be argued for the first time in this Court.

C.4 The remitter issue

40. Mr Gordon also raises for the first time in this Court a question relating to what he describes as "a remedy". He proposes that if the Court should not be satisfied that the facts relied on here and in the courts below constitute CIDTP, that the case should be remitted to the Director for him to consider whether CIDTP is made out on the basis of a different set of facts relating to conditions in Nigerian prisons which are said to be appalling. I shall refer to this as "the remitter issue".

D. The approach in this judgment

41. I propose in this judgment to deal:

(a) in Section F below with the constitutionality of section 11;

(b) in in Section G with the scope and effect of section 11;

(c) in Section H with the consequences of the true construction of section 11;

(d) in Section I with the double jeopardy ground;

(e) in Section J with the CIDTP ground;

(f) in Section K with the CIL ground; and finally

(g) in Section L with the remitter issue.

E. A municipal law question

42. Before proceeding to deal with each of those issues, a preliminary matter, rightly emphasised by the respondents, ought to be addressed. While certain provisions of the ICCPR will have to be examined as part of the context, the questions with which we are concerned are to be resolved under the domestic law of Hong Kong and not by any purported direct application the provisions

of that treaty or by any purported adjudication of an issue on the plane of international law.

43. It has long been established under Hong Kong law (which follows English law in this respect), that international treaties are not self-executing and that, unless and until made part of our domestic law by legislation, they do not confer or impose any rights or obligations on individual citizens.[35] It is a principle of construction that where a domestic statute is ambiguous and is capable of bearing different meanings which may in turn conform or conflict with the treaty, the court will presume that the legislature intended to legislate in accordance with applicable international treaty obligations.[36] But where the statute is clear, the court's duty is to give effect to it whether or not that would involve breach of a treaty obligation.[37] It is furthermore clear that the courts do not have jurisdiction to adjudicate upon rights and obligations arising out of transactions between sovereign states.[38]

44. In a passage which addresses all of the foregoing points in the context of the European Convention on Human Rights ("ECHR"), Lord Hoffmann stated:

"... the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (the International Tin Council case). Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283: 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention].' But for present purposes the important words are 'when I am free to do so'. The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not."[39]

F. The appellant's challenge to the constitutional validity of HKBORO section 11

F.1 The content of section 11

45. Section 11 provides:

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

46. Whether in any particular case section 11 has the effect of precluding someone's reliance on a right protected by the BOR may raise questions of law and construction, as well as questions of fact.

(a) Insofar as the Government asserts that section 11 has such effect, it bears the burden of satisfying the Court that factually and as a matter of law the person who seeks to rely on a relevant right is a person who does not have the right to enter and remain in Hong Kong. This is important because section 11 does not apply to Hong Kong permanent residents with a right of abode nor to Hong Kong residents and others who are lawfully entitled to be in Hong Kong.

(b) The Government will also have to satisfy the Court that it is seeking, as against that person, lawfully to enforce duties or to exercise powers arising under immigration legislation which govern entry into, stay in and departure from Hong Kong and that such duties or powers are properly applicable on the facts. This is so since section 11 is inapplicable where other powers or duties are being exercised or enforced.

(c) The person claiming protection will have to identify the BOR rights invoked and adduce evidence supporting his claim that such rights would be infringed if the Government were to proceed with its enforcement of the relevant duties or exercise of the relevant powers. If a section 11 power is exercised without engaging a protected right, obviously no issue as to constitutional protection arises.

(d) If the Court is satisfied that in the case at hand, operation of the relevant provisions of the immigration legislation concerned does engage those rights, it next has to consider whether the rights potentially infringed, in the present case rights under BOR Art 3, are capable of being displaced by section 11.

(e) This last question was raised by the Court in the light of section 5 of HKBORO examined below.[40] Prior to the present hearing, the argument had proceeded on the basis that section 11 must be construed as either having the narrow meaning contended for by the appellant or as overriding *all* the rights contained in the BOR, as the respondents contend. The question whether section 11 should instead be construed as overriding some, but not all, of the BOR rights assumed major importance at the hearing. In particular, the question arose as to whether section 11 is capable of displacing the constitutional protection provided by BOR Art 3. That is a topic to which I return in Section G.

47. In the present case, there is no dispute that the appellant is a person "not having the right to enter and remain in Hong Kong", nor that the deportation order was made under section 20(1)(a) of the Immigration Ordinance which is a provision governing a person's stay in or departure from Hong Kong. The Court of Appeal held that section 11 was triggered and that it precluded reliance by the appellant on either BOR Art 11(6) as protection against double jeopardy; or on BOR Art 3 as protection against being deported to face CIDTP.

F.2 The elements of the appellant's constitutional challenge

48. The appellant contends that section 11 is unconstitutional and must either be read down or

severed from HKBORO altogether so that it does not preclude his reliance on the BOR rights invoked.[41]

49. His challenge proceeds on two alternative bases, each of which requires an examination of the interaction between (i) the reservation relating to immigration legislation ("the immigration reservation") made by the United Kingdom Government when ratifying the ICCPR in 1976; (ii) Article 39 of the Basic Law; and (iii) section 11.

50. The immigration reservation was stipulated in the following terms:

"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, their acceptance of Article 12(4) and of the other provisions 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."

51. The extension to Hong Kong of the ICCPR subject to the immigration reservation therefore meant that the Hong Kong Government reserved *mutatis mutandis* the right to continue to apply such immigration legislation governing entry into, stay in and departure from Hong Kong as it might deem necessary from time to time and, accordingly, that its acceptance of Article 12(4) and of the other provisions of the Covenant was subject to the provisions of any such legislation as regards persons not at the time having the right under the law of Hong Kong to enter and remain in Hong Kong.

52. Article 12(4) of the ICCPR provides: "No one shall be arbitrarily deprived of the right to enter his own country."

53. The text of Article 39 of the Basic Law has been set out in Section B above. For the purpose of understanding the appellant's constitutional challenge, it is sufficient to note that Article 39 provides that "The provisions of the [ICCPR] ... *as applied to Hong Kong* shall remain in force and shall be implemented through the laws of the [HKSAR]". It is common ground (and plainly correct) that the words I have italicised refer to the original application of the Covenant to Hong Kong by the United Kingdom when it ratified the ICCPR in 1976 and declared that its acceptance extended to Hong Kong. Such application was obviously subject to the stipulated reservations, including the immigration reservation.

54. The third element relevant to the appellant's constitutional challenge is section 11, the provision subject to such challenge. The respondents' position is that enactment of the HKBORO, including section 11, was the manner by which the ICCPR was duly implemented through the laws of the HKSAR as mandated by Article 39. However, the appellant argues on two alternative bases that, far from implementing the Covenant, section 11 is unconstitutional because it goes much further than the immigration reservation and impermissibly purports to cut down on the rights guaranteed by Article 39 properly construed.

F.3 The appellant's first constitutional argument

55. The premise of the appellant's first constitutional argument is that the scope of the United Kingdom's 1976 immigration reservation, and thus the scope of such reservation "as applied to Hong Kong," has long been misunderstood and given far too wide a meaning. The contention is that such reservation correctly understood:

"...isaimedat preservingthestateofaffairsbywhichthosewhodonotconcurrently holdBritishcitizenshipdidnotenjoytherighttoenter andresideinthe UK(ie,theBritishIsles),notwithstanding thatart12oftheICCPR providesfor,*interalia*,theirrighttolibertyofmovement,theirfreedom tochoosetheirresidenceandtheirrightnottobearbitrarilydeprivedof therighttoentertheirowncountry."[42]

56. The UK's concern, so it is suggested, was that the ICCPR would be taken to cover all British territories as a single "country" so that a British subject who was not given the right to enter and reside in the UK (particularly a British Asian in East Africa[43]) might claim a right under Article 12(4) not to be arbitrarily deprived of the right to enter his own country.[44]

57. The appellant submits[45] that properly construed in the light of that purpose, the effect of the immigration reservation as extended in 1976 to Hong Kong (and to each of the other British territories then existing) was that:

(a) the right to freedom of movement and of choice of residence within the territory of a state under ICCPR Art 12(1)[46] would be available "in respect only of his or her particular territory or colony – but not any other British territory";

(b) the right in Art 12(4) not to be arbitrarily deprived of the right to enter "his own country" would be available "only in respect of his or her particular territory or colony – but again not any other British territory"; and

(c) "insofar as any other provision of the ICCPR implied a like right to that reserved against in respect of arts 12(1) and 12(4), the Immigration Reservation would apply likewise and to that extent (but to that extent only)".

58. Thus, the argument runs, when Article 39 provides that the provisions of the ICCPR "as applied to Hong Kong" shall remain in force and be implemented through the HKSAR's laws, it takes effect by applying the ICCPR to Hong Kong subject to the immigration reservation narrowly construed in the manner just described. Article 39 therefore does not authorise or permit any greater inroads into the ICCPR rights which it protects.

59. Section 11 is drawn (so it is argued) in much wider terms than permitted since it is not limited in the manner indicated above. It is therefore unconstitutional and, in approaching section 11 as if it faithfully reflects the immigration reservation, the Court of Appeal is said to have fallen into error.

60. The argument that section 11's reach is too wide and therefore unconstitutional proceeds on the footing that the respondents' construction is correct and that section 11 "trumps" *all* the provisions of the BOR, including BOR Art 3 which prohibits **torture** and CIDTP. As I have already indicated, the correctness of that construction was called into question by the Court and is discussed in Section G below. However, the appellant's position is that any construction of section 11 which goes beyond the strictly narrow interpretation that he advocates exceeds what is authorised by Article 39, making section 11 unconstitutional in any event.

61. For the reasons which follow, I do not accept the appellant's first constitutional argument.

F.3.1 What is addressed by the reservation as applied to Hong Kong

62. In my view, the issues arising are not resolved by reference to what may have motivated the United Kingdom Government in 1976 when it laid down the immigration reservation while ratifying the Covenant, especially if adopting that approach involves ignoring the fundamental changes to Hong Kong's legal order which have occurred during the intervening 36 years.

63. One may readily accept that the United Kingdom was anxious in 1976 to continue to enact and enforce laws aimed at preventing an influx into Britain of citizens of its colonies and dependent territories to whom it had chosen to deny a right of abode. An important objective of the immigration reservation from its own point of view would thus have been (as the appellant submits) to prevent such a person from claiming on the basis of ICCPR Art 12(4), that he had a right to enter United Kingdom as "his own country".

64. However, to suggest that the immigration reservation must be construed as pursuing that limited objective, transplanted in some way to Hong Kong, makes little sense. Hong Kong was not faced in 1976 (or at any other time) with any threatened influx of British subjects from other British colonies or dependent territories who might, but for the immigration reservation, be able to claim a right to enter and reside in Hong Kong as their "own country". There is no reason to regard the neutralisation of ICCPR Arts 12(1) and 12(4) as the exclusive or principal reason for applying the immigration reservation to Hong Kong.

65. On the other hand, it is a matter of notoriety that in the 1970's, 1980's and 1990's, major efforts had to be made by the Hong Kong Government to fend off waves of illegal immigrants, numbering in the tens of thousands in some years, originating from the Chinese Mainland.[47] With a view to dealing effectively with such illegal immigrants and human traffickers (or "I.I.s" and "snakeheads") as they were called, the Hong Kong Government adopted robust legal measures authorising removal and deportation with associated arrest and detention powers. The immigration reservation, operating in that context, was aimed at preventing illegal immigrants from seeking to resist such measures by relying on a range of potentially applicable ICCPR rights.

66. By way of example, in *In re Hai Ho-tak and Cheng Chun-heung*,[48] section 11 was relied on in response to an application to quash a removal order as a violation of BOR Art 1 (non-discrimination), Art 14(1) (privacy, etc), Art 15(4) (liberty of parents regarding children's education), Art 20(1) (rights of children) and Art 22 (equal protection of the law). And in *Vo Thi*

Do v Director of Immigration,[49] a test case involving 1,376 former residents of Vietnam, prolonged administrative detention was challenged as a violation of Art 3 (CIDTP) and Art 5 (liberty of the person). Numerous other cases have arisen where reliance was placed on Art 19 (family rights).

67. The language of the reservation as applied to Hong Kong has been treated as apt for dealing with such claims, making acceptance of Art 12(4) "and of the other provisions of the Covenant" subject to the provisions of existing legislation and any future legislation which the Government may deem necessary to enact to govern entry into, stay in and departure by persons who do not have the right to enter and remain in Hong Kong. There is no basis for accepting Mr Gordon's submission that the immigration reservation was applied to Hong Kong with the narrow intention that it be centred on the right under ICCPR 12(4) to enter one's "own country".

68. The United Kingdom and Hong Kong Governments have acknowledged that the ICCPR reservations as extended to Hong Kong were targeted at local conditions and needs. Thus, a White Paper published in the UK on 26 September 1984 and reproduced by the Hong Kong Government in December 1984 in a document explaining aspects of the Joint Declaration stated:

"The reservations entered by the United Kingdom in respect of the application of the Covenants to Hong Kong, which are also public, took account of the realities of the social and economic conditions in Hong Kong: for example, in relation to Hong Kong the United Kingdom made reservations relating to immigration and to the deportations of aliens."

69. Moreover, when on 16 March 1990, the Hong Kong Government gazetted the draft HKBOR Bill 1990 and initiated a process of public consultation, it published a Commentary stating that the decision had been taken to introduce a draft Bill "giving effect in local law to the relevant provisions of the ICCPR, as applied to Hong Kong". The Commentary explained that previously, the ICCPR had been implemented through a combination of common law, legislation and administrative measures, a system which:

"... has not been static, but has evolved continuously through judicial interpretation of existing legislation and enactment of new laws; through developments in the common law; and through refinement of administrative practices."

70. In other words, even before enactment of HKBORO, the application of the ICCPR in Hong Kong had not been statically linked to a 1976 policy, but had undergone a process of domestication, evolving in accordance with local circumstances.

F.3.2 The reservation as applied in the HKSAR

71. The idea that the interpretation of the immigration reservation should be limited by a purposive construction founded on the United Kingdom's immigration policy in 1976 appears even more incongruous when one takes into account developments accompanying the changes to Hong Kong's legal order which took place on 1st July 1997.

72. The question of whether the provisions of the ICCPR should continue to apply in Hong Kong

was specifically addressed by the Central People's Government and the United Kingdom Government in the negotiations leading up to the Joint Declaration. Agreement that the ICCPR "as applied to Hong Kong shall remain in force" was eventually recorded in Annex I, section XIII of the Joint Declaration executed on 19 December 1984, coming into force on 30 June 1985.

73. HKBORO was enacted on 8 June 1991 and, along with other Ordinances as well as Orders in Council containing measures applied by the UK to Hong Kong, it was subjected to the vetting process prescribed by Article 160 of the Basic Law which materially states as follows:

"Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. ..."

74. The Standing Committee gave specific consideration to whether the HKBORO should be adopted as part of the laws of the HKSAR or whether the whole or any part of it should be excluded as contravening the Basic Law. The role played by the Standing Committee under Article 160 and the vetting process as reported to the Legislative Council, were described in *Democratic Republic of the Congo v FG Hemisphere Associates LLC*.[50]

75. By its Decision adopted at the Twenty Fourth Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997, the Standing Committee set out (in Annex 1 to the Decision) a list of Ordinances and subordinate legislation found to be in contravention of the Basic Law and not adopted. It also set out in Annex II, a list of specified provisions of named Ordinances and subordinate legislation similarly excluded. Certain provisions of HKBORO[51] which are not presently material were listed in paragraph 7 of Annex II as excluded provisions, but section 11 and the remaining provisions of HKBORO were adopted as consistent with the Basic Law.

76. The stated objective of the Article 160 exercise (applicable generally to the laws previously in force in Hong Kong) was to bring such laws "into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law."[52] It is this process whereby HKBORO was adopted as part of the laws of the HKSAR, consistent with the Basic Law – and not the UK's immigration policy in 1976 – that provides the operative legal context for the continued application of the ICCPR in the HKSAR.

77. The point is brought home by noting the content of BOR Art 8(4) which is the provision whereby ICCPR Art 12(4) was enacted in 1991 and adopted as part of the laws of the HKSAR in 1997. BOR 8(4) states: "No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong."

78. Thus, the BOR guarantee of the right to enter Hong Kong is limited to persons who have the right of abode in Hong Kong. There is no need to rely on section 11 to override any BOR right reflecting ICCPR Art 12(4)'s reference to "the right to enter his own country" which might

otherwise be invoked by someone without a right of abode.

F.4 The appellant's second constitutional argument

79. The appellant advances an alternative challenge to the constitutionality of section 11 which runs as follows:

(a) If the immigration reservation has a wider meaning which is coextensive with the terms of section 11 it "contravenes the object and purpose of the ICCPR and is null and void as a matter of public international law."

(b) The consequence is that "the reservation is severed from the instrument of ratification such that the author remains a party to the treaty without the benefit of the reservation."

(c) Article 39 therefore "did not incorporate the void reservation into domestic law (contrary to the finding of the Court of Appeal), and as such the HKSAR Government is not constitutionally permitted to breach the ICCPR as it applies to Hong Kong at international law."[53]

80. The contention in sub-paragraph (a) above is based on Article 19(c) of the Vienna Convention on the Law of Treaties which provides:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty."

81. The appellant argues that if the immigration reservation is read to mirror the terms of section 11 widely construed, the reservation would purport to disapply the entire ICCPR in relation to relevant provisions of immigration legislation applicable to persons not having the right to enter and remain in Hong Kong. It would purport to disapply even the prohibition against **torture** and CIDTP under BOR Art 3, thereby offending international law *jus cogens* norms and contravening the object and purpose of the Covenant.[54]

82. Since, so the argument runs, such a purported reservation is null and void, it is severed from the instrument of ratification.[55] In consequence, as a matter of domestic law:

"...the ICCPR applies to Hong Kong without the Immigration Reservation. Thus the relevant articles of the ICCPR that may be engaged in 'foreign cases' are in fact available under the ICCPR applied to Hong Kong. It follows from this that HKBORO s 11 purports to restrict the rights available under the ICCPR 'as applied to Hong Kong', and is therefore unconstitutional by reference to arts 8, 11 and 39 (read together with art 41) of the Basic Law."[56]

83. I do not accept this argument.

F.4.1 Non-justiciable issues

84. For the reasons stated in Section E above, the alternative argument depends on propositions which are not justiciable in a municipal court. The appellant invites this Court to declare that,

contrary to the belief of the United Kingdom Government (and everyone else, it would seem) when ratifying the Covenant in 1976, its immigration reservation was incompatible with the object and purpose of the treaty and therefore "null and void *as a matter of public international law*" requiring it to be "severed from the instrument of ratification."[57]

85. As previously noted, the courts do not have jurisdiction to adjudicate upon rights and obligations arising out of transactions between sovereign states on the international plane. As Lord Oliver of Aylmerton stated in *JH Rayner Ltd v Department of Trade and Industry*:[58]

"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v Sprigg* [1899] AC 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in Secretary of State in Council of *India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75: 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.'"

86. The Hong Kong courts therefore did not in 1976 and do not now have jurisdiction to pronounce upon the validity or invalidity of the UK's ratification, with or without its immigration reservation, as a matter of public international law.

87. The appellant attempts to evade this difficulty by submitting:

"Here, the Court is of course not purporting to pronounce upon the legal effect of the United Kingdom's instrument of ratification to the ICCPR (or even that of the People's Republic of China), but only upon the meaning of the words 'the ICCPR as applied to Hong Kong'."[59]

88. But it is impossible to see how the appellant's argument can proceed unless the Court is persuaded precisely to pronounce upon the legal effect of the instrument of ratification – namely, that the reservation is void and must be severed from it as a matter of public international law – and then to project that legal consequence onto the interpretation of Article 39 thereby rendering section 11 unconstitutional.

F.4.2 Section 11 regarded as valid as a matter of Hong Kong law

89. As a matter of Hong Kong law, the Hong Kong courts have invariably viewed section 11 (without qualifying it by any narrow construction) as consistent with the immigration reservation and with Article 39. This is a point equally relevant to the first limb of the appellant's challenge.

90. Prior to 1st July 1997, the question arose in *Wong King-lung v Director of Immigration*,[60] as to whether the immigration reservation, taken to be reflected in the terms of section 11, was valid. Having noted that the ICCPR could be modified by a reservation provided it was not incompatible with the objects and purpose of the Covenant, Jones J held that section 11 was

consistent with those aims.

91. In *In re Hai Ho-tak and Cheng Chun-heung*,[61] the Court of Appeal held that section 11 precluded reliance on BOR Art 14 (prohibiting unlawful interference with family life). Mortimer JA commented that:

"Section 11 is an essential limitation on the general provisions of the international covenant brought about by the reality of Hong Kong's geographical position and economic success. It follows the United Kingdom's reservation to the international covenant's application to Hong Kong."

92. As we have seen,[62] in preparation for the 1997 transition, acting pursuant to Article 160 of the Basic Law, the Standing Committee of the National People's Congress by its Decision[63] of 23 February 1997, disallowed certain presently immaterial provisions of HKBORO, but otherwise confirmed adoption of the rest of the Ordinance, including section 11, as part of the laws of the HKSAR at least prima facie[64] consistent with the Basic Law.

93. Since 1st July 1997, section 11 has been discussed on a number of occasions in this Court without anyone detecting any inconsistency between that provision and either the original immigration reservation or Article 39 of the Basic Law.

(a) Thus, in *Ng Ka Ling v Director of Immigration*,[65] the Court took notice of a submission referring to "the fact that the ICCPR as applied to Hong Kong is subject to the reservations made by the United Kingdom upon signature and ratification of the ICCPR in May 1976", including the immigration reservation, without demur.

(b) In *HKSAR v Ng Kung Siu*,[66] having cited Article 39, Li CJ stated:

"The Hong Kong Bill of Rights Ordinance (Cap 383), in fact provides for the incorporation of the provisions of the ICCPR into the laws of Hong Kong."

(c) And in *Secretary for Justice v Chan Wah*,[67] Li CJ stated:

"Article 39 of the Basic Law provides among other things that the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The Bill of Rights Ordinance incorporates into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong."

94. In *Tam Nga Yin v Director of Immigration*,[68] the Court was concerned with the question whether BOR Art 19(1)[69] was displaced by section 11. The majority[70] recognized that:

"The effect of the reservation and s 11 is that the ICCPR and the Bill of Rights do not apply to and do not affect immigration legislation regarding persons not having the right to enter and remain in Hong Kong."[71]

But the Director's argument for displacement was rejected on the basis that the case was not concerned with relevant immigration legislation, the majority concluding as follows:

"Accordingly, the reservation and s 11, which have the effect of rendering the ICCPR and the Bill of Rights inapplicable to immigration legislation in relation to persons who do not have the right of abode in Hong Kong, cannot affect the matter."

95. In *Gurung Kesh Bahadur v Director of Immigration*,[72] Li CJ (with whom the other members of the Court agreed) acknowledged that the immigration reservation was reflected in section 11:

"The provisions of the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong were implemented through the Hong Kong Bill of Rights Ordinance (Cap 383), which contains the Hong Kong Bill of Rights (the Bill). That Ordinance effects the incorporation of the ICCPR as applied to Hong Kong into our laws. See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, (10 July 2002) para 53, *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 at 455.

The ICCPR as applied to Hong Kong was subject to the reservation, originally made by the United Kingdom, that immigration legislation as regards persons not having the right to enter and remain could continue to apply. It is unnecessary to set out the terms of the reservation in full since it is reflected in s 11 of the Hong Kong Bill of Rights Ordinance."

F.5 Conclusion as to the appellant's constitutional challenge

96. For the foregoing reasons in my view, both limbs of the appellant's challenge to the constitutionality of section 11 must fail. I therefore conclude that section 11 is consistent with Article 39 and constitutionally valid. I turn then to a consideration of the reach or scope of section 11 on its proper construction.

G. The scope and effect of section 11

G.1 The central question

97. Section 11's content and application have been examined in Section F.1 above. The central and controversial question concerning the reach of section 11 arises when one juxtaposes section 11 with section 5 of HKBORO. For convenience, I set out the terms of section 11 once more:

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

98. Section 5 relevantly states:

Public emergencies

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.

(2) No measure shall be taken under subsection (1) that ...

(c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15."

99. Section 5(2)(c) therefore precludes derogation from BOR Art 3 relied on by the appellant. By the same token, BOR Art 11(6), also relied on by him, is not mentioned.

100. On its face, section 11 excludes all the provisions of HKBORO (and therefore all the rights contained in the BOR) without exception or qualification in relation to the persons and immigration legislation provisions within its ambit. However, sections 5 and 11 are provisions in the same Ordinance and it is obviously necessary when construing section 11 in order to ascertain its scope, to read it in the context of HKBORO as a whole. Thus, in addressing the question whether the legislative intention is that section 11 should override all BOR rights without exception, including BOR Art 3, it is of cardinal importance to note that section 5 provides that there can be no derogation from BOR Art 3 even in times of "public emergency which threatens the life of the nation".

101. The central question for immediate purposes is therefore whether the legislature could have intended that section 11 should be allowed to preclude reliance on BOR Art 3 in respect of immigration legislation powers routinely exercised, while at the same time laying it down in section 5 that there can be no derogation from BOR Art 3 even in the time of a proclaimed public emergency which threatens the life of the nation. Does section 11's exclusion of reliance on BOR Art 3 not constitute a derogation from BOR Art 3? Since section 5 prohibits derogation even in a time of public emergency, does it not suggest that *a fortiori* derogation from that Article is not allowed where no such emergency exists? If there is an apparent conflict between the two sections, which is to prevail? In seeking to answer these questions, the nature and interaction of the two sections and the nature of the rights protected by BOR Art 3 fall to be examined.

G.2 The effect of section 11

102. It is perhaps worth emphasising that the present topic of discussion concerns merely the construction of section 11. There is no question of that section being unconstitutional. As I have previously concluded, in adopting the ICCPR as applied to Hong Kong, Article 39 applied the Covenant subject to the immigration reservation made at the time of the United Kingdom's ratification. And as previously discussed, section 11 is consistent with that reservation. It follows that section 11 has the blessing of Article 39 and cannot be unconstitutional. Moreover, Article 154(2) of the Basic Law expressly authorises the HKSAR Government to "apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions". The question under discussion is therefore whether section 11, properly construed, precludes reliance on BOR Art 3 when it disapplies HKBORO from affecting any immigration

legislation governing entry into, stay in and departure from Hong Kong in relation to persons not having a right to enter or remain in Hong Kong.

103. Placing that question in a broader context, it may be noted that the European Court of Human Rights in Strasbourg (" the Strasbourg Court") has consistently taken as its starting-point, the proposition that under the ECHR:

"Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens."[73]

104. The House of Lords has taken the same view. Thus, in *R (Saadi) v Secretary of State for the Home Department*,Lord Slynn of Hadley stated:[74]

"In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory. Even as late as 1955 the eighth edition of *Oppenheim's International Law*, pp 675-676, para 314 stated that: 'The reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.' Earlier in *Attorney General for Canada v Cain* [1906] AC 542, 546, the Privy Council in the speech of Lord Atkinson decided: 'One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: *Vattel, Law of Nations,* book I, s 231; book 2, s 125.' This principle still applies subject to any treaty obligation of a state or rule of the state's domestic law which may apply to the exercise of that control."

105. In Hong Kong, the extent to which the Government's exercise of such powers is limited by its treaty obligations, or more accurately, by the constitutional protections conferred domestically by BOR Art 3, depends on resolving the question under discussion, namely, as to the scope and reach of the exclusionary provisions of section 11 in relation to rights having the character of the rights protected by BOR Art 3.

G.3 The effect of section 5 in relation to BOR Art 3

106. Section 5(2)(c) entrenches the prohibition against **torture** and CIDTP laid down by BOR Art 3 against derogation even in the extreme situation of a public emergency which threatens the life of the nation. If it is non-derogable in such circumstances of acute danger, it is impossible to imagine any circumstance in which derogation is permitted. Furthermore, that BOR Art 3, made non-derogable by section 5, has additionally the status of an absolute right is demonstrated by the jurisprudence of the Strasbourg and United Kingdom courts. I hasten to add that these comments are directed solely at section 5(2)(c) insofar as it relates to BOR Art 3. I am not suggesting that *all* the rights listed in section 5(2)(c) as non-derogable are also to be classified as absolute, as I explain further below.[75]

107. Section 5 derives from Article 4 of the ICCPR.[76] It also largely mirrors Article 15 of the ECHR which is materially in the following terms (with my insertions in square brackets):

“Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of **torture** and inhuman or degrading treatment or punishment], 4 (paragraph 1) [prohibition of slavery and servitude] and 7 [no punishment without law] shall be made under this provision. ...”

108. In 1978, the Strasbourg Court held that ECHR’s Art 3 prohibition against **torture** and CIDTP[77] was both non-derogable by virtue of Article 15 and absolute:

“The Convention prohibits in absolute terms **torture** and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 ..., Article 3 ... makes no provision for exceptions and, under Article 15 para. 2 ..., there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.”[78]

109. This was re-iterated in the important case of *Soering v United Kingdom*,[79] with the Court pointing out that the provision reflects an internationally accepted standard:

“Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition on **torture** and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.”

110. This has been accepted in the House of Lords. In *R (Ullah) v Special Adjudicator*,[80] Lord Steyn, undertook what he called a “brief *tour d'horizon*” of the various ECHR rights and concluded that Art 3’s prohibition of **torture** and CIDTP was an absolute right. Lord Steyn also highlighted the absolute nature of the prohibition of CIDTP in Privy Council cases in which he dissented on the immediate issue of delay in death penalty cases, but where his statement of principle is not in question. Thus, in *Higgs v Minister of National Security*,[81] an appeal from The Bahamas, in relation to Article 17 of the Bahamian Constitution which is in the same terms as ECHR Art 3, his Lordship stated:

“The European Court of Human Rights has emphasised on numerous occasions that article 3 of

the European Convention prohibits in absolute terms **torture** or inhuman or degrading treatment or punishment: *Republic of Ireland v United Kingdom* (1978) 2 EHRR 25, 79, para 163; *Selçuk and Asker v Turkey* (1998) 26 EHRR 477, 515-516, para 75. The guarantee under article 3 is a universal minimum standard, the breach of which is protected under the Convention. The only qualification under the Convention system is that in order for the conduct to be covered by the prohibition it must 'attain a minimum level of severity.' But there is no express or implied derogation in favour of the state: the prohibition is equally applicable during a war or public emergency. The guarantee is subject to no derogation in favour of the state in order to enable it to fight terrorism or violent crime: *Tomasi v France* (1992) 15 EHRR 1, 33, para 115. Breaches cannot be justified by a lack of resources: see Lester and Pannick, Human Rights Law and Practice (1999), para 4.3.1-4.3.8; Jacobs and White, The European Convention on Human Rights, 2nd ed (1996), p 49. Similarly, under article 17(1) of the Bahamian Constitution there is no express or implied derogation in favour of the state. A breach cannot be justified on any grounds. It is an absolute an unqualified constitutional guarantee. These propositions are elementary but important."

111. In *R (Limbuela) v Secretary of State for the Home Department*,[82] Lord Hope of Craighead summarised the position regarding the absolute nature of the **torture** and CIDTP prohibition in ECHR Art 3 as follows:

"The headnote to article 3 describes its contents in these terms: 'prohibition of torture'. But the prohibition that it contains goes further than that. The prohibition extends also to inhuman or degrading treatment or punishment. As the article puts it, 'no one shall be subjected to' treatment of that kind. The European court has repeatedly said that article 3 prohibits **torture** and inhuman and degrading treatment in terms that are absolute: *Chahal v United Kingdom* (1996) 23 EHRR 413, 456-457, para 79; *D v United Kingdom* (1997) 24 EHRR 423, 447-448, paras 47, 49. In contrast to the other provisions in the Convention, it is cast in absolute terms without exception or proviso or the possibility of derogation under article 15: *Pretty v United Kingdom* 35 EHRR 1, 32, para 49."

112. In this Court in Secretary for *Security v Sakthevel Prabakar*,[83] although spoken in the different context of a challenge mounted on the basis of the Covenant Against **Torture** which did not raise section 11 issues, Bokhary PJ stated:

"Some rights are non-derogable under any circumstances. They form the irreducible core of human rights. The right not to be tortured is one of these non-derogable rights."

G.4 Conclusion as to the scope and effect of section 11

113. As the Court laid down in *Ng Ka Ling v Director of Immigration*,[84] constitutional instruments must generally be interpreted purposively. That applies of course to the Basic Law but also to HKBORO which is given constitutional force by Article 39. Li CJ put this as follows:

"It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to

particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."[85]

114. In my judgment, 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. It is also clear from the highly persuasive jurisprudence of the Strasbourg Court and the House of Lords in relation to the closely analogous provisions of the ECHR that BOR Art 3 rights are not only non-derogable but also absolute. 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".

115. Accordingly, any apparent conflict between section 5 and section 11 or any ambiguity as to the statutory purposes of those provisions should be resolved by giving precedence to section 5, according decisive weight to the non-derogable and absolute character of the rights protected by BOR Art 3. Therefore, construed purposively, section 11 must be read as qualified by section 5. Section 11 must be understood to exclude the application of HKBORO and BOR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong *except insofar as the non-derogable and absolute rights protected by BOR Art 3 are engaged*.

116. The aforesaid approach is consistent with the adoption of a generous construction of provisions conferring rights and a narrow construction of provisions restricting rights endorsed by this Court in *Ng Ka Ling*.[86] This was re-iterated by Li CJ in *Gurung Kesh Bahadur v Director of Immigration* as follows:[87]

"A generous approach should be adopted to the interpretation of the rights and freedoms whilst restrictions to them should be narrowly interpreted *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at 28I – 29A and *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 457B. (In this context, right and freedom are used interchangeably). So, art 31 providing for the right to travel and the right to enter should be generously interpreted. On the other hand, art 39(2), which deals with the question of restrictions to rights and freedoms, should be narrowly interpreted."

G.5 The respondents' arguments against that conclusion

117. Mr Benjamin Yu SC, appearing[88] for the respondents advanced four arguments against reaching the abovementioned conclusion.

G.5a HKBORO section 2(2)

118. First, he relied on HKBORO section 2(2) which provides that "The Bill of Rights is subject to Part III". Section 11 is in Part III and therefore, so it is argued, overrides the rights contained

in the BOR.

119. That argument cannot be accepted. It merely restates but does not answer the central question. The issue remains: What on its true construction is the scope of section 11 to which the BOR is made subject?

G.5b Derogation vs reservation

120. Secondly, Mr Yu SC sought to distinguish between sections 5 and 11 on the basis that they involve quite different concepts and "do different things". Section 11 is a reservation which is made at the time of ratification of the Covenant, by which the Contracting State declines to take on specified obligations; while section 5 is concerned with derogations which involve withdrawing from Covenant obligations originally undertaken.

121. In my view, that distinction has no relevance to the discussion at hand. Sections 5 and 11 in HKBORO are not concerned with the *processes* of reservation or derogation. It is nothing to the point to state that such processes are different. The relevance of section 5(2)(c) lies in its declaration that the process of derogation in respect of BOR Art 3 is unavailable at any time – even in the time of a proclaimed public emergency which threatens the life of the nation. As the review of the Strasbourg and United Kingdom decisions in Section G.3 above shows, section 5(2)(c) thereby acknowledges or confers on BOR Art 3 the status of an absolute, non-derogable right entitled to dominance over section 11.

G.5c A matter which should be left to the Director's discretion

122. Mr Yu's next submission was that the Court should recognize that the legislature has decided that the exercise of immigration powers within the ambit of section 11 is to be left in the discretion of the Director of Immigration and should accordingly steer clear of interfering. He sought to draw support from Lord Hoffmann's observation in *Matadeen v Pointu*,[89] that non-justiciable questions may exist and that one should not believe that it must always be the judges who have the last word. Mr Yu added that the Court could take comfort from the fact that if the proposed approach is adopted, the Director would still be subject to the usual administrative law constraints against any unlawful exercise of his discretion.

123. *Matadeen* was a case concerned with equality of treatment of pupils in respect of school subjects, examinations and school places. Lord Hoffmann[90] was commenting on an attempt by one of the parties to rely on a principle of equality amorphously described as "permeating" the Mauritian constitution as the basis for deciding the case. It was in that context that he observed that while equality might represent a general principle of rational behaviour, it did not necessarily entail a justiciable principle.

124. *Matadeen* was, in other words, a world away from a case involving non-derogable fundamental rights. By section 7 of the HKBORO, the Ordinance binds the Government, all public authorities and any person acting on their behalf, obviously including the respondents. The question now arising is quintessentially a question for the Court: What, on its true construction, is the scope and effect of a legislative provision which purports to exclude a class

of persons in Hong Kong from relying on the rights constitutionally protected by BOR Art 3 when such rights are engaged by the exercise of statutory powers vested in the respondents? To say that the Court should be content to let such powers reside in the Director's discretion begs the crucial question.

125. When taxed by the Court, Mr Yu was constrained to accept that the logic of his argument is that it may be lawful for the Director to exercise his discretion in favour of deporting a person who falls within section 11 even though there is incontrovertible evidence that such deportation almost certainly means sending him to face **torture** or CIDTP (which would otherwise be prohibited by BOR Art 3); or even sending him to face being arbitrarily deprived of his life (otherwise prohibited by BOR Art 2). That submission is, to say the least, deeply unattractive.

126. If, as duly determined by the Court, the true reach of section 11 falls short of displacing BOR Art 3 classified as an absolute, non-derogable right, any inconsistent action by the respondents would constitute a constitutional violation for which redress is granted as of right and not subject to discretionary considerations. Such a violation would not merely be justiciable: the Court would be duty bound to intervene. In a well-known passage in *Ng Ka Ling*,[91]this was emphasised by Li CJ as follows:

"In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."

127. Mr Yu's third submission must therefore be rejected.

G.5d Construction in line with what the legislature must have assumed was the law

128. Mr Yu's final argument against construing section 11 to have a limited reach involved his reliance on *Harding v Wealands*,[92] for the proposition that the Court should construe the provision in line with what the legislature must be taken to have understood the law to be when enacting the statute, even if the legislature's view of the law is later shown to have been wrong.

129. I do not accept that *Harding v Wealands* has any relevance in a case like the present. The issue in *Harding v Wealands* was whether damages for personal injury arising out of an accident in New South Wales should be calculated according to the law of NSW, selected as the applicable law under a certain English statute, or whether such damages involved a question of procedure falling to be determined in accordance with English law, being the law of the forum. The English statute had been enacted to cure a perceived defect in the pre-existing conflicts rule

and it was therefore pertinent to ask what Parliament's understanding of the law was at the time of that statute's enactment, whether or not Parliament's view is thought to have been correct.[93]

130. We are not concerned with any such exercise in the present case. It is true, as Mr Yu points out, that Hong Kong case-law on section 11 appears uniformly[94] to have treated section 11 as displacing the rights contained in the BOR. However, with the exception of *Vo Thi Do and Others v Director of Immigration*,[95] in none of those cases, was there any attempt to rely on BOR Art 3 or indeed, any of the other rights listed in HKBORO section 5.

131. In *Vo Thi Do*, a case brought by Vietnamese asylum seekers who complained of their very prolonged administrative detention, it was alleged, among other complaints, that such detention constituted CIDTP in violation of BOR Art 3. Section 11 was relied on and issue was joined as to whether detention of the applicants was pursuant to immigration legislation governing their stay in Hong Kong. The Court of Appeal held that section 11 was triggered but added:

"This construction of s 11 does not affect, in the end, the result of the case because the judge went on to hold that, upon the facts, none of the rights guaranteed under arts 3, 5(1) and 6(1) were infringed."[96]

Vo Thi Do was thus a case where the Court did not enter into any analysis of whether those rights were ousted by section 11.

132. More importantly, in none of the decided cases brought to this Court's attention, was the argument based on the juxtaposition of sections 5 and 11 made or considered. It is therefore impossible to suggest that in enacting those two sections as provisions co-existing within HKBORO, the legislature were making any assumptions one way or the other as to their inter-relationship in law.

133. For the foregoing reasons, I am not dissuaded by any of the arguments advanced on the respondents' behalf from reaching the conclusion set out in Section G.4 above.

G.6 Why the foregoing analysis does not necessarily apply to the other rights listed in section 5

134. As I have been at pains to stress, this judgment confines itself to the relationship between sections 5 and 11 on the one hand and BOR Art 3 and BOR Art 11(6) on the other. The other rights listed in section 5(2)(c) have not been argued and nothing in this judgment is intended to rule on section 11's relationship with those rights. I will, however, say a few words as to why one should not too readily extrapolate from what is said in this judgment to those other rights.

135. In the first place, it does not follow from the conclusion that the right against being subjected to CIDTP protected by BOR Art 3 is both non-derogable and absolute, that the same applies to all the other rights listed in section 5(2)(c). The listed rights are those protected by the following Articles of the BOR, namely: Art 2 [right to life], Art 4(1) and (2) [slavery and servitude], Art 7 [no imprisonment for breach of contract], Art 12 [no retrospective criminal offences], Art 13 [right to recognition as person] and Art 15 [freedom of thought, etc]. Some of these rights may be non-derogable by virtue of section 5 but not absolute, with the consequence,

for instance, that statutory qualification of such rights may be permissible if justifiable upon a proportionality analysis.

136. The Human Rights Committee in General Comment No 24[97] recognized the distinction between non-derogable and absolute or peremptory rights as follows:

"... While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of **torture** and arbitrary deprivation of life are examples."

137. One may accordingly observe, without deciding, that there is an obvious difference between say, the prohibition of arbitrary deprivation of life on the one hand and imprisonment for breach of contract on the other, the reasons for each being included as non-derogable rights in section 5 (and ICCPR Art 4) being quite different, as explained in the extract from General Comment 24 just cited.

138. It is moreover self-evident that aspects of the right to freedom of thought, conscience and religion, protected by BOR Art 15 are not absolute since the article provides for possible qualification of rights relating to the manifestation of religious beliefs in its own paragraph 3.[98]

139. There are likely to be other differentiating considerations relevant to a case involving section 11 and the other section 5 rights. It suffices for the present to re-iterate that this judgment does not stray into that territory.

140. It is also important to note that some of the case-law[99] holding that certain rights additional to those listed in the relevant Articles[100] falling short of CIDTP "cannot be excluded" from being considered non-derogable and/or absolute must be treated in our jurisdiction with great caution especially in the context of deportation or removal because of the necessity to take account of section 11.

H. The consequences of the construction of section 11 here adopted.

141. What then are the main consequences – in the particular context of deportations and removals – of holding, as I have done, that the subjugation of HKBORO by section 11 does not extend to precluding reliance on rights under BOR Art 3, being non-derogable and absolute

rights?

H.1 The deportee's conduct and proportionality

142. The first two consequences are related. Provided that the risk and severity of the prospective ill-treatment are duly established in the manner discussed below,[101] the first consequence of the right not to be subjected to CIDTP being an absolute right is that the proposed deportee cannot be exposed by the Government to such risk, however objectionable may be his conduct or character supplying the ground for his proposed expulsion.

143. Thus, in *Chahal v UK*[102] the Strasbourg Court stated:

"The prohibition provided by Article 3 ... against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 ... if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."

144. Similarly, in *RB (Algeria) v Home Secretary*,[103] another deportation case, Lord Phillips of Worth Matravers stated:

"Article 3 is an absolute right. The European court made it plain that the question of whether article 3 prevented deportation was not influenced by the ground of deportation, even if this were that the individual under threat of deportation ... posed a threat to national security."

145. The second and related consequence is that the Government cannot justify any infringement of the absolute BOR Art 3 right on the ground that the deportation satisfies a proportionality analysis. Thus, in *R (Limbuela) v Secretary of State for the Home Department*,[104] Lord Hope of Craighead pointed out:

"...proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute."

H.2 Applicability of the rights in expulsion cases

146. The third major consequence concerns the applicability of BOR Art 3 rights in expulsion cases. The authorities just cited proceed on the assumption that the prohibitions contained in BOR Art 3 apply not merely in respect of CIDTP within the territory of the deporting State, but also where a sufficient risk is shown of the deportee facing CIDTP in the country to which he is being deported. It is not obvious why this should be so and some further discussion is called for.

H.2a Covenant rights generally subject to territorial limits

147. The purpose of enacting HKBORO and its adoption as part of the laws of the HKSAR, was

to implement the Covenant as part of our domestic law. This is reflected in HKBORO's long title which states that it is:

"An Ordinance to provide for the incorporation into the law of Hong Kong of provisions of the [ICCPR] as applied to Hong Kong; and for ancillary and connected matters."

148. What the Covenant, thus made part of our law, requires of the parties is stated in its Art 2(1):

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (Italics supplied)

149. The ICCPR and the HKBORO are therefore intended, prima facie at least, to safeguard rights only within the HKSAR's territory in relation to persons subject to its jurisdiction.

150. Article 1 of the ECHR is to similar effect. It provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"

151. The Strasbourg Court in *Soering v United Kingdom*[105] acknowledged that this had the effect of setting territorial limits on Convention obligations:

"... the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction.' Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention."

152. Lord Bingham of Cornhill also acknowledged this in *R (Ullah) v Special Adjudicator*,[106] drawing a parallel with ICCPR Art 2:

"By article 1 of the European Convention the contracting states undertook to secure 'to everyone within their jurisdiction' the rights and freedoms defined in section 1 of the Convention. The corresponding obligation in article 2 of the International Covenant on Civil and Political Rights 1966 extends to all individuals within the territory of the state and subject to its jurisdiction, but the difference of wording is not significant for present purposes. Thus the primary focus of the European Convention is territorial: member states are bound to respect the Convention rights of those within their borders. In the ordinary way, a claim based on the Convention arises where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory. Such claims may for convenience be called

‘domestic cases’.”

H.2b Extension of the rights to “foreign cases”

153. In the same judgment,[107] Lord Bingham contrasted “domestic cases” with what he called “foreign cases” which are:

“...cases in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory.”

154. The extension of the rights protected by BOR Art 3 to operate in relation to such foreign cases is traceable to the judgment of the Strasbourg Court in *Soering v United Kingdom*.[108] That was a case involving a request by the United States for the extradition of a German national from the United Kingdom on charges of murdering the parents of his girlfriend in Virginia. Extradition was resisted on the ground that, if convicted, he would face CIDTP as a result of “the death row phenomenon” which defendants sentenced to death for capital murder face in Virginia, especially given that the applicant suffered from psychiatric problems. If the UK acceded to the United States’ request, it would obviously not itself be committing any acts of CIDTP within its own territory. So the issue facing the Strasbourg Court, was described by it as follows:

“What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.”[109]

155. The Court acknowledged that usually Covenant obligations were subject to territorial limits but held that such considerations “cannot ... absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”[110] It decided that:

“In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”[111]

156. Turning to ECHR Art 3, the Court (in a passage already cited above) noted that it imposed an “absolute prohibition on **torture** and on inhuman or degrading treatment or punishment” and that it represented an internationally accepted standard.[112] The Court’s observed that therefore:

“It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrendera fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to **torture**, however heinous the crime allegedly committed. Extradition in such circumstances, while not

explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."[113]

157. The Court justified such a departure from the normal territorial principle on the basis of the particularly serious and irreparable nature of CIDTP, absolutely prohibited by Art 3:

"It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article."[114]

158. The Court summarised its conclusion in the following terms:

"In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to **torture** or to inhuman or degrading treatment or punishment in the requesting country."[115]

159. *Soering* has since been followed on many occasions.[116] In the recent decision in *Al Husin v Bosnia and Herzegovina*,[117] the *Soering* approach was summarised in these terms:

"The Court reiterates that as a matter of well-established international law and subject to its treaty obligations, including those arising from the Convention, a Contracting State has the right to control the entry, residence and expulsion of aliens ... The right to asylum is not contained in either the Convention or its Protocols ... Expulsion by a Contracting State may, however, give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to ill treatment. In such a case, Article 3 implies an obligation not to expel that person to the country in question ... Since the prohibition of **torture** or inhuman or degrading treatment or punishment is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account..."

160. The third consequence of reaching the conclusion stated at the start of Section H above is therefore that a sufficiently established threat of BOR Art 3 being violated by the receiving country if the deportee should be sent there constitutes a ground for restraining the Hong Kong Government from proceeding with the deportation.

I. The double jeopardy ground

161. Having dealt with the principles, I turn to their application on the facts of this case. The

double jeopardy ground can be dealt with quite shortly.

162. The appellant's challenge to the deportation order founded on BOR Art 11(6) must fail. Section 11 precludes reliance on that provision. The right which it protects, namely, the right not 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 is neither non-derogable (not being mentioned in section 5) nor absolute.

163. That disposes of this first ground of challenge. However, as two further grounds for rejecting that challenge were relied upon by the Court of Appeal I will deal briefly with them.

164. I respectfully agree both with Reyes J and the Court of Appeal that an additional ground for concluding that BOR Art 11(6) does not avail the appellant is that it only applies within the territorial limits of the HKSAR. As noted in Section H.2a above, Covenant rights generally operate within such limits, an exception having been made in respect of BOR Art 3 because of the absolute character and non-derogable character of the prohibition of CIDTP and the severe and irreparable harm it entails. There are no grounds for making such an exception in relation to BOR Art 11(6).

165. This conclusion is consistent with the position taken by the parties to the Covenant as revealed in the *travaux préparatoires*[118] and in Communications of the Human Rights Committee.[119] It also coincides with the view expressed by Tang JA (as Tang PJ then was) in *Yeung Chun Pong v Secretary for Justice*;[120] and with the opinion expressed by Sir Anthony Mason NPJ in this Court in the same case.[121]

166. The Court of Appeal's third reason for holding that the appellant cannot rely on BOR Art 11(6) is that such protection only applies to the narrow, *autrefois convict* or *acquit* heads of double jeopardy and not to the broader common law rule empowering the Court to stay proceedings as an abuse of process.

167. It is a ground that involves arguing that prosecution of the appellant under the Nigerian law would constitute the broader form of double jeopardy, leading to a debate as to whether such a prosecution falls within or outside BOR Art 11(6). However, given that I have held that BOR Art 11(6) does not apply in relation to double jeopardy arising through a prosecution in a foreign state, this question does not actually arise in the present case and does not require further discussion. This third ground does, however, flag an issue which may have to be faced in a purely domestic case. But that is not a matter to be dealt with in this judgment.

168. Accordingly, for the foregoing reasons, I conclude that BOR Art 11(6) does not avail the appellant as a basis for challenging the deportation order.

J. The CIDTP ground

J.1 Not precluded by section 11

169. Applying the analysis developed in Sections G and H of this judgment, section 11, properly

construed, does not preclude the appellant from relying on BOR Art 3.

170. Accordingly, the concession[122] accepted by Reyes J was rightly made. In deciding that the concession had been wrongly made, the Court of Appeal did not of course have before it, the arguments based on the juxtaposition of sections 5 and 11 and the non-derogable and absolute nature of BOR Art 3 developed in this appeal.

171. The outcome of the case therefore depends on whether the appellant can bring himself within the terms of BOR Art 3 on the facts.

J.2 What must be established factually

172. For him to do so successfully, he must meet two main requirements: he must establish (i) that the ill-treatment which he would face if expelled attains what has been called "a minimum level of severity" and (ii) that he faces a genuine and substantial risk of being subjected to such mistreatment. It is clear that a very high threshold must be surmounted to establish each of those requirements.

173. In *R (Limbuela) v Secretary of State for the Home Department*,[123] Lord Hope of Craighead, citing decisions of the Strasbourg Court, described what was required to meet the "minimum level of severity", pointing out that it generally involves actual bodily injury or intense physical or mental suffering and that its assessment is ultimately a matter of judgment:

"... the European court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment or punishment': *Ireland v United Kingdom* (1978) 2 EHRR 25, 80, para 167; *A v United Kingdom* (1998) 27 EHRR 611, 629, para 20; *V v United Kingdom* (1999) 30 EHRR 121, 175, para 71. In *Pretty v United Kingdom* 35 EHRR 1, 33, para 52, the court said:

'As regards the types of "treatment" which fall within the scope of article 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'

It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3. ... So the exercise of judgment is required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has

been satisfied."

174. As to the degree of risk that the deportee must establish, it has variously been put as a requirement that he must show "substantial grounds ... for believing"[124] or "strong grounds for believing"[125] that if deported (or extradited) he faces a "real risk" of being subjected to **torture** or CIDTP.

175. Recently, the Strasbourg Court in *Al Husin v Bosnia and Herzegovina*,[126] endorsed the following approach:

"The assessment of the existence of a real risk must be rigorous (see *Chahal v the United Kingdom*, 15 November 1996, § 96, Reports of Judgments and Decisions 1996 V). As a rule, it is for applicants to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (*N v Finland*, no 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it. The Court will take as its basis all the material placed before it or, if necessary, material obtained on its own initiative."

176. In the Strasbourg context, the Court went on to state that the Court should assess the risk at the time of the proceedings, taking account of information that has come to light after the deportation decision was taken in order to ensure that the Court is able to make a "full and up-to-date assessment" of the current situation.[127]

J.3 The facts in the present case

177. The appellant's case on CIDTP is a based once again on the risk of double jeopardy. He contends that implementation of the deportation order would expose him to a risk of being re-prosecuted and punished afresh under the Nigerian law because of his drug-trafficking activities for which he has already been convicted and imprisoned for 16 years in Hong Kong. It is the impact on him of the prospect of such fresh proceedings and punishment which he says would constitute CIDTP. Reyes J accepted his submission and the appellant invites the Court to hold that the Court of Appeal was not entitled to reverse the Judge's finding.

178. In reaching his conclusion that the appellant had successfully established a potential violation of BOR Art 3, Reyes J took into account the appellant's age; the fact that he had spent 16 years in prison and had "expiated his crime"; and the fact that while he had incurred 11 disciplinary reports between 1994 and 2004, the appellant had "made an effort to turn his life around", attending religious gatherings and becoming a model prisoner. His Lordship's view was that the risk of being "detained, tried and sentenced to at least[128] 5 years' imprisonment in relation to the same offence" would "self-evidently constitute a severe mental and psychological blow" to him, which "could well induce fear and anguish in him as a human being".[129] He added:

"...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."[130]

179. Reyes J concluded that the aforesaid facts established that deportation would indeed constitute CIDTP so that the deportation order should be quashed:

"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."[131]

180. The Court of Appeal reversed Reyes J because it did not:

"... consider the risk of prosecution and punishment under section 22 of the Act in the present case gives rise to anything approaching the level of intense physical or mental suffering or humiliation necessary to constitute cruel, inhuman or degrading treatment."[132]

181. I respectfully agree with the Court of Appeal's conclusion. Whether the ill-treatment allegedly feared is of a nature which attains the minimum level of severity required; and whether the appellant has established substantial grounds for believing that, if deported, he would face a real risk of being subjected to such mistreatment, is a matter of judgment to be exercised with guidance from the relevant jurisprudence. In my opinion, the appellant falls far short of meeting both the substantial risk and minimum level of severity requirements.

182. 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.

183. So far as the level of risk is concerned, there was a dearth of evidence that the appellant would be prosecuted, and if prosecuted and convicted, as to what sentence the Nigerian court was likely to impose. That is perhaps not surprising since in a letter from the Director of Immigration to the appellant dated 14 August 2008, which the appellant placed before the Court, it appears that there were very few convictions to date. The Director stated in the letter that there appeared to be conflicting evidence as to whether he would be prosecuted upon his return. He referred to country information that the National Drug Law Enforcement Agency had told a local newspaper that it would "make sure that anyone convicted of drug charges abroad" would be prosecuted under the Nigerian law. But on the other hand, he stated that someone from the Federal Ministry of Justice had indicated that "he was not aware of anyone being convicted a

second time when a ‘full sentence’ had already been served overseas.” The letter continued:

“It is noted that while a total of 418 Nigerians were deported from foreign countries for committing drug-related offences from January 2001 to March 2007, few of them have been prosecuted and convicted under [the Nigerian law]. There is also country information that the NDLEA has attempted to prosecute 10 Nigerian repatriated from foreign countries under the provisions of [the Nigerian law] between January 2001 and March 2003. These cases are still pending in the court system, with no convictions made to date.”

184. As the Strasbourg Court pointed out in *Al Husin*, it is generally for the applicants to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. The Court is also entitled to take account of the latest available evidence and so was entitled to consider the contents of the Director’s letter mentioned above. In the circumstances, the evidence fell far short of establishing substantial grounds for believing that the appellant faces a genuine risk of being subjected to CIDTP if the deportation order is carried out. The CIDTP must therefore fail.

K. The CIL ground

185. This ground needs little discussion. The respondents’ objection to its introduction for the first time at this stage of the proceedings is well-founded. As stated in *Flywin Co Ltd v Strong & Associates Ltd*,[133] and many times since, the Court will not entertain a new point unless there is no reasonable possibility that the state of the evidence relevant to the point would have been materially more favourable to the other side if the point had been taken at trial. The respondents point out that they would have wished to put in evidence as to the practice of states and of juridical opinion regarding the existence and binding nature of the purported norm of CIL asserted by the appellant.

186. In any event, in the course of the hearing, Mr Gordon did not press this ground and accepted that on analysis, it was not a ground which could a achieve a different outcome from the outcomes arrived at respecting the grounds of challenge already discussed.

L. The remitter issue

187. As earlier indicated, another point which Mr Gordon seeks to raise for the first time in this Court relates to what he describes as “a remedy”. He submits that if the Court is not satisfied that the facts presently relied on constitute CIDTP, it should order the case to be remitted to the Director for him to consider whether CIDTP is made out on the basis of a different set of facts relating to conditions in Nigerian prisons which are said to be appalling.

188. This suggestion has in fact nothing to do with any “remedy” and I see no conceivable basis for making such a remitter. In Reyes J’s judgment,[134] he makes the following observation:

“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."

189. It therefore appears that the decision was deliberately taken not to introduce any allegations concerning ill-treatment in Nigerian prisons or indeed, any grounds other than the "anguish" referred to. That was presumably thought to be a good tactic for whatever reason. Consequently, there has never been any suggestion that the Director has wrongly failed to take account of prison conditions and accordingly no basis for remitting the issue to him for consideration.

M. Conclusion

190. For the foregoing reasons, I would dismiss the appeal. In the light of the fact that new issues arose at the Court's instigation and in the light of the outcome, I would make an order nisi that there be no order as to costs. Any submissions which the parties may wish to make on costs should be lodged in writing within 14 days from the date of this judgment. I would direct that in default of such submissions, the order nisi should stand as an order absolute without further order.

Mr Justice Tang PJ:

191. I agree with the judgment of Mr Justice Chan PJ and Mr Justice Ribeiro PJ.

Lord Walker of Gestingthorpe NPJ:

192. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Ma:

193. The appeal is accordingly unanimously dismissed and the Court makes the order as to costs referred to in the final paragraph of Mr Justice Ribeiro PJ's judgment.

(Geoffrey Ma) Chief Justice	(Patrick Chan) Permanent Judge	(RAV Ribeiro) Permanent Judge
(Robert Tang) Permanent Judge	(Lord Walker of Gestingthorpe) Non-Permanent Judge	

Mr Richard Gordon QC, Mr Hectar Pun and Mr Timothy Parker, instructed by Tso Au Yim & Yeung and assigned by the Legal Aid Department, for the Appellant

Mr Benjamin Yu SC, Professor Malcolm Shaw QC, Mr Anderson Chow SC and Ms Grace Chow, instructed by the Department of Justice, for the Respondents

[1] As regard persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

[2] No one shall be subjected to **torture** or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[3] Cap 383.

[4] Initially promulgated as Decree No 33 of 1990.

[5] Cap 115. Section 20(1)(a): (1) The Chief Executive may make a deportation order against an immigrant if the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than 2 years; ...' The order was made under powers delegated by the Chief Executive to the Secretary.

[6] *A (**Torture** Claimant) v Director of Immigration* [2008] 4 HKLRD 752.

[7] Contained in HKBORO, section 8. Article 5(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[8] ICCPR Art 14(7): "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."

[9] Adopted by the UN General Assembly on 19 September 1966.

[10] ICCPR Art 7: "No one shall be subjected to **torture** or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[11] HCAL 77/2008 (5 May 2009) §§120-128.

[12] [2008] 4 HKLRD 752.

[13] [2011] 1 HKLRD 359.

[14] *Ghulam Rbani v Secretary for Justice*, CACV 267/2011.

[15] At §§54 and 70.

[16] At §§64-67.

[17] As Fok JA then was.

[18] [2008] 3 HKLRD 1 at §§16-24.

[19] *Yeung Chun Pong v Secretary for Justice* (2009) 12 HKCFAR 867 at §§10-12, §§21-25. For a helpful discussion of the distinction see the Report on Double Jeopardy by the Law Reform Commission of Hong Kong (February 2012) Chapter 1.

[20] Reyes J at §§71-76.

[21] At §§124-148, where the Court of Appeal dealt with the double jeopardy and CIDTP grounds together, those grounds being separately addressed in this judgment.

[22] Reyes J at §83-85.

[23] Court of Appeal at §§100-117.

[24] Court of Appeal at §123.

[25] Reyes J at §§56-70.

[26] Court of Appeal at §70.

[27] United Nations Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 1: "For the purposes of this Convention, the term 'torture' means 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 of 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."

[28] Reyes J at §91.

[29] With Mr Hectar Pun and Mr Timothy Parker.

[30] Reyes J at §94.

[31] In Section J.3 below.

[32] Court of Appeal at §137.

[33] Court of Appeal at §136 and §146.

[34] Originally, reliance had been placed on a purported CIL norm prohibiting *refoulement* to face a fundamental breach of the right to a fair trial, including double jeopardy; but that was abandoned by Mr Gordon at the hearing.

[35] *JH Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 476-477 per Lord Templeman and at 500 per Lord Oliver of Aylmerton; *R v Lyons* [2003] 1 AC 976 at §27; *R v McKerr* [2004] 1 WLR 807 at §48 per Lord Steyn; *In re Hai Ho-tak and Cheng Chun-heung* [1994] 2 HKLR 202 at 208.

[36] *R v Secretary for the Home Department ex parte Brind* [1991] 1 AC 696 at 747-748 per Lord Bridge of Harwich and at 761 per Lord Ackner.

[37] *R v Secretary for the Home Department ex parte Brind* [1991] 1 AC 696 at 747-748 per Lord Bridge of Harwich and 760 per Lord Ackner.

[38] [1990] 2 AC 418 at 499. Applied in *Re Chong Bing Keung (No 2)* [2000] 2 HKLRD 571 at 582.

[39] *R v Lyons* [2003] 1 AC 976 at §§27-28.

[40] In Section G.

[41] Appellant's Case ("AC") §§146, 169-170 and 221.

[42] AC§63.

[43] See Lord Lester of Herne Hill QC, "Thirty Years On: The East African Asians Case Revisited" [2002] PL 52.

[44] AC§§64-84 and 101.

[45] AC§145.

[46] Art 12(1): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

[47] For example, in *In re Hai Ho-tak and Cheng Chun-heung* [1994] 2 HKLR 202 at 209, Nazareth JA stated: "Historically Hong Kong has been and continues to be subjected to unparalleled immigration pressures. If not rigorously controlled they pose a grave threat to the prosperity and stability of Hong Kong. And specifically in the context of close relatives or family members, the numbers of persons without rights to enter and remain, who have family members in Hong Kong with such rights are very substantial indeed; an estimate of 400,000 in the adjoining provinces of China was mentioned to us."

[48] [1994] 2 HKLR 202.

[49] [1998] 1 HKLRD 729.

[50] [2011] 4 HKC 151, see §311-312 as to the SCNPC's role and §371 for the vetting process.

[51] These were sections 2(3), 3 and 4 of the pre-existing HKBORO.

[52] Decision of 23 February 1997, §4.

[53] The words in quotation marks are all taken from AC§172.

[54] AC§183-184.

[55] AC§§199-201.

[56] AC§220.

[57] AC§172.

[58] *JH Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 499. Applied in *Re Chong Bing Keung (No 2)* [2000] 2 HKLRD 571 at 582.

[59] AC§202.

[60] [1994] 1 HKLR 312 at 327.

[61] [1994] 2 HKLR 202 at 208 on appeal from *Wong King-lung*.

[62] Section F.3.2 above.

[63] Adopted at the Twenty Fourth Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997.

[64] "Prima facie" since Article 160 of the Basic Law envisages possible subsequent determinations of incompatibility: "If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure prescribed by this Law."

[65] (1999) 2 HKCFAR 4 at 41.

[66] (1999) 2 HKCFAR 442 at 455.

[67] (2000) 3 HKCFAR 459 at 470.

[68] (2001) 4 HKCFAR 251.

[69] Article 19(1): “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

[70] By the joint judgment of Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ.

[71] At p 260.

[72] (2002) 5 HKCFAR 480 at §§21-22.

[73] *Chahal v UK* (1996) 23 EHRR 413 at §73. For recent re-iterations see *F v United Kingdom* [2004] ECHR 723 (Application No 17341/03), 22 June 2004; and *Al Husin v Bosnia and Herzegovina* [2012] ECHR 232 (Application no 3727/08), 7 February 2012.

[74] [2002] 1 WLR 3131 at §31. See also *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 per Lord Bingham of Cornhill at §6 and per Lord Steyn at §30.

[75] In Section G.6.

[76] ICCPR Art 4.1: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” Art 4.2: “No derogation from articles 6 [right to life], 7 [prohibition of **torture** and CIDTP], 8 (paragraphs 1 and 2) [prohibition of slavery and servitude], 11 [imprisonment for breach of contract], 15 [no retrospective criminal liability], 16 [right to recognition as a person] and 18 [freedom of thought, etc] may be made under this provision.” (Insertions in square brackets supplied)

[77] Although the word “cruel” is not used in ECHR Art 3, to avoid confusion, I have continued to use the abbreviation “CIDTP” in relation to the ECHR even though strictly, the letter “C” should be eliminated.

[78] *Ireland v the United Kingdom* [1978] ECHR 1, Judgment of 18 January 1978, Series A no 25, p 65, §163.

[79] (1989) 11 EHRR 439 at §88. See also *Chahal v UK* (1996) 23 EHRR 413 at §79.

[80] [2004] 2 AC 323 at §40.

[81] [2000] 2 AC 228 at 252.

[82] [2006] 1 AC 396 at §46.

[83] (2004) 7 HKCFAR 187 at §66.

[84] (1999) 2 HKCFAR 4.

[85] At 28.

[86] (1999) 2 HKCFAR 4 at 28-29.

[87] (2002) 5 HKCFAR 480 at §24.

[88] With Professor Malcolm Shaw QC, Mr Anderson Chow SC and Ms Grace Chow.

[89] [1999] 1 AC 98 (PC).

[90] At p 109.

[91] (1999) 2 HKCFAR 4 at 25.

[92] [2007] 2 AC 1.

[93] See per Lord Hoffmann at §§51-53; per Lord Rodger of Earlsferry at §§57-60, 66-67.

[94] With the exception of *A (* ***Torture*** *Claimant) v Director of Immigration* [2008] 4 HKLRD 752, where section 11 was not raised by the Director.

[95] [1998] 1 HKLRD 729.

[96] At p 748, per Litton VP for the Court.

[97] Of 4 November 1994, §10.

[98] BOR Art 15(3): Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

[99] For example: *F v United Kingdom (Application No 17341/03)* [2004] ECHR 723) 22 June 2004; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, especially in Lord Steyn's speech; *Z and T v UK* [2006] ECHR 1177.

[100] HKBORO section 5; ICCPR Art 4 and ECHR Art 15.

[101] Section J.2 of this judgment.

[102] (1996) 23 EHRR 413 at §79.

[103] [2010] 2 AC 110 at §6.

[104] [2006] 1 AC 396 at §55.

[105] (1989) 11 EHRR 439 at §86.

[106] [2004] 2 AC 323 at §7.

[107] At §9.

[108] (1989) 11 EHRR 439.

[109] At §85.

[110] At §86.

[111] At §87.

[112] At §88.

[113] At §88.

[114] At §90.

[115] At §91.

[116] Examples include *Chahal v UK* (1996) 23 EHRR 413 at §73; *F v United Kingdom* [2004] ECHR 723; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at §12.

[117] [2012] ECHR 232 (Application no 3727/08), 7 February 2012

[118] Bossuyt and Humphrey, Guide to the "Travaux Préparatoires´of the ICCPR, 1987, pp 316-317 (Summary, Third Committee, 14th Session 1959); UNGA, Third Committee, 14th Session, 20 November 1959, A/C.3/SR 963 §3;

[119] Communication No 204/1986, *AP v Italy*, §7.3; Communication No 692/1996, *ARJ v Australia*,§§ 4.11 and 6.4

[120] [2005] 3 HKC 447 at §29.

[121] *Yeung Chun Pong v Secretary for Justice* (2006) 9 HKCFAR 836 at 849.

[122] Referred to in Section C.2 above.

[123] [2006] 1 AC 396 at §§53-55.

[124] *Soering v United Kingdom* (1989) 11 EHRR 439 at §91.

[125] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at §24.

[126] [2012] ECHR 232 (Application no 3727/08), 7 February 2012 at §50.

[127] At §51.

[128] This was an error as the Nigerian law prescribed 5 years imprisonment as the maximum and not the minimum sentence.

[129] Reyes J at §108.

[130] Reyes J at §110.

[131] Reyes J at §§111 and 118.

[132] Court of Appeal at §85.

[133] (2002) 5 HKCFAR 356.

[134] At §131.