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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].