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TORTURE CLAIMS APPEAL BOARD
NON-REFOULEMENT CLAIMS
PETITION OFFICE
ROOMS 3007-10, 30/F
IMMIGRATION TOWER
7 GLOUCESTER ROAD
WANCHAI, HONG KONG
Tel: 3106 8798 Fax: 3106 2595

Our Ref. : USM 16379
Your Ref.:

9 December 2024

By Post

Mr EL BOURICHI Adil
Room E, 8/F,
No. 123 Tam Kung Road,
To Kwa Wan,
Kowloon City,
Kowloon

Dear Sir/Madam,

I refer to your appeal/petition against the immigration officer's decision as contained in the Notice of Decision of 27 September 2019 attached to your Notice of Appeal/Petition of 10 October 2019.

The Torture Claims Appeal Board ("the Board")/Adjudicator of the Non-refoulement Claims Petition Office has reviewed your case and decided that the above-mentioned decision should be confirmed. Please find attached the Decision of the Board/Adjudicator setting out its reasons for dismissing your appeal/petition. The Decision of the Board/Adjudicator is final for this appeal/petition.

Yours faithfully,

(Ms Jolene CHAN)
for Torture Claims Appeal Board /
Non-refoulement Claims Petition Office

c.c. Director of Immigration (Attn : CIO(RLS)1)

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Reference No.: USM 16379

Torture Claims Appeal Board /
Non-refoulement Claims Petition Office

Determination of Appeal/Petition With a Hearing

Article 48(13) Basic Law (Delegated)
Section 37ZR, Cap 115
Section 23, Schedule 1A, Cap 115

Appellant/Petitioner: Mr EL BOURICHI Adil

Representation: **For the Appellant/Petitioner:**
In person

For the Director of Immigration:
Excused from attending

Date of hearing: 18 August 2022

Heard at: Hearing Room C
Room 2201-2209,
22/F, Two Chinachem Exchange Square,
338 King's Road, North Point,
Hong Kong

Decision

Introduction

1. This is an appeal/petition ("**Appeal**") from a decision of the Director of Immigration ("**Director**") dated 27 September 2019 rejecting the Appellant/Petitioner's ("**the Appellant**") claims made under section 37X of Part VIIC of the Immigration Ordinance (Cap. 115) ("**Immigration Ordinance**") that he is at risk of torture should he be returned to Morocco ("**torture claim**") and his non-refoulement claims made under the Unified

Screening Mechanism ("**USM**") on all other applicable grounds. In this case, these grounds include:

a. risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**BOR 3 risk**");

b. risk of violation of the right to life under Article 2 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**BOR 2 risk**"); and

c. risk of persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol ("**persecution risk**").

Background

2. The Appellant is a national of Morocco, born on 26 July 1977 in Sidi Kacem. The Appellant departed Morocco on 28 June 2014 and lived for sometime in Orlando and Hawaii in the USA, Malaysia, Indonesia, and, most recently, in Macau for around seven weeks from 10 December 2018 to 18 December 2018 and from 24 December 2018 to 31 January 2019 when he travelled to Hong Kong.

3. Upon his most recent entry to Hong Kong on 31 January 2019, he was granted visitor status until 2 March 2019. Following a same-day return trip to Macau on 2 March 2019, he received permission to remain in Hong Kong until 1 April 2019. The Appellant subsequently overstayed this permission and surrendered himself to the Immigration Department on 2 April 2019, at which time he initiated his non-refoulement claim through a written representation dated 23 April 2019.

4. A Removal Order was issued in the Appellant's name on 25 June 2019 and he is now subject to removal to a place outside Hong Kong. He claims no right of abode in any country or place other than Morocco and it is this place against which the Appellant's claims are assessed.

5. The Appellant first indicated his intention to apply for non-refoulement protection at his initial interview with an immigration officer on 23 April 2019. He wrote two letters addressed to the Immigration Department, both dated 23 April 2019, alleging that he had a leading role in a protest against the king of Morocco and was at risk of being kidnapped. He claimed that from this time he started to receive threatening phone calls which he believed may have been coming from secret/political police. He then formally outlined his torture and

other non-refoulement claims (collectively his "**non-refoulement claims**") in a completed Non-refoulement Claim Form ("**NCF**") dated 31 July 2019. On 20 August 2019, the Appellant provided further detail to his claims at his screening interview held with an officer from the Immigration Department. The nature of these claims is outlined below.

6. The Appellant's non-refoulement claims were rejected by an officer acting on behalf of the Director under cover of letter dated 27 September 2019 and are the subject of the present Appeal. The Appellant filed this Appeal against the immigration officer's decision for consideration by the Torturé Claims Appeal Board/Adjudicator of the Non-refoulement Claims Petition Office ("**the Board**") on 10 October 2019.

7. A Notice of Hearing was sent to the Appellant on 26 November 2019 listing the proceeding for hearing on 21 February 2020. As a result of limitations imposed by the COVID-19 pandemic, the hearing of the Appellant's appeal was postponed until 18 August 2022.

8. Immediately before his oral hearing was to take place, the Appellant filed his own translation of the word spokens in a video, together with an updated letter with the Board, which substantially expanded the scope of the Appellant claims as well as giving greater detail to those claims that had already been made. It is apposite to reproduce the text of that letter, written in English:

> *"My Non-Refoulement Application*
>
> *Since my last interview, I had enough time to ponder on the events leading to my departure from Morocco in 2014 and my non-refoulement application in 2019.*
>
> *It's as if there was a "lock" on my memory preventing me from recalling some events.*
>
> *I mentioned in my application that there was an attempt to kidnap me in 2014 from inside a bar when I was with two colleagues and talked during the conversation about the protest in 2013, then suddenly a man who looked to be a secret police officer popped up and started watching me closely and carefully listening to every word I said, then I made an excuse to my friends saying I was going to buy cigarettes and didn't come back to the bar, but actually, the apparent secret police officer had plenty of time to kidnap me before I made the excuse, so why didn't he do it?*

It was clear from his facial expression that he recognized me and now after thinking things over, I can say that he knew that something else was being prepared for me by the secret police to make me fall into some trap that would allow them to arrest me using apparently legal means and therefore he didn't feel the need to rush things and kidnap me on the spot.

What is leading me to this belief is an event that happened in July 2011 when I was away from my home for more than four hours during which agents of the Brigade Nationale de la Police Judiciare broke into my apartment and installed a camera and microphone inside my TV set which was in my bedroom and facing my bed. In July 2011, my then girlfriend whom I met in January 2011, just a few days after the Arab Spring started in Tunisia, invited me for lunch in Rabat, which is only 40 kilometers away from my hometown in Kenitra. I didn't have a car back then so I took the train from Kenitra to Rabat around 7 pm; the journey was supposed to be around 35 to 40 minutes. A few minutes after the train departed from Kenitra, it stopped for no reason. There was no announcement for the reason of the stop. In all, it stopped for about 4 hours during which my then girlfriend was calling me on my mobile phone every 10 or 15 minutes asking where I was and expressing her disappointment every time I was telling her that the train hadn't moved yet. At last, around 11 pm, the train moved but backwards back to Kenitra and when she called me and I told her that the train was moving back to Kenitra, she just said "OK", didn't express any disappointment and hung up.

One day in November 2011, around two weeks before the first parliamentary election after the Arab Spring and after the adoption of a new constitution in July 2011 which held in November 2011, she called me in the morning and asked me to go with her for lunch because her mother prepared lunch and she - my then girlfriend - was going to bring it to me and even I suspected something fishy because I knew that Moroccan women believed in sorcery and that they would give magical food prepared by a sorcerer to their husbands or boyfriends to make them obedient and blindly trusting their wives or girlfriends and never questioning any of their words or behavior. Back then, I thought that all that was nonsense but to avoid any side effects like food poisoning, I planned to throw the food she was going to bring me and to go have lunch somewhere. At noon, she arrived, gave me the food and drove away. I was on my way to the garbage bin to throw the food, when idea entered my mind that said "she will

want the empty container of the food back." To avoid the embarrassment if she really asked me about the empty container which she never had - I decided to go up to the apartment, throw the food in the garbage in my kitchen and keep the container. In my kitchen, I found myself eating it with both hands while standing and eating with verocity like an animal. When I realized what I was doing and stopped eating, I had already eaten most of it. After that I went home. I was feeling not being myself and I went to see a psychiatrist who gave me anxiety medication that helped calming me down. My psychological turmoil continued for years feeling anxious, sad, suicidal and many times fearing that I was losing my mind. Most importantly I never made the link between that "magical" food I ate in 2011 and all the psychological distress I went through.

Thanks to the unexpected postponement of my hearing due to the pandemic, I had enough time to think and that gave me the emotional strength I needed to face these memories.

Although all this seems hard to believe, I swear that all I said is the exact truth and that the "memory lock" I talked about in the first page was real; I wasn't able to freely use my brain in the last ten years and there were memories that I couldn't access. For example, I stated in my application that I was being targeted by Brigade Nationale de la Police Judiciare agents but I couldn't explain the link between me and them; that link was my ex-girlfriend who was having sex with some Brigade Nationale de la Police Judiciare agents that I had met while actually she was being used by them as a prostitute. The "memory lock" is that I couldn't realize that she was having sex with these Brigade Nationale de la Police Judiciare agents even though, many times she lied to me saying that she was going to her family's home when she was going out with them and ending up in bed with them.

As to how they would have set me up to arrest me in an apparently legal manner, they could have accused me of raping my ex-girlfriend of mine. Indeed, many times when we were in the bed facing the TV set in my bedroom as I explained earlier, she would ask me to do sex in a violent manner as if I was raping her. Failing to do that, not being of a violent nature, she eventually stopped asking. Have I succeeded in acting violently as she asked, a rape charge supported by video evidence could have been easily made against me.

This kind of set up is common in Morocco where the judicial system is corrupt and there is no guarantee of a fair trial. In a recent report by Human Rights Watch, available online at https://www.hrw.org/report/2022/07/28/they'll-get-you-no-matter-what/Moroccos-playbook-crush-dissent entitled "They'll Get You No Matter What: Morocco's Playbook to Crush Dissent"

HRW found that "Moroccan authorities have committed an array of fair-trial violations and other abuses."

Aziz Bennar, a journalist who fled Morocco for being persecuted by the police, told HRW:

"Moroccan authorities have figured out that to accuse someone of a sex crime is an effective 'symbolic execution.' It strips its target of international solidarity and makes their parents in their own communities, shrouded by friends and family who are either embarrassed or afraid to be associated with them."

Knowing the extent of control that the Moroccan king has on the country and the extent of savagery his system of repression can go to, it is natural to conclude that if a 'symbolic assassination' fails, they can simply resort to plain old 'physical assassination', i.e. murder.

Having been critical to the king's policies and decisions, my life will be permanently in danger in Morocco as long as the monarchy rules there."

9. The Appellant appeared in person before the Board on 18 August 2022. He had previously written to the Board indicating that he was proficient in the English language and would not be requiring an interpreter. At hearing, the Appellant's English was of a highly proficient standard and he had no language difficulties. As outlinined in greater detail at paragraphs 73 to 87 below, at the commencement of the hearing the Board explained its role and the purpose of the hearing, and outlined the criteria against which it would be assessing the Appellant's claims well at the same time assessing the Appellant's ability to meaningfully participate at hearing. He demonstrated that he was able to do so, providing coherent, clear and logical responses to the Board's preliminary questions. When asked if there were any grounds other than those outlined at paragraph 1 above upon which he wished to rely, the Appellant responded there were not. Noting the new claims made in writing immediately before his oral hearing, the Board asked the Appellant his reasons for not filing that evidence earlier, to which the Appellant explained that he had forgotten many of the matters contained in that letter, but that the COVID-19 pandemic had given him

an opportunity to reflect and recall those incidents. The Board checked with the Appellant to ensure that the claims and evidence he had given to date were true and correct, to which he confirmed that they were and adopted them in evidence. Asked whether he had any additional claims or new information relevant to his claims, the Appellant responded that there was nothing to vary or add to those claims already submitted.

10. The Board has before it the Hearing Bundle relating to the Appellant. It has had regard to the material referred to in it, including, inter alia, the Director's Notice of Decision dated 27 September 2019, the Notice of Appeal/Petition filed by the Appellant containing his grounds of appeal/petition dated 10 October 2019, two letters from the Appellant both dated 23 April 2019, an Interview Report containing the Appellant's Grounds for Non-removal also dated 23 April 2019, the Appellant's completed NCF dated 31 July 2019, a record of interview conducted with the Appellant by an immigration officer on 20 August 2019, the Appellant's visa application file dated 2 March 2019, an udated letter from the Appellant filed immediately before his oral hearing, a transcription and translation by the Appellant of words said in a video to which he provided a link immediately before his oral hearing, a copy of the Appellant's passport and recognizance documentation, the Director's skeleton submissions, country information from a variety of sources, and a range of other material.

11. The critical issues in this case relate: first, to the impact of the Appellant's differential diagnoses of schizoaffective disorder and bipolar affective disorder with mood congruent psychotic symptoms on the credibility of his claims to be targeted by the security apparatus of Morocco as a result of his prediction in 2000 of the September 11 bombings and Arab Spring, from his role in protests in Morocco in 2013, as a result of his online expressions of political opinion and finally because of his understanding of the systemic corruption present in that country; and, second, to whether or not the Appellant might face a real risk of harm as a result of those conditions. Ultimately, having regard to the claims that were made by the Appellant, the question for the Board is whether or not the Appellant faces a real risk of being subjected to proscribed harm as outlined below should he return to Morocco. For the reasons set out below, the decision in relation to the Appellant's Appeal is confirmed in relation to all applicable grounds.

Applicable law

12. As outlined above and to the Appellant at hearing, the issues to be determined relate to whether the Appellant would face a risk of proscribed harm, namely a torture risk, a BOR 2 risk, a BOR 3 risk or a persecution risk ("**proscribed harm**"), should he be returned to Morocco. The Appellant confirmed there were

no other grounds he wished the Board to consider at hearing. Whether a person is at risk of such harm is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

13. The Board is mindful that it must apply "high standards of fairness" in determining the Appellant's claims because life and limb may be in jeopardy and the Appellant's fundamental human rights not to be subjected to torture is involved. Exactly what is required, however, will depend on the circumstances of each case.[1] At a minimum, it is clear that it does not involve adopting an attitude of sitting back and putting the Appellant to strict proof of his claim. While the inquiry is one of joint endeavour during which the Board is to apply the civil standard when making findings on primary facts,[2] it remains for the Appellant to make his or her case.[3]

14. The nature of these risks is outlined below.

Persecution risk

15. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (together the "**Refugee Convention**") has never applied in Hong Kong. However, following the judgment in *C & Ors*,[4] if raised, the Director will determine whether a refugee claim is well-founded when deciding whether or not to exercise the power under the Immigration Ordinance to remove a refugee claimant to a Risk Country. The non-refoulement principle in Article 33 of the Refugee Convention applies to people who are refugees as defined in Article 1 of that Convention. Article 1A(2) relevantly defines a refugee as any 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it..."*

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[1] *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187.

[2] see *TK v Michael Jenkins Esq and Anor* [2013] 1 HKC 526 (CA) at [31].

[3] *ST v Betty Kwan and ors,* CACV 115/2013, 26 June 2014, unreported; *TK v Michael Jenkins Esq and Anor* [2013] 1 HKC 526 (CA) at [30]-[31].

[4] *C & Ors v The Director of Immigration & Anor* FACV Nos. 18, 19 and 20 of 2011.

16. Whether a person is a refugee requires consideration of several elements of the above definition. First, the Appellant must be outside his or her country.

17. Second, the person must fear persecution. Persecution is defined neither in the Immigration Ordinance nor the Refugee Convention. While it will depend on the circumstances of each case, it must reach a minimum level of severity[5] and frequently involves targeting people or groups for serious human rights violations and serious or intolerable harm. While the most recognised form of persecution is the infliction of physical harm such as torture or kidnapping, it is not the only form.[6] It covers many forms of harm ranging from physical harm to the loss of intangibles; from death and torture to state sponsored or condoned discrimination in social life and employment.[7] However, persecution must be something "graver than discrimination" and "must be kept at a high and demanding level."[8] It can take the form of actions which are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, as well as the accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner.[9] Persecution may be directed against a person as an individual or as a member of a group because of something perceived about them or attributed to them and has traditionally taken a variety of forms of serious social, political and economic discrimination. However, such harm or threats of harm will only amount to persecution where it is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it.[10] In addition, it must have an official quality to it, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the Risk State. However, the threat of harm need not arise from the government directly, but can be perpetrated by non-governmental entities. In those circumstances, it may be enough that the government is unable or unwilling to provide protection from persecution.[11]

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[5] *Muhammad Azam v Deputy Chairperson of the Torture Claims Appeal Board / Non-refoulement Claims Petition Office & Anor* [2018] HKCFI 4; HCAL 161/2017, per Woodcock J at [51].

[6] *Muhammad Azam v Deputy Chairperson of the Torture Claims Appeal Board / Non-refoulement Claims Petition Office & Anor* [2018] HKCFI 4; HCAL 161/2017, per Woodcock J at [55].

[7] *ON v TCAB/NCPO* [2018] HKCFI 2727; HCAL 663/2017 (Hon Campbell-Moffat J, 18 December 2018) at [31] citing *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [40].

[8] *Luu The Troung v Chairman of the Refugee Status Review Board & Anor* [2003] 2 HKLRD 351

[9] see *ON v TCAB/NCPO* [2018] HKCFI 2727; HCAL 663/2017 (Hon Campbell-Moffat J, 18 December 2018) at [31] in which the Court referred with approval to the guidance found in Art 9(1)(a) of the EC Council Directive 2004/83/EC.

[10] *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55.

[11] *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

18. Third, the persecution feared must be for one or more of the reasons enumerated in the Refugee Convention definition, namely a person's race, religion, nationality, membership of a particular social group or political opinion. Fourth, a person's fear of the persecution must be a "well-founded" fear. In other words, there must be an objective basis for holding such a fear. A person has a "well-founded fear" of persecution if they have genuine fear founded upon a "real chance" or a "real and substantial risk" of being persecuted for one of the reasons outlined above.[12] A fear is well-founded where there is a real substantial basis for it but not if it is based on mere speculation. A "real chance" is one that is not remote, insubstantial or far-fetched.[13]

19. Finally, the person must be unable, or unwilling because of their fear, to avail themselves of the protection of their country or countries of nationality or, if stateless, unable, or unwilling because of their fear, to return to their country of former habitual residence. Thus, even if a well-founded fear is established, if State protection is available but an applicant cannot establish they are unable or cannot show why they are unwilling to avail themselves of that protection then, they should not qualify for Refugee status.[14]

Torture risk

20. A person who claims non-refoulement protection in Hong Kong on the ground of a torture risk can make a torture claim, inter alia, by signifying this in writing to an immigration officer under section 37X(1) of the Immigration Ordinance. In doing so, the person must include reasons for claiming non-refoulement protection which relate to torture.[15] Torture is defined in section 37U(1) of the Immigration Ordinance to mean an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. In addition, it must be inflicted either for a particular purpose or for a discriminatory reason. In the former case, the purposes contemplated by the Immigration Ordinance are non-exhaustive and include:

(i) obtaining from that person or a third person information or a confession;

(ii) punishing that person for an act which that person or a third person has committed or is suspected of having committed; and

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[12] *Luu The Troung v Chairman of the Refugee Status Review Board & Anor* [2003] 2 HKLRD 351.
[13] *Muhammad Azam v Deputy Chairperson of the Torture Claims Appeal Board / Non-refoulement Claims Petition Office & Anor* [2018] HKCFI 4; HCAL 161/2017, per Woodcock J at [51].
[14] *Muhammad Azam v Deputy Chairperson of the Torture Claims Appeal Board / Non-refoulement Claims Petition Office & Anor* [2018] HKCFI 4; HCAL 161/2017, per Woodcock J at [51].
[15] section 37X(2) of Part VIIC of the Immigration Ordinance (Cap.115).

(iii) intimidating or coercing that person or a third person.

21. In addition, it must be inflicted by, at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.[16] The "official capacity" element in the second limb of the definition of torture in section 37U(1) of the Immigration Ordinance replicates the "official capacity" limb for torture under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**CAT**") and is constituted where the person in question is imbued with State authority. It is sufficient if the act is done under the colour of state authority or in the ostensible exercise of the public authority. The test is satisfied if the person instigating the torture act is either acting in an official capacity or purports to act in an official capacity.[17] In addition the "official capacity" limb will be satisfied where the State, having capacity to provide the relevant protection, is aware of the torture but fails to exercise due diligence in respect of it with the consequences that it provides a form of encouragement to those engaged in it and that those committing the acts are able to do so with impunity.[18] However, pain or suffering arising only from, inherent in or incidental to lawful sanctions is excluded.[19]

22. A torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if removed or surrendered to a Risk State.[20] Conversely, it must be rejected in the absence of such substantial grounds.[21] The burden for establishing a torture claim falls on the Appellant to prove that there are substantial grounds for believing that he or she would be in danger of being subjected to torture if returned to the putative place of threat ("**Risk State**").[22] The risk of torture must go beyond mere theory or suspicion. It must be a foreseeable, real and personal risk of being subject to torture as defined in section 37U(1) of the Immigration Ordinance if returned to the Risk State. The risk needs not be highly probable although it must be personal and present.[23]

23. In determining this, all relevant considerations should be taken into account. These include both whether there is any region within the Risk State in which the claimant would not be in danger of being subjected to torture and the

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[16] section 37U(1) of Part VIIC of the Immigration Ordinance (Cap.115).
[17] *A v Director of Immigration & Or* HCAL 69 of 2012 at [89].
[18] *AM v Director of Immigration* HCAL 102 of 2012 at [63]-[65].
[19] section 37U(1) of Part VIIC of the Immigration Ordinance (Cap.115).
[20] section 37ZI(3) of Part VIIC of the Immigration Ordinance (Cap.115).
[21] section 37ZI(4) of Part VIIC of the Immigration Ordinance (Cap.115).
[22] *Secretary for Security v Saktheval Prabakar* (2014) 7 HKCFAR 187 at [51].
[23] *A v Director of Immigration & Or* HCAL 69 of 2012 at [89].

existence in the Risk State of a consistent pattern of gross, flagrant or mass violations of human rights.[24] However, the existence of such a pattern alone is not determinative of a person being in danger of being subjected to torture upon his return to that country. "Additional grounds must exist to show that the person will be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her circumstances".[25]

BOR 3 risk

24. Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**BOR 3**") reflects Article 7 of the International Covenant on Civil and Political Rights ("**ICCPR**"). It provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…" The nature of this right in the context of the exercise of discretionary powers of removal or deportation under the Immigration Ordinance was considered in *Ubamaka*.[26] In that case, the Court of Final Appeal held that where a sufficiently established threat of Article 3 being violated by the receiving country upon return is made out, the Hong Kong Government could be restrained from proceeding with the deportation.[27]

25. The prohibition in Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) relates to torture and cruel, inhuman or degrading treatment or punishment ("**CIDTP**"). Article 1 of the CAT provides a definition of torture that is widely accepted and is reflected in the definition of torture in the Immigration Ordinance outlined above. To resist removal because of a real risk of CIDTP, the Appellant must establish two matters: first, that the ill-treatment he faces if expelled attains "a minimum level of severity"; and second, that he faces a genuine and substantial risk of being subjected to such mistreatment. Judicial commentary makes clear that a very high threshold must be surmounted to establish each of those requirements.[28] While ultimately a matter of judgment, "a minimum level of severity" generally involves actual

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[24] section 37ZI(5) of Part VIIC of the Immigration Ordinance (Cap.115).

[25] *TK v Michael Jenkins Esq and Anor* [2013] 1 HKC 526 (CA) at [29].

[26] *Ubamaka Edward Wilson v Secretary for Security and Another*, FACV 15/2011 (unreported, dated 21 December 2012).

[27] *Ubamaka Edward Wilson v Secretary for Security and Another*, FACV 15/2011 (unreported, dated 21 December 2012) at [160].

[28] *Ubamaka Edward Wilson v Secretary for Security and Another*, FACV 15/2011 (unreported, dated 21 December 2012) at [172].

bodily injury or intense physical or mental suffering.[29] However, other forms of harm might also attain the requisite level of severity, for example treatment which humiliates or debases people, which disrespects or diminishes their human dignity or arouses feelings of fear, anguish or inferiority and is capable of breaking their moral and physical resistance may be characterized as sufficiently degrading.[30] While intention may be relevant to findings on cruel, inhuman or degrading treatment or punishment, it is not a formal component of establishing that ill-treatment.[31]

BOR 2 risk

26. Article 2 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**BOR 2**") reflects Article 6 of the ICCPR. It has both a negative component, protecting against the arbitrary deprivation of life by the State or its agents, and a positive component, containing measures that are conducive to allowing life. Specifically, Article 2 provides:

> *"(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life.*
>
> *(2) Sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of this Bill of Rights and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*
>
> *(3) When deprivation of life constitutes the crime of genocide, nothing in this article shall authorize the derogation in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
>
> *(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
>
> *(5) Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.*

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[29] *Ubamaka Edward Wilson v Secretary for Security and Another,* FACV 15/2011 (unreported, dated 21 December 2012) at [173].
[30] *Pretty v United Kingdom* 35 EHRR 1, 33 at [52].
[31] *Peers v Greece* (2001) 33 EHRR 1192, [74].

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment in Hong Kong."

27. In addition to restrictions on the carrying out of the death penalty, BOR 2 requires that nobody should be arbitrarily deprived of life. This prohibition suggests that life must not be taken in a way that is capricious, unreasonable, unjust, unpredictable or disproportionate in the circumstances.[32] This would occur, for example, where the deprivation is based on a decision unrelated to any test laid down by law or recognised at law. However, while a relevant consideration, this should not be equated with unlawfulness, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[33] For example, in the case of laws of general application which impose the death penalty, what will constitute an "arbitrary" deprivation of life will informed by the nature and use of such a law.[34] It can therefore be said that a person may be "arbitrarily deprived of his or her life" by lawful or unlawful action that is demonstrated to have elements of capriciousness, inappropriateness, injustice or lack of predictability.[35]

28. While there is no restriction as to who must inflict the harm or why in the terms of BOR 2, judicial comments have suggested the obligation to prevent arbitrary deprivation of life is restricted to the risk of being deprived of life by a third party or parties[36] and is directed at such things as extrajudicial killings, often committed, condoned or acquiesced by governments, and the excessive use of police force.[37] In addition to refraining from killing people in this way, the State's obligation to protect people from "arbitrary deprivation of life" means that the State must exercise due diligence in preventing people from being killed by other actors.[38]

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[32] See: Joseph and Castan, 'The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary', (3rd ed, Oxford University Press, 2013) at [8.04]; and *WBM v Chief Commissioner of Police* (Vic) [2012] VSCA 159; (2012) 230 A Crim R 322 at [114] per Warren CJ.

[33] See, for example, the findings of the UN Human Rights Committee in *Van Alphen v The Netherlands* 3 NZBORR 326 at [5.8].

[34] See: *SZTEQ v Minister for Immigration and Border Protection* [2015] FCAFC 39; (2015) 229 FCR 497 at [88] to [92]; and, for example, the discussion by Hathaway and Pobjoy in "Queer Cases Make Bad Law" (2012) 44 NYU J Int'l L & Pol 315-389 of punishment imposed in some countries for homosexual conduct.

[35] See: *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326 at [44].

[36] See: *EZC18 v MHA* [2019] FCA 2143 at [47].

[37] *MZAAJ v MIBP* [2015] FCCA 151 (Judge Riley, 4 February 2015) in obiter dicta comments at [42]; see also S Joseph & M Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary,* OUP, Oxford 2013 at [8.41].

[38] *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [162]; *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, [29]—[30]; *Soering v United Kingdom* (1989) 11 EHRR 439, [100].

29. The obligation in Article 2 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) would be breached if in returning the Appellant to Morocco, it would expose him to a real risk of a violation of his right to life as outlined above.[39]

Appellant's case

30. The account which follows is a summary of the Appellant's claims.

Appellant's personal and family background

31. The Appellant, is a 47 year old man born in Sidi Kacem, Morocco, and the younger of two siblings, with his sister being three years his senior. The Appellant achieved normal early developmental milestones while being raised by his parents. His father worked as a primary school teacher, and both parents, along with his sister, continue to reside in Morocco.

32. At hearing on 18 August 2022, the Appellant gave evidence that he had ceased all contact with his family in 2017 following a conversation on Facebook with his father. He claimed for the first time at hearing that his father was a pedophile who had sexually abused him as a child. He described his mother as "a stupid woman who just wants to have children and eat." When questioned about ongoing family contact through social media, the Appellant stated that he had maintained a Facebook account until 2020, at which time he deleted it, and currently only engages with YouTube videos for media consumption.

33. The Appellant has lived both within Morocco and internationally. His early years were spent in Kenitra, Morocco, where he lived from 1990 to 1997. He then relocated to Fes in Morocco from 1997 to 1999 to pursue his undergraduate studies at University of Sidi Mohammed. Following his graduation, the Appellant worked in the Rabat area until 2001, after which he remained unemployed for approximately two years.

34. A significant period of the Appellant's life was spent in Japan, where he pursued advanced studies at University of Kyushu, Japan from 2004 to 2009. He then returned to Morocco and purchased an apartment in Kenitra in July of that year, alternating between living there and with his parents when not teaching full-time.

35. The Appellant next departed Morocco on 28 June 2014, marking the beginning of a period of international movement. He initially relocated to Orlando, USA, followed by a period in Hawaii until around March 2018, when the Appellant

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[39] *See, in the context of Art. 6 of the ICCPR the Human Rights Committee ruling in* ARJ v Australia, *CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997 at [6.9].*

moved to Kuala Lumpur, Malaysia. During this period, he made two brief visits to Jakarta, staying for approximately ten days from 6 May 2018 to 12 May 2018 and from 24 December 2018 to 31 January 2019. When questioned as to why he did not seek asylum in either the United States or Malaysia, the Appellant maintained that his valid employment visas in both countries made separate asylum applications unnecessary.

36. In late 2018, he commenced traveling between Hong Kong and Macau. He spent approximately seven weeks in Macau across two periods: from 10 December 2018 to 18 December 2018 and from 24 December 2018 to 31 January 2019. Upon entering Hong Kong on 31 January 2019, he was granted visitor status until 2 March 2019. Following a same-day return trip to Macau on 2 March 2019, he received permission to remain in Hong Kong until 1 April 2019. The Appellant subsequently overstayed this permission and surrendered himself to the Immigration Department on 2 April 2019, shortly after which he initiated his non-refoulement claim through a written representation dated 23 April 2019.

Appellant's physical and mental health background

37. A summary of the Appellant's mental health history has been documented in two forensic psychiatric examinations conducted by Dr. LIU at Castle Peak Hospital, as well as through his own testimony regarding prior treatment. The first examination, conducted on 11 October 2022, revealed a complex history of psychiatric symptoms and treatment spanning multiple countries.

38. The Appellant claimed his first contact with psychiatric services occurred in Morocco in 2011, at which time he was prescribed Prozac and anti-anxiety medication. Though the diagnosing physician did not provide a specific diagnosis, the Appellant continued this treatment for approximately 2-3 months.

39. His psychiatric history includes two significant hospital admissions: a two-week admission in 2015 following suicidal ideation involving plans to shoot himself, although he was prevented from purchasing a handgun due to licensing requirements, and a one-week admission in 2017 when he again experienced suicidal thoughts involving plans to overdose on nicotine and cut his wrist. In both instances, the Appellant reported improvement following inpatient treatment but discontinued follow-up care after several months.

40. Dr. LIU, a Consultant in the Department of Forensic Psychiatry at Castle Peak Hospital, conducted a forensic psychiatric examination of the Appellant on 11 October 2022 at the Tuen Mun Mental Health Centre as outlined in greater detail at paragraphs 73 to 87 below. During her October 2022 examination, Dr. LIU observed that the Appellant, despite showing over-friendliness, maintained

cooperative behavior and spoke relevantly and coherently. The doctor diagnosed the Appellant with psychosis, suggesting differential diagnoses of schizoaffective disorder and bipolar affective disorder with mood congruent psychotic symptoms. The examining psychiatrist noted the presence of delusions of persecution but found no evidence of hallucinations or active suicidal or aggressive ideation.

41. Dr. LIU opined that some of the Appellant's claims, particularly those involving "magical food" and "magical glue" allegedly used by government agents, were consistent with delusional beliefs arising from his psychotic illness. While the doctor noted that the Appellant appeared capable of following proceedings during the hearing, based on his coherent speech during the October 2022 assessment, she opined his testimony would likely have been impacted when discussing matters related to his persecutory delusions.

42. She noted that the Appellant reported that his most recent experience of pervasive feelings of persecution occurred between 2011 and October 2021, and centered on his belief that the government had "infused a spirit inside his body via the 'magical food.'" She observed that he had claimed this ended in October 2021 when he "fought the 'ghost' in a dream, and it was dead." At the time of examination, the Appellant denied hearing non-existent voices but reported past episodes of depressed mood and suicidal ideation, last occurring in 2019, and episodes of racing thoughts with many plans, with the last occurring in 2021.

Appellant's education and employment background

43. The Appellant has attained significant academic achievement. He completed his primary and secondary education in Morocco before pursuing tertiary studies at University of Sidi Mohammed in Fes, where he obtained a Bachelor's Degree in Computer Engineering at age 22. Following a period of employment and unemployment, he undertook further studies at University of Kyushu, in Japan from 2004 to 2009, completing both masters and doctorate degrees in Computer Engineering with the support of university scholarship and partial financial assistance from his father.

44. He was first employed as a software developer at a French company, Al Catel near Rabat, where he worked from February 2000 to January 2001. This was followed by a brief period of employment at a bank in Casablanca, which ended during his probationary period under circumstances the Appellant claims were politically motivated. After a period of unemployment and further education, he returned to Morocco and worked as a teacher at two universities in Tangier from summer 2009 to April 2010.

45. The Appellant's most stable period of employment was his position as an Assistant Professor at Ibn Tofail University, which he held from March 2011 to June 2014. Following his departure from Morocco, he secured a position as a Visiting Fulbright Scholar at University of Central Florida in Orlando from July 2014 to March 2015. His subsequent employment included roles as a software developer at Solodev, Orlando, USA between March 2015 and May 2017, and at Hawaii Technology Academy between July 2017 and March 2018. His final formal employment was as a software developer at BAE Systems Applied Intelligence Malaysia SDN BHD in Kuala Lumpur, Malaysia, from May 2018 to November 2018.

Appellant's political profile and expression of political opinions

46. The Appellant claims to have maintained an active online presence expressing political views critical of the Moroccan government and monarchy. In this respect, he gave evidence at hearing that he regularly posted political content online, particularly through YouTube and Facebook platforms. However, he deleted his YouTube channel in October 2019 and his Facebook account in April 2020 (with a final deletion in June 2020), explaining that he had achieved his goals to show that the king was lying about the constitution.

47. The Appellant specifically referenced a video he created in May 2015, which he claims helped people understand that "all power was in hand of one person." The Appellant gave evidence at hearing that after this video, there was increased dissent within Morocco. However, his online political activity gradually decreased, with fewer videos being produced in 2016 and a complete cessation of video production by 2017 or 2018.

48. When questioned about evidence of his online political expression, the Appellant was unable to provide specific examples owing to him having deleted all his social media accounts. He currently only watches YouTube videos and does not maintain any other social media presence.

<u>Appellant's involvement and role in protests</u>

49. At the heart of the Appellant's claims is his account of involvement in the August 2013 protests against a royal pardon of a convicted pedophile, Daniel Vino Galvan ("**Galvan**"). This account has evolved through different stages of his claim. In his initial NCF, he stated that he "organized a mass protest against one of the decisions made by the King of Morocco." However, he significantly modified this claim at hearing, clarifying that he participated in rather than organized the protest. In this regard, the Appellant gave evidence at hearing that he attended the protest in Rabat around 7 PM, at which he claims to have

delivered some prepared remarks. He described walking around the area initially, observing that everyone was afraid.

50. The scale of the protest, as corroborated by country information outlined at paragraphs 94 to 96 below, involved thousands of peaceful protesters gathering before the Parliament building in Rabat. Additional demonstrations occurred in other cities including Kenitra, Tangier, and Tetouan, as well as outside the Moroccan embassy in Paris.

51. The Appellant claimed to have attended subsequent protests in his hometown and Rabat over the following days, but noted that these later protests were not dangerous as the king had already acknowledged making a mistake in granting the pardon. The protests led to an unprecedented response from the palace, with the king revoking the pardon and claiming he had been unaware of the gravity of Galvan's crimes.

Employment incident in 2000

52. The Appellant claimed for the first time at hearing that a significant incident in October 2000 marked the beginning of government interest in him. In this regard, the Appellant claimed that while working at Al Catel near Rabat, the Appellant became angry with his French Moroccan employer, whom he viewed as representing corruption. In this state of anger, he claims to have made several provocative statements, including prophesizing that there would be an attack in New York the following year which would result in the system falling and him ruling the country.

53. The day following this outburst, the Appellant was called to his employer's office where he noticed a camera had been set up. He reports that a recorded conversation lasting more than an hour took place, during which he attempted to explain that he was not against the king but believed the monarchy could end. The Appellant left the company two months after this incident.

54. Following this, the Appellant secured employment at a bank which he claims was owned by the king. However, he was terminated during his probationary period, with his bank account being closed on the same payday. The Appellant believes this termination was ordered by the king himself, basing this belief on an interaction with a human resources officer who made a phone call during their discussion of his termination.

55. When asked about his reason for not including these events in his earlier statements, the Appellant explained that his mental state, particularly during 2020, had made him worried about "losing his mind." He described 2020 as

"very harsh" and indicated that during his earlier interview he had been "cold" and unable to recall certain events.

56. The Appellant advanced claims for the first time before the Board in relation to two further significant incidents not referred to at the first tier: first, an incident in relation to his girlfriend and a delayed train; and, second, another incident involving his former girlfriend and food that she had given him. These claims are outlined further below.

Train Station Incident

57. The Appellant claims that he met a woman who became his girlfriend in January 2011, during a period of significant political upheaval as the Arab Spring had just begun in Tunisia. He later discovered her connection to the national police when she inadvertently revealed that certain individuals they had encountered were from the Brigade Nationale de la Police Judiciare.

58. The Appellant provided a detailed account to the Board of an incident in July 2011, in which his girlfriend invited him for lunch in Rabat, approximately 40 kilometers from his hometown of Kenitra. As he did not own a car at that time, the Appellant took an evening train from Kenitra to Rabat around 7 PM, expecting the journey to take between 35 and 40 minutes. However, shortly after the train's departure from Kenitra, it stopped without explanation and remained stationary for approximately four hours. During this prolonged delay, his girlfriend repeatedly contacted him by mobile phone at intervals of 10 to 15 minutes, expressing disappointment each time he informed her that the train had not yet moved. The Appellant noted a significant change in his girlfriend's demeanor during the final call around 11 PM when, upon learning that the train was returning to Kenitra rather than proceeding to Rabat, she simply responded "OK" without any sign of the previous disappointment and terminated the call.

59. The Appellant maintained that the train incident formed part of a broader pattern of surveillance and manipulation by state agents. He cited the inexplicable train delay as evidence supporting his "deduction" that the Brigade Nationale de la Police Judiciare had infiltrated his apartment and installed surveillance equipment in his television. This claim was further supported, in his view, by subsequent interactions with his girlfriend, including an incident in which she and a friend departed suddenly from dinner and were later observed preparing to meet with individuals who, according to the Appellant's testimony, had instructed her to return and monitor his activities.

Food Poisoning and Psychological Effects

60. The Appellant described a second significant incident occurring in November 2011, approximately two weeks before the first parliamentary election following the Arab Spring and the adoption of a new constitution in July 2011. In this regard, the Appellant claimed his girlfriend contacted him one morning, offering to bring him lunch her mother had prepared. The Appellant admitted harboring suspicions about this offer, citing his awareness of a belief among Moroccan women in the practice of using "magical food" prepared by a sorcerer to render their husbands or boyfriends compliant and unquestioningly trustful. Despite initially dismissing such beliefs as nonsense, the Appellant stated he had planned to dispose of the food to avoid potential food poisoning.

61. The Appellant provided a detailed account of what followed: upon receiving the food container when his girlfriend delivered it at noon, he initially intended to discard the contents but reconsidered due to concerns about returning an empty container. After taking the food to his apartment kitchen, the Appellant described experiencing an inexplicable compulsion, finding himself "eating it with both hands while standing and eating with verocity like an animal." He reported only regaining awareness of his actions after consuming the majority of the food, at which point he experienced a profound sense of disconnection from himself.

62. Following the food incident, the Appellant sought psychiatric assistance due to feeling that he was "not being myself". He was prescribed anxiety medication which provided some relief. He described experiencing prolonged psychological turmoil spanning several years, characterized by anxiety, sadness, suicidal ideation, and frequent fears of losing his mind. The Appellant emphasized that he did not initially connect this ongoing psychological distress to the "magical" food consumed in 2011. This period of mental health challenges led to several psychiatric interventions, including hospitalizations in 2015 and 2017, with symptoms persisting until October 2021, when he claims to have overcome the effects through what he described as fighting a ghost in a dream.

Bar incident in 2014

63. The Appellant gave evidence at hearing and before the Director in relation to an incident occurring in mid-April 2014 while drinking with two university colleagues. He claims that during their conversation about the 2013 mass protest, he observed suspicious behavior that led him to believe he was under surveillance. He described noticing the barman make a very quick glance

between himself and a man who had entered the establishment, which he interpreted as evidence that the barman had summoned law enforcement.

64. The Appellant identified one patron as a police officer based on several observations: the individual was not drinking, maintained close observation of the Appellant's group from a distance of two to three meters, listened intently to their conversation, and maintained what the Appellant described as a posture ready for action that contrasted with the relaxed demeanor of other patrons. Upon making these observations, the Appellant immediately left the establishment.

65. In his screening interview, the Appellant characterized this incident as a kidnapping attempt. When questioned at hearing about the basis for this characterization, he pointed specifically to the suspected officer's posture and alertness, which he contrasted with the more relaxed atmosphere typical of the bar's regular patrons.

Threats directed towards Appellant

66. The Appellant detailed receiving threatening phone calls during two distinct periods: between early August 2013 and November 2013, and again following the April 2014 bar incident. He described these calls as occurring frequently during the first period, with two to three calls a day for at least two to three months.

67. The content of these calls, as described by the Appellant during the hearing, consisted primarily of sexual threats and demeaning language, including threats to rape his mother and homophobic slurs. When asked how he determined these calls originated from government agents, the Appellant cited the specifically sexual nature of the threats, claiming most people don't use those words. He speculated that the calls came from a specialized branch of the police force known as the Brigade Nationale de la Police Judiciare, which he described as targeting anti-government activists.

State Protection

68. The Appellant consistently maintained that seeking state protection would have been futile given his belief that the threats originated from the government itself. In his NCF and subsequent testimony, he outlined several reasons for not seeking assistance from authorities or institutions.

69. When informed during his interview about the existence of the National Council on Human Rights, a publicly funded national human rights institution that operates independently, the Appellant dismissed its credibility precisely because

of its public funding, arguing that this made it a government organization. Similarly, when presented with information about the Mediator Institution, which considers allegations of governmental injustices and has the power to conduct inquiries and investigations, the Appellant characterized it as a "dummy organization for the government." He supported this assessment by citing incidents of public abuse occurring in public arguing that no investigation was necessary when "people were illegally beaten up while the police were wearing police uniform."

Internal Relocation

70. The Appellant maintains that internal relocation within Morocco would not provide safety from persecution. In his NCF, he stated categorically that he, "cannot be safely relocated in any parts of Morocco because the government agents would have hunted [him] down in all parts of the country no matter where [he] hides."

71. The Appellant elaborated on this position at hearing by explaining his view of the Moroccan system as a "satanic dictatorship." He argued that the risk of persecution was specifically linked to one's understanding of the system's true nature, giving evidence that only those who understand this to be the situation are at risk in Morocco. He described an oligarchy that is making people stupid and maintained that his understanding of the system's true nature made him a particular target.

72. When questioned as to his belief that he would still face threats after such a long period away from Morocco, the Appellant responded by explaining his view of the regime's nature being desirous of total submission of their population in the nature of a dictatorship.

Preliminary issue: Appellant's capacity

73. Immediately before his oral hearing, the Appellant filed a letter with the Board in which he claimed to have suffered from anxiety, sadness, suicidal ideation and on a number of occasions feared that he was losing his mind. Mindful of this, the Board was careful first to assess the capacity of the Appellant to meaningfully participate in the hearing, before taking evidence from him as to thec content of his claims for protection. The Board did this not only at the beginning of the hearing, but at several points throughout. The Board asked the Appellant a number of questions in relation to his mental state and more broadly assessed his ability to understand the nature of the proceedings and the questions asked of him, and his ability to meaningfully participate in the hearing.

74. The Appellant gave evidence regarding his history of mental health treatment across multiple jurisdictions at hearing. In this regard, the Appellant gave evidence that he first sought psychiatric care in Morocco in 2011. This initial treatment consisted of prescription medications including Prozac and anti-anxiety medication, although he maintained the treating physician did not disclose a specific diagnosis. The Appellant claimed that he continued this treatment for approximately two to three months before discontinuing care.

75. During his time in the United States, the Appellant testified to experiencing two significant psychiatric hospitalizations. The first occurred in 2015, when he was admitted for a two-week period following the development of suicidal ideation. The Appellant gave evidence that during this episode, he had formulated plans to shoot himself but was prevented from acquiring a handgun due to licensing restrictions. The second admission took place in 2017, lasting approximately one week, after the Appellant experienced suicidal thoughts and developed plans to overdose on nicotine and cut his wrist. In both instances, the Appellant maintained that while he experienced improvement following the inpatient treatment, he discontinued follow-up care after several months. The Appellant further testified that during his time in the United States, he received a diagnosis of bipolar disorder and was prescribed medication that he described as being "also used for epilepsy," though he was unable to recall the specific name of the medication.

76. At hearing, the Appellant maintained he had not experienced any adverse mental health issues since October 2021 and did not feel any current need for psychiatric medication. When questioned about his mental state, the Appellant explained that he had experienced what he described as a "memory lock" that had affected him for the previous ten years, but stated he was getting better and could now think more freely than during his initial interview.

77. While the Appellant presented at the hearing conducted on 18 August 2022 in such a way as to suggest that he possessed the mental capacity to understand the proceedings and to meaningfully participate in them, given that he claimed to have been previously diagnosed with anxiety and bipolar disorder for which medication had been prescribed, and out of an abundance of caution, the Board made directions in order to ascertain the extent to which such a condition might have impacted on his ability to meaningfully participate in the hearing. Those directions relevantly directed:

a. the Appellant undergo a psychiatric examination to be arranged by an immigration officer on behalf of the Director; and

b. the Appellant attend the examination at the date, time and place specified by the immigration officer.

78. The Board obtained the Appellant's consent for the disclosure of his psychiatric information.

79. Dr. LIU, a Consultant in the Department of Forensic Psychiatry at Castle Peak Hospital, conducted a forensic psychiatric examination of the Appellant on 11 October 2022 at the Tuen Mun Mental Health Centre. Dr. LIU's qualifications include a Bachelor of Medicine & Bachelor of Surgery from The Chinese University of Hong Kong (2001), Fellowship of the Hong Kong College of Psychiatrists (2009), Fellowship of the Hong Kong Academy of Medicine (Psychiatry) (2009), and recognition as a Specialist in Psychiatry.

80. During the mental state examination, Dr. LIU described the Appellant as a large body-build man with shoulder-length curly hair who demonstrated cooperative behavior despite being eager to express himself. She noted over-friendliness but observed that the Appellant's mood was not overtly elated and found relevantly that he could speak relevantly and coherently, with no hallucinations elicited, though delusions of persecution were present. No active suicidal or aggressive ideation was observed during the examination.

81. Based on these observations and the Appellant's history, Dr. LIU diagnosed the Appellant with psychosis, suggesting differential diagnoses of schizoaffective disorder and bipolar affective disorder with mood congruent psychotic symptoms. She provided the Appellant with a referral letter for outpatient psychiatric services and strongly recommended he pursue assessment and treatment.

82. While no statutory provision or procedural rule has been written into the USM procedures for handling appeals or petitions before the Board from an appellant or petitioner who suffers from mental incapacity, Direction PD-04 [2022], which was promulgated in September 2022, assists the Board in approaching appellants who may not have the requisite mental capability or capacity to attend and participate in the hearing before the Board. Direction PD-04 refers Members to *the Mental Health Ordinance, Cap 136* and Order 80 of the *High Court Rules, Cap 4A*. In this regard, section 2 of the *Mental Health Ordinance, Cap 136*, provides a person is considered to have mental incapacity (精神上無行為能力) when he/she is (i) mentally disordered (精神紊亂); or (ii) mentally handicapped (弱智). A mentally incapacitated person (精神上無行為能力的人) means

a. for the purposes of the management of the property and affairs of a mentally incapacitated person, a person who is incapable, by reason of mental incapacity, of managing and administering his property and affairs; or

b. for all other purposes, a patient or a mentally handicapped person, as the case may be.

83. The Direction goes on to direct that "[o]ther than a mentally handicapped person, a person is considered to have mental incapacity if he or she is incapable, by reason of his mental incapacity, to manage or administer his affairs" and guides Members to take heed of the criteria and yardstick set out in Cap 136 and the procedures outlined in Order 80 of the *High Court Rules, Cap 4A*. In this respect, the Direction provides the following guidance:

> *9. The conduct of a court proceeding by persons under disability is governed by O.80. The need of appointing a Next Friend for the commencement of a court proceeding has no direct application to the appeal/petition before this Board, until the appeal/petition reached its next level of scrutiny at the judicial review stage. For a person who has become a mentally incapacitated person after the commencement of a court proceeding, application must be made to Court for the appointment of his Next Friend for the case to proceed further, by virtue of O.80 r.3(5).*
>
> *10. In fairness to the Applicant his Guardian should, as far as possible, act by solicitor or counsel before the Board (c.f. O.80 r.2(3)).*
>
> *11. Members would likely be well aware of the powers of the Board to order medical examinations of an Applicant under section 37 ZC of Cap 115 and paragraph 16 of the Petition Guide. We are also well aware of the fact that clinical psychologist may not be a medical doctor."*

84. Dr. LIU provided a supplementary report on 20 February 2023, which provided a detailed analysis of the Appellant's mental capacity and ability to participate in proceedings, building upon her initial psychiatric assessment of October 2022. In the supplementary report, Dr. LIU explained that under the *Mental Health Ordinance, Cap 136*, the Appellant's condition did not render him mentally incapacitated for purposes of managing property and affairs (Part II of the *Mental Health Ordinance, Cap 136*). However, she noted that he did qualify as a mentally incapacitated person under other provisions of the *Mental Health Ordinance, Cap 136* due to his psychotic disorder, while explicitly stating he

did not meet the definition of mental incapacity under the High Court Rules Cap 4A Order 80.

85. Regarding the Appellant's ability to participate in hearings, Dr. LIU acknowledged the difficulty in retrospectively assessing the impact of his psychotic illness on the August 2022 hearing. While noting that his cooperative behavior and coherent speech during the October 2022 assessment suggested an ability to follow proceedings, she cautioned that his participation would be more significantly impacted during discussions of persecution allegations, as some of these were determined to be delusional in nature. The Board has had special regard to these observations when assessing the Appellant's account of events.

86. Dr. LIU specifically identified certain claims, particularly those involving "magical food" and "magical glue," as delusions arising from the Appellant's psychotic illness. The doctor explained that a delusion is "a false, unshakable belief that is out of keeping with the patient's social and cultural background, and not amenable to change in light of conflicting evidence," and characterized these particular beliefs as manifestations of the Appellant's psychiatric condition rather than accurate recollections of events.

87. Dr. LIU's findings in relation to the Appellant's mental capacity are consistent with the Board's observations at hearing. In this regard, the Board found the Appellant to be coherent when giving evidence, able to understand the nature of the proceedings and the questions asked of him, and able to meaningfully participate in the hearing. The Appellant gave evidence of his diagnosed mental impairments, but even when taking them into account, the Board formed the view at the hearing that such deficits did not prevent him from being coherent and responsive to questioning. As a result, the Board found that the Appellant was not disabled by his psychological deficits from giving evidence and presenting arguments or otherwise meaningfully participating in the hearing. Having subsequently taken into account Dr LIU's reports, the Board sees no reason to depart from this view.

Consideration

88. The Appellant's identity is not in dispute. Based on a copy of the Appellant's passport, the consistency of the Appellant's claims in relation to his home country, the ease with which he spoke about places in his claimed hometown and the language he spoke at hearing, the Board accepts that he is a national of Morocco, born in Sidi Kacem on 26 July 1977.

89. The Appellant has never claimed that simply residing in Morocco might expose him to a risk of being subjected to proscribed harm, nor do the materials before the Board suggest that there is a consistent pattern of gross, flagrant or mass

violations of human rights in Morocco. When the Board raised with the Appellant any concerns that he might have in relation to breaches of human rights in the country, he characterized his case as being one based on the interest of the authorities and special police in him as a result of his political profile, understanding of the political situation in Morocco, and his protest against the king. In light of the Appellant's comments and all the information before it, the Board finds there is not a consistent pattern of gross, flagrant or mass violations of human rights in Morocco.

90. The Appellant presented as an intelligent witness. He gave a coherent and plausible account of his educational and employment background and the Board accepts much of his evidence in this respect. The Board also generally accepts the Appellant' account of his family background and the places that he has lived. However, many of his claims of past persecution appeared grounded elsewhere than in reality. While the Board has no doubts that many of the events described by the Appellant believed by him to be real, the Board has significant doubts as to whether or not they align with objective fact.

Appellant's political profile

91. The Board accepts that the Appellant holds strong anti-government views. It accepts that the Appellant believes that because of his anti-government views, he is being monitored by government apparatus. For the reasons outlined in greater detail below, however, it does not accept that these beliefs are objectively factually true.

92. The Appellant claimed to have regularly expressed his political views online. However, when asked if he could provide any examples of such expressions, he was unable to do so. He explained that he had deleted his Facebook account in 2020 and his YouTube channel ceasing video production in around 2017 or 2018, and that he had no other social media presents. Asked his reasons for deleting his YouTube channel and Facebook account, he responded that he had achieved his goals and saw no need for maintaining them.

93. The Board accepts the Appellant has no online presence and this is for the reason that he believes that he has achieved his goals and not out of any fear that he might hold related to expressing those beliefs. The Board finds the Appellant has never been harmed as a result of his online expression of his political beliefs in the past, nor would he be at risk of harm on account of such expression in the reasonably foreseeable future. Finally, the Board does not accept that the Appellant has ceased expressing his political views online out of a fear of being persecuted or otherwise harmed should he do so.

2013 protests

94. At the heart of the Appellant's claims is his fear of being harmed as a result of his involvement in protests in Morocco around August 2013. In this regard, information published by Reuters and adduced by the Appellant corroborates the Appellant's claims that in August 2013 Morocco witnessed significant public protests following King Mohamed VI's controversial decision to pardon a Spanish pedophile who had been serving a 30-year sentence.[40] The convicted man, Daniel Vino Galvan, had been found guilty of raping and filming children between the ages of 4 and 15 in Kenitra, Morocco. The pardon was part of a broader release of 48 Spanish prisoners, granted at the request of Spain's King Juan Carlos following his recent visit to Morocco.

95. The decision sparked widespread outrage across the country, leading to demonstrations in several cities. In the capital Rabat, riot police forcefully dispersed hundreds of protesters attempting to gather in front of the parliament, resulting in injuries to several people, including journalists. While the Justice Ministry defended the pardon as serving Morocco's national interests and maintaining friendly relations with Spain, it also emphasized that Galvan was banned from returning to Moroccan territory.

96. The timing of the pardon coincided with Throne Day on July 30, a traditional occasion for royal pardons in Morocco. However, this particular case drew exceptional criticism from various segments of society, including child protection activists, members of the ruling coalition party, and families of the victims. Critics viewed the decision as particularly problematic given both the severity of the crimes and the fact that the pardon was granted at the request of a former colonial power. The incident highlighted tensions between traditional royal prerogatives and public accountability, with one protest organizer describing the justice system as "a toy."

97. While the Board has some reservations about the Appellant's evidence of mistreatment of a sexual nature at the hands of his father given such claims were raised for the first time at his oral hearing, it understands that disclosure of such matters may often cause someone embarrassment and does not find that the late timing of such disclosure adverse to the credibility of such claims. The Board accepts in this regard the Appellant account of being personally aggrieved at the pardoning of Galvan in this context and that this motivated him

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[40] El Yaakoubi, A., Reuters, 'Moroccan police break up protest against royal pardon of Spanish paedophile', 3 August 2013, available at: https://www.reuters.com/article/us-morrocco-spain-protest/moroccan-police-break-up-protest-against-royal-pardon-of-spanish-pedophile-idUSBRE97202320130803/.

to be involved with the August 2013 protests. The Board does not, however, accept that he was a leader within the protest movement, nor that he had a profile above that of other protesters.

98. In particular, the Board finds that the Appellant's involvement in the protest was peripheral at best. His evidence at hearing was initially that he was only involved online. His knowledge of the protest was inconsistent with country information insofar as he estimated that hundreds of people attended the protest instead of thousands.

99. More critically, the Appellant's account of his involvement in the protest evolved significantly over time. Whereas the Appellant had claimed in his NCF to have organized a protest against the decision made by the king of Morocco, he recanted those claims at hearing emphasizing that he participated but did not organize any protests.

100. He provided instead an account at hearing in which he decided to conduct a coup after having attended the protests. The Appellant went on to claim that the king must have seen him, realized that there would have been a coup attempt, and decided to issue his statement retracting his pardon. Asked how the Appellant formed the belief that the king had seen him, he referred to a video of him speaking and claimed that he had been targeted since 2011. The Board finds the evolving nature of the claims made by the Appellant undermine his reliability as a witness. The Board does not accept the Appellant was ever involved in a coup attempt, that he organized a protest, nor that he had been in any leadership role within the protest movement.

101. In any event, the Board gives weight to the outcome of the protests in assessing the government's attitude towards the protesters. In this regard, the evidence before the Board establishes that the king revoked the pardon and claimed that he had been unaware of the gravity of Galvan's crimes. Rather than suggest that the king disagreed with the protesters, such an outcome suggest that he in fact had some sympathy for their position.

102. When it was put to the Appellant at hearing that it might be strange that the government would want to harm him given that it agreed with the protesters' position, the Appellant responded by saying that Morocco is a dictatorship and that when the government says one thing they do something else. The Board observed that thousands of people had been involved in the protest across Morocco and asked why he believed that he would be particularly targeted, to which he responded that his difficulties did not start with the protest. It is apposite then to turn to those other difficulties.

103. The first time the Appellant claims to have had any difficulties with the government was in around October 2000 when the Appellant claims that he predicted that there would be an attack in New York the following year and that this would result in "the system" falling and him ruling the country. In this regard he claims that he predicted the September 11 terrorist attack and the Arab Spring and as a result arouse the interests of the security apparatus in Morocco he claims to have from that time be monitored at his workplace and then to have resigned his position two months later. He claims that he then took up a position at a bank, but was let go during his probation.

104. In assessing the Appellant's claims in this regard, the Board has had regard to Dr. LIU's assessment of the Appellant's mental health and his account of the same. Having regard to the evidences a whole, the Board does not accept the Appellant account of having predicted the September 11 terrorist attack or the Arab spring. The Board does not accept the Appellant account of having been monitored as a result of expressing such predictions. While the Board accepts that the Appellant may have believed that he was being monitored at the time, the Board find that these beliefs were the result of delusions and not founded in reality. The Board does not accept that the Appellant was let go from his position at a bank in Morocco as a result of his predictions made in October 2000. The Appellant was able to point to little more than his own speculation in this regard.

105. For similar reasons the Board rejects the Appellant's account of the train delay incident, the magical food incident of November 2011 and of the bar incident of 2014. Having regard to the evidence as a whole, and in particular the findings of Dr LIU, the Board finds that each of the Appellant's claims in relation to these incidents, while real for, and truly believed by, the Appellant, constitute delusional beliefs arising from his psychotic illness. In this regard, Dr LIU observed in her 2023 report:

> *"A delusion is a false, unshakable belief that is out of keeping with the patient's social and cultural background, and not amenable to change in light of conflicting evidence.*
>
> *Delusion is one of the core symptoms of Psychosis, or Psychotic Disorder.*
>
> *Mr EL BOURICH reported that his girlfriend gave him some "magical food" which infused a spirit into his body, someone from government put something called "magical glue" with a very high technology into his food, to weaken him by making him sick and*

painful. These allegations of being persecuted, are opined to be delusions."

106. In reaching this conclusion, the Board has been mindful of multiple competing considerations. First, as outlined by his Lordship the CJHC in *TK v Michael Jenkins & Anor* ("***TK***"), in many or most instances, genuine appellants appearing before the Board may have fled their countries with few belongings and documents and with levels of education that are relatively low.[41] Normal rules of evidence should be viewed within such a context. It would be wrong to require corroborative documentation in such cases as the high standards of fairness require a proper appreciation of the difficulties of proof faced by such appellants. The Board has also had regard to the factors outlined in section 37ZD of the Immigration Ordinance and paragraph 17 of the Practice and Procedural Guide of the Administrative Non-refoulement Claims Petition Scheme.

107. The Board is mindful that the critical events the Appellant described are said to have occurred more than a decade ago and that memory fades with the effluxion of time. In this context, the Board accepts that failures in an appellant's memory can explain inconsistencies, inaccuracies and lack of detail in a narrative which is true in substance. As noted by the UNHCR:

> *"Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also he given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors."*[42]

108. The Board is also cognizant of the fact that appellants before it may be understandably bewildered, frightened and even desperate, that they may not understand the process or language spoken at various stages in the process and that this may affect the consistency and veracity of their evidence. What this

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[41] see *TK v Michael Jenkins Esq and Anor* [2013] 1 HKC 526 (CA) at [22].

[42] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims', 16 December 1998, available at: https://www.refworld.org/docid/3ae6b3338.html at [9].

means, in the words of Lord Justice Brook of the UK Court of Appeal, is that the Board must be careful so as not to exclude any matters from its consideration when assessing future risk unless it has no real doubt that they did not in fact occur, or, indeed, that they are not occurring at present. Similarly, if an appellant contends that the relevant matters did not happen, the Board should not exclude the possibility that they did not happen even where it believes that they probably did, unless it has no real doubt that they did in fact happen.[43] However, the Board is not required to accept uncritically all of the allegations made by an appellant, nor is the Board obliged to accept claims that are inconsistent with independent evidence regarding the situation in the Appellant's country of nationality.[44]

109. In particular, the Board has had regard to the Appellant's claims to have been suffering from what he described as a "memory lock" which prevented him from recalling these events, with the exception of the bar incident, when giving his account of events at the first tier. However, having regard to the Appellant's evidence as a whole, the Board finds that the Appellant's perception of events was affected by his mental health at the time. For example, the Board finds the Appellant's account of the bar incident reveals severe paranoia, rather than a risk of being subjected to proscribed harm. In this regard, the Appellant characterised the incident as a kidnapping attempt at his screening interview on the basis of the suspected officer's posture and alertness. The Appellant could point to nothing more than the demeanour of those men when contrasted to the relaxed attitude of other patrons of the bar to support his conclusion that they were intending to harm and/or kidnap him. The Board rejects the Appellant's characterisatisation of such men as not credible.

110. While the Board is mindful of the fact that it is quite possible for the centre piece of an appellant's claim to stand despite the presence of some exaggeration, uncertainly or even untruthfulness,[45] this was not the case with the Appellant's evidence. The difficulty with the Appellant's evidence is that it changed fundamentally over time, that the incidents and parties involved changed and that his account relied substantially upon his projected fears, which are more readily accounted for by reference to his mental health.

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[43] *Karanakaran* [2000] Imm AR 271 at [102]-[103].

[44] see for example, *Randhawa v MILGEA* (1994) 54 FCR 437 at [451]; *MIMA v Rajalingam* (1999) 93 FCR 220; and *MIEA v Guo & Anor* (1997) 191 CLR 559 at [169]-[170].

[45] *Secretary of State for the Home Department v Chiver* [1997] INLR 212, 220.

Treatment of people with mental health challenges

111. Given the Board's findings regarding the Appellant's mental health, the Board has gone on to consider the state of Morocco's mental health system and whether returning the Appellant to Morocco now or in the reasonably foreseeable future might result in a risk of him being subjected to proscribed harm.

112. Morocco's mental health system has undergone significant changes over the past two decades, with varying degrees of progress in infrastructure, workforce development, and human rights protections. An October 2023 investigation by Hespress English ("**Hespress Report**"),[46] Morocco's leading digital news platform, indicates that 48.9% of Moroccans suffer or have suffered from psychological disorders. More specifically, according to a Morocco World News Report ("**Morocco World News Report**"),[47] 26% of Moroccans experience depression at some point in their lives, 9% experience anxiety disorders, 5.6% experience mental disorders, and 1% experience schizophrenia.

113. In 2006, the World Health Organization conducted a comprehensive assessment of Morocco's mental health system using its Assessment Instrument for Mental Health Systems ("**WHO-AIMS Report**").[48] This assessment, carried out in collaboration with Morocco's Mental Health Office and the Directory of Epidemiology and Fight against Diseases at the Ministry of Health, provides a baseline understanding of the country's mental health infrastructure. According to the WHO-AIMS Report, Morocco had 306 psychiatrists (1.02 per 100,000 population) and 648 nurses (2.17 per 100,000 population).[49] The World Health Organization's Mental Health Atlas 2020, part of WHO's initiative to map

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[46] Tachfine, K., Hespress English, 'Mental health issues persist in Morocco as infrastructure lags behind', 12 October 2023, available at: https://en.hespress.com/72606-mental-health-issues-persist-in-Morocco-as-infrastructure-lags-behind.html.

[47] Rahhali, L., Morocco World News, 'Minister: Morocco Is Actively Dealing with Mental Health Issues', 20 July 2022, available at: https://www.Moroccoworldnews.com/2022/07/350364/minister-Morocco-is-actively-dealing-with-mental-health-issues.

[48] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true.

[49] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.5.

mental health resources and systems globally ("**2020 Atlas**"), showed an increase to 428 psychiatrists (1.17 per 100,000) and 1,335 nurses (3.66 per 100,000).[50] By 2022, according to the Morocco World News report, a prominent English-language Moroccan news outlet reporting on ministerial statements, these numbers had evolved to 343 psychiatrists, supported by 214 psychologists, 1,335 psychiatric nurses, 16 child psychiatrists, and 64 physicians with special mental health training.[51]

114. Human rights concerns have, however, persisted over time. In particular, the WHO-AIMS Report highlighted that over 20% of patients were physically restrained or secluded within the previous year in both community-based psychiatric inpatient units and mental hospitals, with an estimated 70% of admissions being involuntary.[52] The 2020 Atlas indicates that this pattern of involuntary treatment continues, with 51-75% of admissions still being involuntary.[53] This suggests limited progress in reducing coercive practices over the 14-year period.

115. Infrastructure development has been ongoing but remains also insufficient. The WHO-AIMS Report documented that in 2006, there were 74 outpatient mental health facilities, 15 community-based psychiatric inpatient units, and 9 mental hospitals, with no day treatment facilities available.[54] The 2020 Atlas shows some progress in community-based care, reporting 88 community-based mental health facilities (0.24 per 100,000 population).[55] According to the Hespress

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[50] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[51] Rahhali, L., Morocco World News, 'Minister: Morocco Is Actively Dealing with Mental Health Issues', 20 July 2022, available at: https://www.Moroccoworldnews.com/2022/07/350364/minister-Morocco-is-actively-dealing-with-mental-health-issues.

[52] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.11.

[53] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[54] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.5.

[55] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at:

Report, by 2023, the system includes 2,330 beds in mental health facilities, with plans for three new 120-bed centers in Agadir, Kenitra, and Beni Mellal.[56]

116. Geographic inequity in access to care remains a persistent human rights concern. The WHO-AIMS Report found that the proportion of psychiatric beds in or near the largest city was 9.23 times greater than in the rest of the country, with particular access challenges for rural users and Berberous groups.[57] The 2020 Atlas confirms this urban-rural divide persists, and the Hespress Report[58] notes that services remain predominantly concentrated in major cities like Casablanca and Rabat.[59]

117. The human rights framework in Morocco has evolved since 2006. The WHO-AIMS Report noted that while a national human rights review body existed, only 11% of mental hospital staff and 7% of inpatient psychiatric unit staff had received human rights training. [60] The 2020 Atlas indicates improvement in this area, reporting that Morocco's mental health legislation is largely in line with human rights covenants, scoring 5 out of 5 on the WHO's human rights checklist for mental health laws.[61] However, the WHO-AIMS Report identified significant gaps in social protection, noting that in 2006 there

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https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[56] Tachfine, K., Hespress English, 'Mental health issues persist in Morocco as infrastructure lags behind', 12 October 2023, available at: https://en.hespress.com/72606-mental-health-issues-persist-in-Morocco-as-infrastructure-lags-behind.html.

[57] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.11.

[58] Tachfine, K., Hespress English, 'Mental health issues persist in Morocco as infrastructure lags behind', 12 October 2023, available at: https://en.hespress.com/72606-mental-health-issues-persist-in-Morocco-as-infrastructure-lags-behind.html.

[59] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[60] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.9.

[61] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

were no legislative provisions for persons with mental disorders concerning employment, housing, or financial support.[62] The 2020 Atlas shows some improvement in legal protections,[63] but according to the Hespress Report,[64] the recent withdrawal of a mental health draft law from the House of Representatives in 2023 suggests that legislative protection of mental health rights remains incomplete.

118. Developments in training and workforce development also show signs of progress in protecting patient rights. In this regard, while the WHO-AIMS Report noted that only 4% of training for medical doctors and nurses was devoted to mental health in 2006,[65] the 2020 Atlas indicates improved integration of mental health into primary care, with a functional rating of 4 out of 5 on WHO's checklist for primary care integration.[66]

119. Similarly, the materials before the Board indicate that treatment and monitoring of persons with severe mental illness has improved over time, with the 2020 Atlas reporting that 126,584 cases of psychosis were treated (76,482 male and 50,102 female), indicating increased capacity for treating severe mental illness.[67] However, this must be viewed in the context of Morocco's population of over 36 million, suggesting significant unmet need which is all too common in even the most developed of nations.

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[62] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.5.

[63] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[64] Tachfine, K., Hespress English, 'Mental health issues persist in Morocco as infrastructure lags behind', 12 October 2023, available at: https://en.hespress.com/72606-mental-health-issues-persist-in-Morocco-as-infrastructure-lags-behind.html.

[65] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.5.

[66] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

[67] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

120. The country information sighted by the Board suggest that while the high rate of involuntary admissions remains a significant human rights concern that requires attention, the oversight of human rights in mental health facilities has strengthened over time. In this regard, while the WHO-AIMS Report noted only basic oversight mechanisms,[68] the 2020 Atlas indicates that Morocco now has a dedicated authority to assess compliance of mental health legislation with international human rights standards, including regular inspections and complaint mechanisms.[69]

121. The Appellant has never complained of breaches of his human rights arising as a result of his mental health. Dr LIU reported his interactions with the mental health services in Morocco thus:

> *"The Appellant said that he first saw psychiatrist in Morocco in 2011. Without telling him the diagnosis, he said the psychiatrist gave him Prozac, i.e. a kind of antidepressant, and medication for treatment of anxiety. He stopped seeing the psychiatrist after 2 to 3 months."*

122. This was consistent with the Appellant's evidence at hearing. In this regard, the Appellant claimed he saw a psychiatrist in his hometown, whose name he could not recall. The visit was prompted after he saw his face in the bathroom mirror and noticed he looked different, causing him to run down the stairs to the psychiatrist's office where he had seen a sign, and waited in the waiting room where a nurse asked about his condition. He visited the psychiatrist on three or four occassions, although the doctor had wanted to see him more frequently. When asked about prescribed medication, the Appellant could not remember specifically but indicated it was Prozac under a different name, along with anti-anxiety medication. When asked if the medication helped, the Appellant confirmed it did.

123. Nothing in the Appellant's claims and evidence suggest he has been mistreated in Morocco on account of his mental health. While the Board accepts that he ceased employment in 2000, the Appellant claimed that this was his own decision to resign. In relation to the Appellant being let go in 2001 while on probation, the Board considers while this could possibly have some association

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[68] World Health Organization, 'WHO-AIMS Report on Mental Health System in Morocco', 2006, available at: https://cdn.who.int/media/docs/default-source/mental-health/who-aims-country-reports/Morocco_who_aims_report.pdf?sfvrsn=2473c5b_3&download=true at p.9.

[69] World Health Organization, 'Mental Health Atlas 2020 Country Profile: Morocco', 2020, available at: https://cdn.who.int/media/docs/default-source/mental-health/mental-health-atlas-2020-country-profiles/mar.pdf?sfvrsn=a0b66670_6&download=true.

with his mental health, such a claim was not made and nor has it been established by the Appellant.

124. Having regard to the Appellant's evidence together with the country information as a whole, the Board finds the Appellant not to be at risk of being subjected to proscribed harm on account of his mental health should he return to Morocco in the reasonably foreseeable future.

Conclusion

125. The Board has considered the Appellant's claims both individually and cumulatively, but in light of the findings above, the Board does not consider that he would face a real risk of suffering proscribed harm should he return to Morocco in the reasonably foreseeable future. Based on the evidence as a whole, the Board finds for the reasons that follow that the Appellant's case for non-refoulement has not been made out.

Conclusions regarding persecution risk

126. The Appellant need not have suffered severe injury or serious harm in the past in order to bring himself within the definition of persecution. However, he must establish he has a well-founded fear at the time his claim is assessed and good grounds for fearing persecution in the future. As pointed out in *Azam,* he must establish that he has a subjective fear of persecution and also that the fear is well-founded in an objective sense. While evidence of past persecution is one of the effective means of showing that a fear of future persecution is objectively well-founded, severe injury or serious harm is not a necessary factual element to establish persecution.[70]

127. However, the Appellant has neither established that he has been persecuted in the past, nor that he would be of sufficient interest to be persecuted in the future. As a result, the Board does not consider there to be a "real possibility",[71] a "real chance" or a "reasonable degree of likelihood" of him being persecuted should he return to Morocco.[72] There is no real or substantial basis for saying that this would occur. Accordingly, the Board finds the feared harm not to be well-founded.

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[70] *Muhammad Azam v Deputy Chairperson of the Torture Claims Appeal Board / Non-refoulement Claims Petition Office & Anor* [2018] HKCFI 4; HCAL 161/2017, per Woodcock J at [51].

[71] *B v TCAB / NCPO & Director of Immigration* HCAL 2231/2018 [2020] HKCFI 380 at [46]; *INS v Cardoza Fonseca* 480 US 421 (1987) at [440]; *R v Secretary for the Home Department, ex parte Sivakumaran* [1988] AC 958 at [994F].

[72] *Chan v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; *Sivakumaran* [1988] 1 AC 958 (UKHL, Dec. 16, 1987)

128. Having regard to the evidence as a whole, the Board finds the Appellant is not at real risk of being persecuted on any Refugee Convention basis. Accordingly, the Board finds that he does not have a well-founded fear of being persecuted in Morocco, whether for reason of any of the Refugee Convention grounds enumerated in Article 1A, or for any other reason.

Conclusions regarding torture risk

129. For similar reasons, the Board finds the risk of torture not to be a real one so as to engage protection under the Immigration Ordinance. The Board is mindful in this context that the risk of torture must go beyond mere theory or suspicion. It must be a foreseeable, real and personal risk of being subjected to torture should the Appellant return to Morocco. The risk needs not be highly probable although it must be personal and present.[73] In this case, the risk is not. There is nothing in the Appellant's accepted evidence indicating he was of adverse interest to the Moroccan government or anybody else in the past. While evidence of past harm is not required in order for a non-refoulement claim to be successful in the Board's opinion, it is most certainly a relevant consideration when weighing up the potential risk appellants facing before it. For example, in General Comment No. 1,[74] the UN Committee Against Torture notes that previous torture or mistreatment by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past, in particular the recent past, would be a relevant consideration. This view was endorsed by the Court in *Secretary for Security v Sakthevel Prabakar*.[75]

130. This is not a case of the Board considering that past harm is necessary in order to establish substantial grounds for believing there is a future danger of torture or other mistreatment. This is clearly not necessary.[76] As the observations of the Court in *A v Director of Immigration*[77] make clear, the lack of past harm

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[73] *A v Director of Immigration & Or* HCAL 69 of 2012 at [89].

[74] UN Committee Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, A/53/44, annex IX, available at: https://www.refworld.org/docid/453882365.html.

[75] *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187 at [52].

[76] see the Court's obiter comments in *AM v Director of Immigration & Anor* HCAL 102 of 2012 (McWalters J, 20 November 2013) to the effect that the Adjudicator in that case had misdirected himself that there had to be past exposure to torture in order to establish substantial grounds for believing there is a future danger of torture. The Court in that case held that what weight should be given to such instances of past harm may depend on a whole range of matters such as the gravity of it, how recent it was, whether the authors of the harm are still alive and active and how extensive their ability is to cause harm in the home country.

[77] *A v Director of Immigration & Or* HCAL 69 of 2012 at [105]-[106].

alone cannot not be a sufficient reason to find that the Appellant does not face a real risk of torture, including by way of severe mental suffering, upon return to Morocco.

131. The Board has, however, considered if there is anything else in the Appellant's profile or claims which might suggest he could be at risk of torture or other form of proscribed harm in the future. In this regard, the Board has been mindful that its principal task in the context of torture claims is to assess whether the Appellant would be at a foreseeable, real and personal risk of being subject to torture if returned, having regard to all relevant considerations including emerging country conditions. The risk needs not be highly probable, although it must be personal and present. Even having regard to these matters, however, the Board does not consider this to be the case on the basis of the Appellant's claims or evidence.

132. On the facts accepted, the Board does not consider there to be anything which creates a risk of severe pain being inflicted on the Appellant should he return to Morocco. As a result, the Board does not consider that there are substantial grounds for believing him to be in danger of being subjected to torture if returned to Morocco.

Conclusions regarding BOR 3 risk

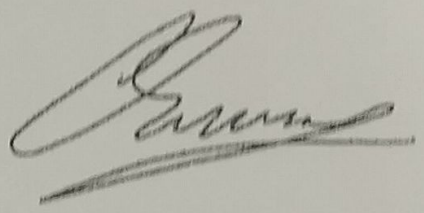
133. In light of the foregoing and the accepted facts, the Board similarly finds there is nothing which indicates the Appellant faces a genuine and substantial risk of being subjected to any form of mistreatment, let alone treatment which can be characterized as torture or which attains the requisite level of severity to amount to CIDTP, should he return to Morocco. Accordingly, the Board finds that the Appellant is not at risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment if returned to Morocco so as to constitute a breach of Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

Conclusions regarding BOR 2 risk

134. In light of the foregoing, the Board finds there is not a real risk the Appellant will arbitrarily be deprived of life, have the death penalty imposed on him or otherwise be deprived of his rights under BOR 2. As a result, the Board finds that returning the Appellant to Morocco would not expose him to a real risk of a violation of his right to life so as to constitute a breach of Article 2 of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

Decision

135. For the reasons set out above, the Appellant's claims for non-refoulement protection are not made out on any applicable ground. Accordingly, the Board confirms the Decision of the Director dated 27 September 2019.



(Gregory Brock)
Member of the Torture Claims Appeal Board /
Adjudicator of the Non-refoulement Claims Petition Office
9 December 2024