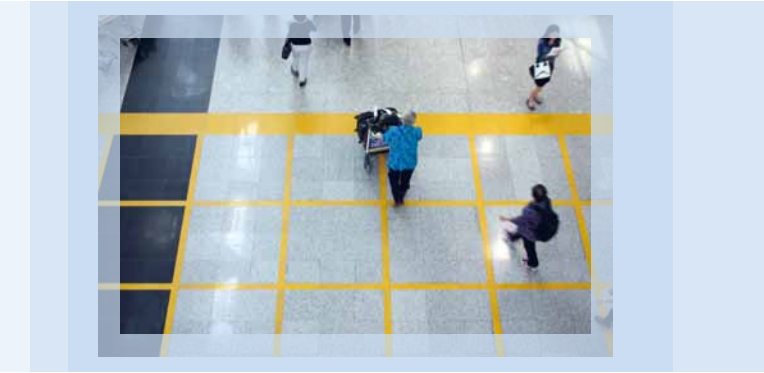
Ubamaka Edward Wilson v Secretary for Security & Anor

FACV No. 15 of 2011 (21 December 2012)[1]
CFA

Background

In 1991, Edward Wilson Ubamaka, a Nigerian national, was arrested upon arrival at the Hong Kong international airport for possessing dangerous drugs. In 1993, he was convicted of drug trafficking and sentenced to 24 years' imprisonment.



Before July 1997, Mr Ubamaka applied to the Hong Kong and British Governments for repatriation to Nigeria to serve the remainder of his sentence there. However, as there was then no such arrangement between Hong Kong and Nigeria, the application for transfer was abortive. The Secretary for Security ("the Secretary") issued a deportation order against him in July 1999.

Sometime in 1998, Mr Ubamaka became aware of Decree No. 33 of 1990 which has since been incorporated into the National Drug Law Enforcement Act of Nigeria, making it an offence (i) to export narcotic drugs or psychotropic substances from Nigeria (if the journey originates from Nigeria without such prohibited substances being detected and that person is found to have imported such prohibited substances into a foreign country); and (ii) to bring the name of Nigeria into disrepute by being found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances. The maximum penalty for either of these offences is a maximum term of 5 years' imprisonment and forfeiture of assets, notwithstanding that such a person may have been tried and convicted for the same conduct in that foreign country.

In September 2006, Mr Ubamaka applied to the Hong Kong office of the United Nations High Commissioner for Refugees ("UNHCR") for refugee status under the 1951 Convention Relating to the Status of Refugees. In March 2007, he lodged a claim with the Director of Immigration ("the Director") against the deportation order on the basis of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Mr Ubamaka claimed that, on being deported to Nigeria, he risked imprisonment both pending and following trial pursuant to the National Drug

[1] Reported at [2013] 2 HKC 75.

Law Enforcement Act and alleged that it would be common for detainees for drug-related offences to be subjected to torture and other inhuman or degrading treatment during such imprisonment. In December 2007, the UNHCR rejected his claim for refugee status. Separately, in August 2008, Mr Ubamaka's CAT claim was rejected by the Director.

In December 2007, Mr Ubamaka was released from prison early for good behaviour but was immediately placed in administrative detention by the Director pending deportation. Between January and March 2008, Mr Ubamaka made repeated unsuccessful requests to the Director for release on recognisance. He applied for judicial review to challenge the deportation order and administrative detention. In August 2008, following the grant of leave to apply for judicial review, Mr. Ubamaka was released on recognisance.

In May 2009, the CFI allowed the application for judicial review, quashed the deportation order and ruled that the administrative detention in question was unlawful. On appeal by the Secretary and the Director, the decision of the CFI was reversed by the CA.

Issues

In his appeal to the CFA, Mr Ubamaka challenged the deportation order on the basis that, if deported to Nigeria, he would face a serious risk of prosecution and punishment under the Nigerian law for the same conduct – drug trafficking – which had led to his conviction and incarceration for 16 years in Hong Kong, thereby exposing him to the risks of cruel, inhuman or degrading treatment or punishment ("CIDTP") and double jeopardy prohibited by Articles 3 and 11(6) of the BoR respectively under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"). Mr Ubamaka further argued that the rule prohibiting *refoulement* to face CIDTP constitutes a norm of customary international law which had been incorporated into the common law of Hong Kong and provided an independent basis for nullifying the deportation order. The leading judgment of the CFA, dismissing the appeal, was given by Mr Justice Ribeiro PJ. The challenge against the administrative detention no longer needed to be dealt with by the Court.

A municipal law question

Ribeiro PJ stated clearly at the outset that the questions with which the CFA was concerned were to be resolved under the domestic law of Hong Kong and not by any purported direct application of the provisions of the ICCPR or by any purported adjudication of an issue on the plane of international law. It was held that it is long-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 the domestic

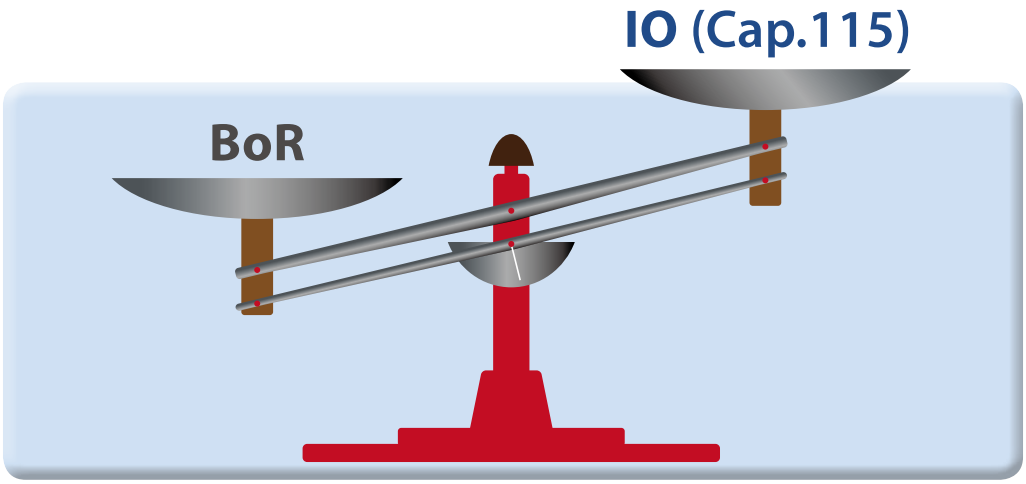
law by legislation, they do not confer or impose any rights or obligations on individual citizens. It is a principle of construction that where a domestic statute is ambiguous and is capable of bearing different meanings which may in turn conform or conflict with the international treaty, the court will presume that the legislature intended to legislate in accordance with applicable international treaty obligations. But where the statute is clear, the court's duty is to give effect to it whether or not that would involve a breach of any treaty obligation. The courts have no jurisdiction to adjudicate upon rights and obligations arising out of transactions between sovereign states.

The first constitutional argument: section 11 of the HKBORO was interpreted too widely

Mr Ubamaka contended that section 11 of the HKBORO is unconstitutional and must either be read down or severed from the HKBORO altogether so that it does not preclude his reliance on the BoR rights invoked. The premise of his contention was that the scope of the UK's 1976 immigration reservation to the ICCPR, and thus the scope of such reservation "as applied to Hong Kong" has long been misunderstood and given too wide a meaning.[2] The contention was that the reservation was aimed at preserving the state of affairs by which those British subjects who did not concurrently hold British citizenship did not enjoy the right to enter and reside in the UK, notwithstanding that Article 12 of the ICCPR provided for, *inter alia*, their right to liberty of movement, their freedom to choose their residence and their right not to be arbitrarily deprived of the right to enter their own country. It was suggested that the UK was concerned 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) might claim his right under Article 12(4) not to be arbitrarily deprived of the right to enter his own country.

Mr Ubamaka argued, therefore, that the effect of the immigration reservation to the ICCPR as extended in 1976 to Hong Kong (and to each of the other British territories then existing) was that (i) the right to freedom of movement and of choice of residence within the territory of a state under Article 12(1) of the ICCPR would be available in respect only of his or her particular territory or colony – but not any other British territory; (ii) the right in Article 12(4) of the ICCPR 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; (iii) insofar as any other provision of the ICCPR implied a like right to that

[2] Section 11 of the HKBORO 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."



reserved against in respect of Articles 12(1) and 12(4), the immigration reservation would apply likewise and to that extent (but to that extent only). Thus, it was argued that when BL 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 described above; it does not authorise or permit any greater inroads into the ICCPR rights which it protects.

Ribeiro PJ rejected this argument. His Lordship was of the view that the issues arising in the present case could not be resolved by reference to what might have motivated the UK when it made the immigration reservation to the ICCPR in 1976, especially as adopting that approach involves ignoring the fundamental changes to Hong Kong's legal order since then. In 1976, Hong Kong was not faced with a threatened influx of British subjects from other 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". Instead, during 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 from the Mainland and robust legal measures were adopted in authorising removal and deportation with associated arrest and detention powers. The immigration reservation operated in that context to prevent illegal immigrants from seeking to resist such measures by relying on potentially applicable ICCPR rights. For example, in *re Hai Ho-tak and Cheng Chun-heung* [1994] 2 HKLR 202, section 11 of the HKBORO was relied on in response to an application to quash a removal order as a violation of Article 1 (non-discrimination), Article 14(1) (privacy, etc.), Article 15(4) (liberty of parents regarding children's education), Article 20(1) (rights of children) and Article 22 (equal protection of the law) of the BoR. And in *Vo Thi Do and Others v Director of Immigration* [1998] 1 HKLRD 729, a test case involving 1,376 former residents of Vietnam, prolonged administrative detention was challenged as a violation of Article 3 (CIDTP) and Article 5 (liberty of the person) of the BoR. Numerous other cases have arisen where reliance was placed on Article 19 (family rights).

The question of whether the provisions of the ICCPR should continue to apply in Hong Kong was specifically addressed by the CPG 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. The 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 BL 160 ("the BL 160 exercise"). 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. By its Decision adopted at the Twenty Fourth Session of the Standing Committee of the Eighth NPC on 23 February 1997, the Standing Committee set out a list of Ordinances and subordinate legislation found to contravene 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 the HKBORO were listed therein as excluded provisions, but section 11 and the remaining provisions of the HKBORO were adopted as being consistent with the Basic Law. Properly understood, it is the above process of the BL 160 exercise whereby the HKBORO was adopted as part of the laws in Hong Kong, consistently 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.

The second constitutional argument: section 11 of HKBORO is not incorporated by BL 39

Mr Ubamaka contended alternatively that, if the immigration reservation has a wider meaning which is coextensive with the terms of section 11 of the HKBORO, it contravenes the object and purpose of the ICCPR and is null and void as a matter of public international law. The consequence is that the reservation is severed from the instrument of ratification such that the state which made the reservation remains a party to the treaty without the benefit of the reservation. BL 39 therefore did not incorporate the void reservation into domestic law, and as such the HKSAR Government is not constitutionally permitted to breach the ICCPR as it applies to Hong Kong at international law.

As stated above, Ribeiro PJ noted that municipal courts do not have jurisdiction to adjudicate upon rights and obligations arising out of transactions between sovereign states on the international plane. Accordingly, it was held that this alternative argument involving the validity or invalidity of the UK's ratification, with or without its immigration reservation, as a matter of public international law, is not justiciable in Hong Kong courts.

For the reasons stated above, both limbs of the constitutional challenge failed, and the CFA concluded that section 11 is consistent with BL 39 and constitutionally valid.

Section 11 of the HKBORO regarded as valid as a matter of Hong Kong law

In domestic law, the Hong Kong courts have invariably viewed section 11 as consistent with the immigration reservation and BL 39. Even before 1 July 1997, it was held in *Wong King-lung and Others v Director of Immigration* [1994] 1 HKLR 312 that the immigration reservation, taken to be reflected in the terms of section 11, was valid. After 1997, section 11 has been discussed on a number of occasions in the CFA without detection of any inconsistency between that provision and the original immigration reservation under the ICCPR or BL 39.

The scope and effect of section 11 in the context of section 5 of the HKBORO

Ribeiro PJ noted that, on its face, section 11 of the HKBORO excludes all rights in the BoR without exception or qualification in relation to the persons and immigration legislation within its ambit. However, section 5 of the HKBORO provides that there can be no derogation from, *inter alia*, Article 3 even in times of public emergency which threatens the life of the nation. The central question is whether, in the face of section 5 of the HKBORO, the legislature could have intended that section 11 should be allowed to preclude reliance on Article 3 of the BoR in respect of routinely exercised immigration legislation powers. Ribeiro PJ emphasised that there being no question of section 11 of the HKBORO being unconstitutional, the question concerns merely the construction of section 11.

Ribeiro PJ reached the view that if the prohibition against torture and CIDTP in Article 3 of the BoR was non-derogable under section 5 of the HKBORO, even in the extreme situation of a public emergency which threatens the life of the nation, it is impossible to imagine any circumstance in which derogation is permitted. Furthermore, his Lordship noted that the right protected under Article 3 of the BoR has additionally the status of an absolute right as demonstrated by the jurisprudence of the Strasbourg and UK courts.

The CFA laid down in *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, constitutional instruments must generally be interpreted purposively. That also applies to the HKBORO, which is given constitutional force by BL 39. The clear words of section 5 of the HKBORO establish the non-derogable character of the right not to be subjected to torture or CIDTP protected by Article 3 of the BoR, which are also absolute. Accordingly, any apparent conflict between section 5 and section 11 of the HKBORO 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 right protected by Article 3. Construed purposively, section 11 must be read as qualified by section 5 and must be understood to exclude the application of the HKBORO and the BoR relating 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 right protected by Article 3 of the BoR are engaged.

Respondents' arguments

The Respondents advanced four arguments against the Court reaching this conclusion. First, they relied on section 2(2) of the HKBORO which provides that "The Bill of Rights is subject to Part III"; as section 11 is in Part III; it was argued that section 11 overrides the rights in the BoR. Ribeiro PJ rejected this argument, commenting that it merely restates, without answering, the central question concerning the true construction of section 11 and the scope of section 11 to which the BoR is made subject.

Secondly, the Respondents argued that sections 5 and 11 are concerned with processes involving quite different concepts. Section 11 is a reservation (made at the time of ratification of the ICCPR, by which the Contracting State declines to take on specified obligations); whereas section 5 is concerned with derogations (which involve withdrawing from treaty obligations originally undertaken). Ribeiro PJ said that the above argument was not to the point. Instead, the relevance of section 5(2)(c) of the HKBORO lies in its declaration that derogation from Article 3 of the BoR is unavailable at any time, even in the time of a proclaimed public emergency which threatens the life of the nation. Section 5(2)(c) thereby acknowledges or confers on Article 3 the status of an absolute, non-derogable right entitled to dominance over section 11.

The Respondents' third argument was that the legislature had decided that the exercise of immigration powers within the ambit of section 11 should be left to the discretion of the Director whose exercise of power would be subject to the usual administrative law constraints. This argument was also rejected. Ribeiro PJ was of the view that if the true reach of section 11 of the HKBORO falls short of displacing the rights protected by Article 3 of the BoR which are absolute and non-derogable, any inconsistent action by the Respondents would constitute a constitutional violation for which redress is granted as of right and is not subject to discretionary considerations. Such a violation

would be justiciable and the Court is bound to intervene.

The Respondents' final argument was that the Court should construe section 11 of the HKBORO 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. Ribeiro PJ noted that, while Hong Kong case law has uniformly treated section 11 as displacing the rights contained in the BoR, in none of those cases except *Vo Thi Do and Others v Director of Immigration* [1998] 1 HKLRD 729 was there any attempt to rely on Article 3 of the BoR. The CA in *Vo Thi Do* held that section 11, although triggered, did not affect the result of that case since, "upon the facts, none of the rights guaranteed under arts 3, 5(1) and 6(1) were infringed". *Vo Thi Do* was thus a case where the Court did not analyse whether those rights under the BoR were ousted by section 11. Nor did any of the cases relied on by the Respondents consider the relationship of sections 5 and 11.

Other rights listed in section 5 of HKBORO

The CFA's judgment was expressly confined to the relationship between sections 5 and 11 of the HKBORO on the one hand and Articles 3 and 11(6) of the BoR on the other. The other rights listed in section 5(2)(c) have not been argued and nothing in the judgment is intended to rule on section 11's relationship with those rights. The Court made it clear that it does not follow from the conclusion that the right against being subjected to CIDTP protected by Article 3 of the BoR is both non-derogable and absolute, that the same applies to all other rights listed in section 5(2)(c) of the HKBORO. Some of those 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. One should therefore not too readily extrapolate from what is said in this judgment to those other rights.

Consequences of the construction of section 11 of the HKBORO

The first consequence of the right not to be subjected to CIDTP being an absolute right, in the context of deportations and removals, is that a 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. The second and related consequence is that the government cannot justify any infringement of the absolute Article 3 right on the ground that the deportation satisfies a proportionality analysis. The third consequence is that the applicability of Article 3 in expulsion cases is an exception to the general restriction of the ICCPR and the HKBORO

to territorial limits based on the serious and irreparable nature of CIDTP. Therefore the threat of violation of Article 3 by the receiving country if the deportee were sent there is a ground to restrain the Hong Kong Government from proceeding with the deportation.

The double jeopardy ground

Ribeiro PJ held that Mr Ubamaka's challenge to the deportation order on the basis of Article 11(6) of the BoR failed since section 11 precludes reliance on that provision. Mr Ubamaka's 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. Ribeiro PJ also agreed with Reyes J and the CA that Article 11(6) does not avail Mr Ubamaka as, unlike Article 3, it only applies within the territorial limits of the HKSAR.

The CIDTP ground

Section 11, properly construed, does not preclude Mr Ubamaka from relying on Article 3 of the BoR. For bringing himself within the terms of Article 3 on the facts, Mr. Ubamaka must establish that the ill-treatment which he would face if expelled attains "a minimum level of severity", and that he faces a genuine and substantial risk of being subjected to such mistreatment. The threshold for establishing those requirements is very high and generally involves actual bodily injury or intense physical or mental suffering.

The degree of risk that a deportee must establish has variously been put as a requirement that

he must show "substantial" or "strong grounds" for believing that if deported (or extradited) he faces a "real risk" of being subjected to torture or CIDTP. The assessment of the existence of a real risk must be rigorous. 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 it is able to make a "full and up-to-date assessment" of the current situation.

Ribeiro PJ held that the facts in this case fell far short of meeting both the substantial risk and minimum level of severity requirements.

The customary international law ground

Ribeiro PJ held that Mr Ubamaka's contention that there existed a norm of customary international law which prohibited *refoulement* to face CIDTP was a ground introduced for the first time at the final stage of the proceedings. It was well-established that 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 more favourable to the other side if the point had been taken at trial. Besides, Mr Ubamaka accepted that this was not a ground which could achieve a different outcome from those reached regarding the other grounds of challenge.

C & Ors v Director of Immigration & Anor

FACV Nos. 18-20 of 2011 (25 March 2013)[1]
CFA

Background

The three Appellants in the case, C from the Democratic Republic of Congo and KMF and BF from the Republic of Congo, each made a claim to the United Nations High Commissioner for Refugees ("UNHCR") for protection as a refugee under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (collectively, "the Convention"). The UNHCR processed their claims in accordance with the procedural standards for Refugee Status Determination ("RSD") under its mandate. C's claim for refugee status was rejected by the UNHCR on 19 March 2004. His appeal was dismissed by the UNHCR by letter dated 24 March 2004 on grounds that he fell within the exception under Article 1(F)(a) of the Convention which excludes claimants with respect to whom there are serious reasons for considering to have committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes. KMF and BF's claims for refugee status were rejected and their appeals were dismissed in July 2006 and early 2006 respectively.

The Convention imposes obligations on contracting state parties, including an obligation to "facilitate the assimilation and naturalisation of refugees" (Article 34 of the Convention). A "refugee" is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country" (Article 1A(2) of the Convention). According to the principle of *non-refoulement* ("PNR") expressed in Article 33 of the Convention, no contracting state shall return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Although both the United Kingdom and the PRC are contracting states to the Convention, the former did not apply the Convention to Hong Kong before 1997 and neither has the PRC applied it to the HKSAR.

The firm policy of the HKSAR is not to grant asylum to refugees. The practice of the Director of Immigration ("the Director") is that, pending RSD

[1] Reported at [2013] 4 HKC 563.

by the UNHCR, a refugee claimant in Hong Kong would be permitted to remain and, if the claim succeeds, the refugee would not be repatriated to the state where he fears persecution pending resettlement by the UNHCR. The Appellants did not challenge the policy not to grant asylum, nor did they contend that the HKSARG is obliged to facilitate the assimilation and naturalisation of refugees. Rather, they contended that the HKSARG is under an obligation to conduct screening of PNR claims independently of the UNHCR. There were two grounds of appeal.

The first ground of appeal

The Appellants accepted that the Convention had not been extended to the HKSAR, and that Article 33 of the Convention has no direct application. However, they contended that PNR has become a rule of customary international law ("CIL") as well as a peremptory norm, and as such, has become part of the common law of the HKSAR. They also contended that, to give effect to such CIL, the HKSARG should make its own RSD, and the Director must not return any refugee claimant without appropriate enquiry into their PNR claims.

Tang PJ held that it was unnecessary to decide the first ground of appeal, given his decision on the second ground. His Lordship expressed no view on any of the issues raised under the first ground.

Bokhary NPJ explained that this case was in truth covered by the Court's decision in *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187 in which the government's policy of not ordering any return that would put a person in peril of being tortured provided a sufficient basis for classic judicial review because the government had made no determination of its own on the asserted fear of torture in the event of return; this was notwithstanding whether it was accepted that prohibition against torture *non-refoulement* had become part of domestic law as contended by Mr Prabakar.

The second ground of appeal

The Appellants' second ground of appeal was that the Director's decision to return a refugee claimant is subject to judicial review and must satisfy the high standards of fairness required by the gravity and importance of the decision.

i. The exercise of wide discretionary powers under the rule of law

Giving the leading judgment, Tang PJ noted that BL 154 allows the HKSARG to apply immigration controls on persons from foreign states and regions. The Immigration Ordinance (Cap. 115) ("the Ordinance") confers wide discretionary powers on the Director relating to the exercise of immigration controls. He may refuse a person permission to land, give permission to land subject to a limit of stay and impose conditions, remove persons refused permission to land, and authorise persons who have landed in Hong Kong illegally to remain subject to conditions of stay.

Tang PJ further noted that, while the Ordinance is silent on how the Director should exercise his wide statutory powers, there is extensive

authority to the effect that the exercise of such powers must be rational and in a fair and proper manner. The law also requires, and the legislature must have intended, that the Director would take into consideration relevant matters and ignore irrelevant matters.

ii. Standard applicable to the Director's decision-making process

Tang PJ considered what the rule of law requires of the Director in making decisions whether or not to *refoule* a person who claimed to be a refugee.

The Appellants relied on the court's decision in *Prabakar*, which held *inter alia* that the Secretary for Security, who had a policy not to *refoule* a torture claimant if a claim is well-founded, must determine whether the claim is well-founded.

In *Prabakar*, it was held that although ultimately it was for the Secretary to assess the materials and come to an independent judgement, having regard to the gravity of what is at stake, the courts would on judicial review subject the Secretary's determination to anxious scrutiny to ensure that the required high standards of fairness have been met.

The Appellants submitted that, in respect of refugee claimants, the Director must also assess the materials and make an independent judgement whether the Appellants' fear of persecution was well-founded. His determination also must be subjected to rigorous scrutiny to ensure that the required high standards of fairness have been met.

Tang PJ rejected the Respondents' attempt to distinguish *Prabakar* with the argument that, unlike under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which expressly prohibited *non-refoulement* in relation to torture, the HKSARG has no legal duty under the Convention. Tang PJ said that whether there was a legal duty was not critical to the decision in *Prabakar*. It sufficed that the genuineness of a torture claim was relevant to a determination whether or not to remove a person.

The Respondents relied on *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 to argue that the Director has no duty to consider humanitarian grounds in deciding whether or not to make a removal order. However, Tang PJ noted that *Lau Kong Yung* concerned illegal immigrants claiming permanent residence in the HKSAR, which is very different from the more serious consequences that refugee claims can have. Humanitarian considerations such as family reunion in *Lau Kong Yung* have lesser scope as a basis for resisting a removal order.

The Respondents also attempted to distinguish *Prabakar* on the basis that there the Secretary had a policy not to deport a person to a country where that person's claim that he would be subjected to torture is well-founded. In the present case, the Director had no policy, but only a practice. Tang PJ said that the Director must exercise the powers under the Ordinance in a principled manner and it does not matter whether the facilitation of that exercise is labelled a practice or a policy. Bokhary NPJ and Mason NPJ also considered that there is no material difference between a "policy" and a "practice".

Tang PJ held that since whether a person is a refugee is a relevant consideration, it follows that if a person claims refugee status, before the Director exercises his power, the Director must determine whether the claim is well-founded. It is not a sufficient answer to say that the Director has deferred to or relied on the UNHCR's RSD. Since a decision of such moment attracts the high standards of fairness identified in *Prabakar,* the Director's decision must meet those high standards of fairness. It was unnecessary to decide whether when exercising his removal powers the Director must have regard to humanitarian reasons when confronted with a refugee claim. It is sufficient that the Director does so in accordance with his practice under which a relevant humanitarian reason is whether or not a person is indeed a refugee. Nor was it the Court's decision that humanitarian reasons alone must decide the exercise of the Director's power. Whether *refoulement* may be ordered for any other reason was not for decision in this case. Mason NPJ also pointed out for the sake of clarity that his reasons and conclusion in this case relate only to the exercise of the Director's power of removal pursuant to the policy.

Mason NPJ noted that the Director's Case stated that "the Director does independently consider the exercise of his power of removal in each case on its own merits". Mason NPJ commented that this was a statement only and was not supported by evidence. Secondly, the statement did not say what was involved in the consideration of each case on its own merits. Thirdly, the Court was informed that in all cases where the UNHCR has made an RSD in favour of a claimant on the basis of a well-founded fear of persecution in his country of nationality, the Director has not returned him to that country. Mason NPJ was of the view that in a case of this kind, one would have expected the Director to adduce evidence showing in detail the consideration he gives to each case on its own merits after the UNHCR makes its final determination of refugee status.

Accordingly, there were very strong reasons for concluding that the Director had either failed to apply his mind independently to the correctness of the determinations made by the UNHCR or, if he had done so, he had done so in a way that fell short of the anxious scrutiny and high standards of fairness required by *Prabakar*. It was legitimate for the Director to give weight to the UNHCR determination but not to simply rely on it.

The Respondents' contention on adverse consequences

The Respondents submitted that were the HKSARG required to conduct RSD, the UNHCR might not assist a person screened in to settle elsewhere. In turn, this would force the HKSAR to allow refugees to settle in Hong Kong. In response, the UNHCR informed the Court through leading counsel that it would continue to assist refugees to settle in a safe country. The Respondents also submitted that a decision adverse to the Director might lead to a flood of economic migrants. Tang PJ emphasised that the case was not about the grant of asylum, but only about potentially returning persons to countries where they have a well-founded fear of persecution. The Director must give effect to the rule of law and Hong Kong's human rights standard should not be affected.

Tang PJ rejected the Respondents' argument that to require the Director to conduct RSD would require much expense and expertise. Tang PJ noted that the HKSARG had agreed with the UNHCR that it would, at its own cost, supply appropriately experienced immigration officials to handle RSD-related duties. Tang PJ also noted that, as *Prabakar* shows, the high standards of fairness require the Director to obtain relevant information and materials. It was held that while the Director is entitled to give weight to an RSD by the UNHCR, it is essential that the determination to be made by the Director and his duly authorised officers must satisfy the high standards of fairness required.

Conclusion

In conclusion, the Court held that firstly, since it is the Director's practice to have regard to humanitarian considerations when deciding whether or not to exercise his power under the Ordinance to remove a refugee claimant to the country of putative persecution, and whether such claim is well-founded is a relevant humanitarian consideration, the Director must determine whether the claim is well-founded. Secondly, such determination must satisfy the high standards of fairness required having regard to the gravity of the consequence of the determination.

Vallejos and Domingo v Commissioner of Registration

FACV Nos. 19 & 20 of 2012 (25 March 2013)[1]
CFA

Background

BL 24(2)(4) provides that persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than 7 years and have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR shall be permanent residents of the HKSAR. The two Appellants were Philippine nationals who entered Hong Kong for employment as foreign domestic helpers ("FDHs") and have resided in Hong Kong continuously for more than seven years as FDHs. They challenged the constitutionality of s. 2(4)(a)(vi) of the Immigration Ordinance (Cap. 115) ("IO") which provides that a person employed as a domestic helper who is from outside Hong Kong is not to be treated as "ordinarily resident" in Hong Kong and so cannot become a permanent resident of the HKSAR. The Appellants contended that they fall within the "natural and ordinary meaning" of the words "ordinarily resided" ("OR") in BL 24(2)(4) and the restriction in s. 2(4)(a)(vi) of the IO is in breach of BL 24(2)(4) and unconstitutional. Their argument was accepted by the CFI but reversed by the CA. The CFA unanimously dismissed their appeals.

Meaning of OR

The judgment of Ma CJ (to which each member of the bench had contributed) was handed down on 25 March 2013. The CFA decided that the residence of FDHs, as a class, in Hong Kong does not come within the meaning of OR in BL 24(2)(4), and accordingly, FDHs are not eligible for right of abode in Hong Kong under the Basic Law. The CFA identified the special features of the FDH scheme in Hong Kong since the mid-1970s. Such special features included the standard-form two years employment contract, the two-week rule,[2] mandatory return to place of origin for home leave before commencing new contract, general prohibition to change employer when the contract is terminated prematurely and general prohibition to bring in dependants. An FDH admitted to Hong Kong under the FDH scheme can only engage in domestic work and has to work and reside in the employer's residence designated in the contract. He or she cannot work elsewhere or for another employer. The CFA compared the FDHs' situation with other persons not of Chinese nationality who are permitted to enter and remain in Hong Kong under the general employment visas and found that the latter are not subject to similar restrictive conditions of stay.

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[1] Reported at [2013] 2 HKLRD 533.

[2] FDHs must leave Hong Kong upon expiry of their limit of stay or within two weeks after termination of their contracts, whichever is earlier.

The CFA noted that:- (i) the terms on which FDHs are admitted to work and reside in Hong Kong are and have always been highly restrictive and subject to control by the Director of Immigration; and (ii) they are also subject to highly restrictive employment conditions. It is clear that FDHs are not admitted for settlement in Hong Kong, but instead, admitted under a Government's policy to address the shortage of domestic helpers in the labour market.

The CFA accepted the Commissioner's principal argument on the meaning of OR in BL 24(2)(4), namely, that Lord Scarman's formulation in *R v Barnet London Borough Council Ex parte Shah* [1983] 2 AC 309 is the starting point in construing the words OR but not the sole meaning; and the highly restrictive conditions applicable to FDHs place them in such an exceptional category so that excluding them from OR is consonant with BL24(2)(4). The Court emphasized the importance of purpose and context in construing the words "OR", especially in the circumstances of construing those words as they appear in the Basic Law *vis-à-vis* other statutes. It was pointed out that the decision in the *Shah* case is limited in two major respects:- (i) its scope or coverage is limited; and (ii) Lord Scarman's formulation leaves open questions regarding the qualitative aspects of a person's residence in the country, e.g. the qualitative aspects of FDHs' residence in Hong Kong are obviously of potential relevance. Further, the Court found that Lord Scarman's natural and ordinary meaning approach (i.e. relegating context and purpose into second place for consideration) is particularly unhelpful when interpreting words which have some flexibility of meanings.

The CFA held that it is always necessary to examine the factual position of the person claiming to be OR to consider whether there are any special features affecting the nature and quality of his or her residence which may result in that person's residence not to be OR on the basis that it is "qualitatively" far-removed from what would traditionally be recognized as OR. The Court reckoned that the outer boundaries of OR are incapable of precise definition.

In the present appeals, the Court held that BL 24(2)(4), by stipulating a seven year qualifying period, implicitly makes immigration control a constant feature in the process of building up eligibility for right of abode. It was held that it is implicit that the continuous seven year period of OR is subject to continuing immigration control and the imposition of such controls (e.g. the exercise of discretion as to whether a non-Chinese national should be allowed to enter Hong Kong and whether permission to remain should be extended) is not constitutionally objectionable. Accordingly, the Director of Immigration has power to impose conditions on the entry of a person which will materially affect the quality of his residence in Hong Kong. In the case of FDHs, the prominent distinguishing features have an important bearing on the nature and quality of the residence of FDHs as a class in Hong Kong and justify excluding them as a class from the meaning of OR as used in BL 24(2)(4).

Having arrived at the above conclusion on the above basis, the CFA did not consider it necessary to deal with the other arguments, including:- (i) there is a margin of discretion in the legislature to enact exclusionary categories; (ii) the Court should refer to extrinsic materials (if and insofar as the Court may be in doubt as to the meaning of OR in BL 24(2)(4)); and (iii) the Court is bound[3] under BL 158(3) to refer to the NPCSC the proposed question concerning the meaning and scope of an "interpretation" made under BL 158(1).

BL 158(3) reference

The Commissioner argued that if and insofar as the CFA considers it necessary to consider the effect of the Interpretation adopted by the NPCSC on 26 June 1999[4] ("1999 Interpretation"), the Court has an obligation under BL 158(3) to refer to the NPCSC the follow questions:

(i) What is the meaning of an "interpretation" which the NPCSC has power to give under BL 158(1)?

(ii) Whether the Statement in the 1999 Interpretation[5] is or constitutes part of the "interpretation" within the meaning of BL 158(1), such that it is binding on and shall be applied by the courts of the HKSAR when deciding cases involving any one of the categories under BL 24(2) (including BL 24(2)(4))?

In considering whether the CFA should make a judicial reference under BL 158(3) of the questions identified by the Commissioner, the Court admitted that the HKSAR courts' power to interpret the Basic Law is precisely defined and not as wide as the general power vested in the NPCSC. There are limitations imposed on courts' power of interpretation of the Basic Law. Firstly, the power can only be exercised in adjudicating cases; the courts' role is to adjudicate and not to give advisory opinion. Secondly, the seeking of an interpretation from the NPCSC under the circumstances prescribed by BL 158(3) is mandatory. It is the responsibility of the CFA, being part of its "constitutional jurisdiction".

The CFA endorsed the approach developed in *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 in considering whether a reference should be made. Ma CJ held that the CFA has a duty to make a reference under BL 158(3) if the following two conditions are satisfied:-

(a) "the classification condition":- if the provisions of the Basic Law in question-
   (i) concern affairs which are the responsibility of the CPG; or

   (ii) concern the relationship between the Central Authorities and the HKSAR;

   (such provisions being referred to as "the excluded provisions")

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[3] Subject to the circumstances elaborated below.

[4] The interpretation headed "The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" which was made and adopted by the Standing Committee of the Ninth NPC at its Tenth Session on 26 June 1999.

[5] The Statement reads as follows:

"The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, have been reflected in the "Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 19 August 1996."

(b) "the necessity condition":- if the CFA in adjudicating the case needs to interpret the excluded provisions and the interpretation will affect the judgment on the case.

and if the implicit requirement of arguability (i.e. the case is arguable and not plainly or obviously bad) is also satisfied. The arguability factor is to ensure integrity in the operation of a judicial reference to avoid any potential abuse.

Summarizing the CFA's duty under BL 158(3), Ma CJ held:

> "105. The seeking of an interpretation by the Court of Final Appeal … is therefore a precisely defined duty under Article 158(3). It is mandatory in character; it is specifically limited in its application to the excluded provision of the Basic Law and it applies only in the particular circumstances contemplated by that provision, that is, the conditions of classification, necessity and arguability. Then and only then the Court of Final Appeal must make a reference to the Standing Committee."

Beyond the ambit of BL 158(3), there is not any basis for implying a general power in the CFA to seek an interpretation from the NPCSC.

Applying the above legal principle to the Commissioner's application for a reference in the present appeals, the CFA held that although the classification condition is satisfied, in the light of the conclusion the Court has reached on the issue of the true construction of BL 24(2)(4), a reference to the NPCSC is simply unnecessary. It is therefore also not necessary to deal with the arguability factor.

In the CFA's judgment on Costs handed down subsequently (on 16 July 2013), the Court ordered that costs should follow the event and that the Commissioner be awarded his costs. The Court reiterated that because the Appellants fell at the first hurdle (i.e. the construction of the words OR), the Court need not deal with the other arguments raised by the Commissioner, namely, the margin of discretion argument, the extrinsic materials point and the BL 158(3) reference issue. The Court accepted that the Commissioner's arguments were "sequential". In particular, the Court accepted that the extrinsic materials point and the BL 158(3) reference issue ("the relevant points") advanced were "contingently relevant". The CFA did not accept the Appellants' argument that the Government had raised the relevant points for "the ulterior and collateral purpose" of attempting to resolve the issues of babies born to Mainland parents in Hong Kong and held that raising those points involved no abuse.

Judgment Update

W v Registrar of Marriages

FACV No. 4 of 2012 (13 May 2013)[1]
CFA

W is a post operative male-to-female transsexual. The Registrar of Marriages ("the Registrar") decided that she did not qualify as "a woman" for the purpose of the Marriage Ordinance (Cap. 181) ("MO") and the Matrimonial Causes Ordinance (Cap. 179) ("MCO"), hence, there was no power to celebrate a marriage between her and her male partner. W brought judicial review proceedings to challenge the Registrar's decision.

Background

Transsexualism is a gender identity disorder. Transsexual persons perceived themselves to be members of the opposite sex and may have emotional distress. It is generally recognised that transsexualism does not respond to psychological or psychiatric treatment. The only accepted medical treatment involved effecting hormonal and surgical changes to make the person's body conform sexually as closely as possible with his or her self-perception. The treatment began with assessing whether someone was suffering from gender identity disorder. Upon diagnosis that the patient was, he/she would go through a "real life experience", living in the preferred gender for about two years while having hormones of the opposite sex administered. If it appeared that the patient could live as a person of the opposite sex, he/she would be considered medically eligible for irreversible sex reassignment surgery ("SRS"). In Hong Kong, medical facilities for treating transsexuals were first established in 1980. The medical treatment was publicly funded. After completion of the course of medical treatment, a letter certifying the changed gender would be issued by the Hospital Authority ("HA"). As a matter of practice, the letter would be issued after a person has had the original genital organs removed and some form of the genital organs of the opposite sex constructed. The Commissioner of Registration would then issue a replacement identity card reflecting the changed gender.

In the case of W, she was registered as male at birth, a biologically correct classification. Having

[1] Reported at [2013] 3 HKLRD 90.

been diagnosed as suffering from gender identity disorder, W had an orchidectomy (removal of both testes) in 2007 and underwent SRS at HA hospitals involving removal of her penis and the construction of an artificial vagina in 2008. Thereafter, the HA certified her change in gender and she was issued with a new identity card stating her sex as female.

In 2008 upon W's seeking the Registrar's confirmation that she was able to marry her male partner, the Registrar decided that a marriage under the MO involved the union of a man and a woman. Taking the view that one's sex was fixed at birth and could not be changed by surgical means, the Registrar considered that he was not empowered to celebrate the marriage between persons of the same biological sex. W challenged the Registrar's decision by way of judicial review. The CFI and the CA ruled in favour of the Registrar.

Issues

The two main issues before the CFA were :-

(i) Whether, on a true and proper construction, the words "woman" and "female" in sections 21 and 40 of the MO included a post operative male-to-female transsexual?

(ii) if the answer to Question 1 was "No", whether those provisions were unconstitutional having regard to W's right to marry under BL 37 and/or Article 19(2) of the BoR ("BoR 19(2)")?

Construction of MO and MCO

On the construction issue, the relevant provisions read:-

Section 40 of the MO -

"(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.

(2) The expression 'Christian marriage or the civil equivalent of a Christian marriage' implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

Section 20(1)(d) of the MCO -

"A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only ... (d) that the parties are not respectively male and female."

The CFA went through the relevant legislative and judicial history in Hong Kong and the UK. The English case *Corbett v Corbett (otherwise Ashley)* [1971] P 83 held that a post operative male-to-female transsexual did not count as a woman for the purposes of marriage in the UK. *Corbett* held that "the sexual condition of an individual" was only defined by biological factors which were fixed at the time of birth whereas psychological factors were irrelevant.

The CFA held that the Registrar did not misconstrue section 40 of the MO or section 20(1)(d) of the MCO. The relevant statutory provision in the UK was to endorse the *Corbett* criteria for determining who was "a woman" for the purposes of marriage. The statutory intention behind enactment of the MCO provision was to reproduce in Hong Kong's statute book that UK provision. Since the MO provision covered materially the same ground as the MCO provision, the Registrar's approach was in accordance with the true construction of both of those provisions. It followed that if it was not because of the constitutionality issue below, W could not be treated as a "woman" under MO and MCO.

The Constitutional Right to Marriage

W contended that her constitutional right to marriage was infringed if the relevant provisions in the MO and MCO were construed to disallow post operation male to female transsexual from marrying a man. The relevant constitutional provisions were primarily BL 37 and BoR 19(2).

BL 37 reads:

> "The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

BoR 19(2) reads:

> "The right of men and women of marriageable age to marry and to found a family shall be recognized."

Article 12 of the European Convention on Human Rights ("ECHR 12") is in much the same terms and reads:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

Ma CJ and Ribeiro PJ[2] stated that if the MO and MCO excluded from the institution of marriage persons whose right to marry would be recognized under the Basic Law or BoR, it would fall to the CFA to declare the statutory provisions to such extent unconstitutional.

Ma CJ and Ribeiro PJ stated that there was no difference of substance between the two formulations in BL 37 and BoR 19(2). It was common ground that a marriage for constitutional and common law purposes was the voluntary union for life of one man and one woman to the exclusion of all others.[3] Further, following the jurisprudence of the European Court of Human Rights ("the ECtHR") on ECHR 12, the right to found a family under BoR 19(2) was held not to be a condition of the right to marry. The legal rules on marriage must be consistent with the constitutional right to marry protected by BL 37

[2] to whom Lord Hoffmann NPJ agreed; Bokhary NPJ issued a separate concurring judgment; Chan PJ dissented.

[3] The judgment stated that it did not deal with the question of same sex marriage.

and BoR 19(2). Applying the decision of the Grand Chamber of the ECtHR's *Goodwin v UK* (2002) 35 EHRR 18, these legal rules must not operate so as to impair the very essence of the right to marry. In *Goodwin*, the applicant was a post operative male to female transsexual. The majority of the ECtHR held, among others, that disallowing her from marrying a man breached the very essence of her right to marry protected under ECHR 12.

Applying *Goodwin* and other authorities, Ma CJ and Ribeiro PJ held that:-

(i) At the time of the promulgation of the various constitutional documents (including the ICCPR – upon which BoR 19(2) was founded, the Joint Declaration and the Basic Law), their framers would not necessarily have accepted the *Corbett* criteria. Even if the hypothesis that they would have done so was reasonable, the Basic Law and the ICCPR were living instruments intended to meet changing circumstances. There have been significant societal changes which called into question the *Corbett* criteria. The concept of marriage adopted in *Corbett* was derived from the classic description of a Christian marriage with an emphasis on procreative sexual intercourse being an essential purpose of a marriage. While the legal definition of marriage (above) remained the same, there have in many developed nations and in Hong Kong clearly been far-reaching changes to the nature of marriage as a social institution. Further, the ability to procreate children has never been a condition of marriage. There was no justification for regarding the ability to engage in procreative sexual intercourse as a condition of marriage.

(ii) SRS was not readily available in the UK when *Corbett* was decided. Today, transsexualism was recognized everywhere as a condition requiring medical treatment, with diagnostic criteria approved by the World Health Organization. In Hong Kong, as stated above, the official policies have evolved. So have societal attitudes, with post operative transsexuals now being recognized as persons of their acquired gender for a whole range of purposes.

(iii) For W, she has held the unchangeable perception of herself as a woman since young and then made a long and painful transition involving (a) surgical removal of the original male genital and gonadal organs etc; (b) learning to live in society as a woman; and (c) obtaining official recognition as a female for the purposes mentioned above. Having had access to medical treatment of greater sophistication than available in *Corbett's* time, she may now properly be described as an individual who was psychologically,

medically and socially a woman living and having a physical relationship with a man.

(iv) The importance of the psychological and social dimensions of a transsexual person's sexual identity was now far better understood than in *Corbett's* time. It was evident from that judgment that the psychological forces driving the transsexual to seek sex reassignment were then given little weight. Some transsexual persons were willing to endure such a long and painful ordeal to acquire a body which conformed as far as possible with their self-perception and to struggle for social recognition in their acquired gender. This was clear evidence of the fundamental importance of the psychological factor as a determinant of their sexual identity. For the law to exclude that factor as a criterion was unjustifiable.

(v) The *Corbett* criteria which underlied the construction of section 20(1)(d) of the MCO and section 40 of the MO were too restrictive and should no longer be accepted. There was no good reason to adopt criteria which were fixed at the time of the relevant person's birth and regarded as immutable.

(vi) The existing statutory provisions in MO and MCO, construed as endorsing the *Corbett* criteria, precluded W from marrying a man. She has undergone irreversible surgery to eliminate the original male genital and gonadal organs. She had implacable rejection of her male sexual identity. It was thus artificial to assert that post operative transsexuals have not been deprived of the right to marry as, according to law, they remained able to marry a person of their former opposite sex. W lived as a woman, was in a relationship with a man and would only wish to marry a man. She had no possibility of doing so. The provisions unconstitutionally impaired the very essence of her right to marry guaranteed by BL 37 and BoR 19(2)[4].

(vii) The Registrar sought to draw analogy with the argument advanced by the UK Government in *Goodwin*. The Registrar argued that firstly, the CFA should not declare the relevant statutory provisions unconstitutional unless there was a general consensus in Hong Kong in favour of permitting the kind of marriage in question. Ma CJ and Ribeiro PJ

[4] In the light of the above, Ma CJ and Ribeiro PJ considered it unnecessary to embark upon a discussion of the extent, if any, to which W's right to privacy under article 14 of the BoR may support her constitutional right to marry.

rejected this argument. They did not consider that the practice of the ECtHR in seeking a European consensus (as argued by the UK Government) when considering the margin of appreciation had any bearing on the CFA's role in interpreting the HKSAR's constitution in a case like the present. Secondly, reliance on the absence of a majority consensus as a reason for rejecting a minority's claim was inimical in principle to fundamental rights.

(viii) Overall, the *Corbett* criteria were incomplete in that they were limited to a person's biological features existing at the time of birth and treated as immutable. They ignored the psychological and social elements of a person's sexual identity and ignored any sex reassignment treatment that has occurred. As such, they did not permit a full and appropriate assessment of the sexual identity of a person to be made for the purposes of determining whether he/she had the right to marry. In adopting such restrictive criteria, the provisions were inconsistent with and failed to give proper effect to the constitutional right to marry. They were therefore unconstitutional. Additionally, they were unconstitutional since they impaired the very essence of the right to marry. Viewing the realities of W's position, by denying a post operative transsexual woman like her the right to marry a man, the statutory provisions in question denied her the right to marry at all.

Relief

In result, the CFA, by majority[5], allowed the appeal and granted the declarations (subject to modifications) that:-

(i) consistently with BL 37 and BoR 19(2), section 20(1)(d) of the MCO and section 40 of the MO must be read and given effect so as to include within the meaning of the words "woman" and "female" a post operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of SRS;

(ii) W was in law entitled to be included as "a woman" within the meaning of section 20(1)(d) of the MCO and section 40 of the MO and was accordingly eligible to marry a man; and

(iii) the above two declarations should not come into effect until the expiry of 12 months from the date of this judgment.

[5] Mr. Justice Chan PJ rejected W's arguments on both the construction issue and constitutional issue and dismissed her appeal. His Lordship was not persuaded that there was justification for extending the meaning of "marriage" in BL 37 to include a transsexual marriage although he saw a strong case for a comprehensive review of the relevant legislation with a view to proposing changes in the law concerning the problems facing the transsexuals as soon as practicable.