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## ST v BETTY KWAN & ANOR

COURT OF APPEAL
CIVIL APPEAL ACTION NO 115 OF 2013
CHEUNG CJHC, LAM VP & POON J
27-28 MAY, 26 JUNE 2014

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**Administrative Law – Judicial review – Torture claims – Adjudicator – Decision based on document submitted – Whether oral hearing should have been held – Fairness – Basic Law of the HKSAR art 48 (13)**

C 行政法 — 司法覆核 — 酷刑申索 — 審裁員 — 根據呈交的文件而作出裁決 — 是否應進行口頭聆訊 — 公平 — 《香港特別行政區基本法》第48(13)條

D The applicant (A) was a torture claimant under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). His torture claim failed before the Director of Immigration (Director), the interested party. His petition against the Director's decision was dismissed by the first respondent (R) as adjudicator without an oral hearing. The application for judicial review was launched to challenge, amongst other things, R's dismissal of the

E petition.

On 7 July 2004, A raised his CAT claim on the basis that he would be subjected to torture if he were to be refouled to Sri Lanka. Under the revised or post-*FB* screening process, the screening officer, on behalf of the Director, rejected A's CAT claim on two grounds: credibility and real or personal risk of torture.

F In accordance with the post-*FB* screening procedure and pursuant to art 48(13) of the Basic Law of the HKSAR, A petitioned to the Chief Executive against the Director's determination. He did it by means of a written petition dated 20 December 2011 prepared by his lawyer on his behalf.

Under the post-FB revised screening process, there was no right to an oral

G hearing at the petition stage, and the matter was left to the discretion of the adjudicator concerned. Guidelines on how this discretion was to be exercised were set out in the Brief Notes for Adjudicators (Torture Petitions) on Handling Petitions Lodged by Unsuccessful Torture Claimants under art 48(13) of the Basic Law (Brief Notes), as well as the Practice Directions for Adjudicators (Torture Petitions) (Practice Directions).

H R decided against holding an oral hearing, despite a request to that effect in the petition. She did not give reasons for her refusal and dismissed the petition on paper. In her reasoned decision, she did not deal with the question of credibility and took the view that the facts as presented by the applicant, when read as a whole, were insufficient to conclude that he would be at 'personal, foreseeable,

I present and real risk of torture' if refouled to Sri Lanka.

The application for judicial review came before Au J, who held that there was no systemic procedural unfairness in respect of the absence of an oral hearing at the petition stage (see [2013] 3 HKC 87). He also held that there was no absolute right to an oral hearing, that it was all a matter of discretion, a torture claimant had been given sufficient notice of the possibility of there being no oral hearing, and

that there was no duty on the part of the adjudicator to give reasons for not holding an oral hearing before deciding the petition. The present appeal turned on the question of whether an oral hearing should have been held to determine the petition.

**Held, allowing the appeal:**

*General principles on whether to hold an oral hearing*

(1) First, the ultimate question was one of fairness. Secondly, 'the standards of fairness' were not immutable. Thirdly, an opportunity to make 'worthwhile representations' or 'effective representations' was an important requirement of fairness in most if not all situations. Fourthly, it did not follow from the requirement of an opportunity to make worthwhile or effective representations that there must be an oral hearing held before a decision was made. Fifthly, while the presence of material factual disputes which could not be decided on paper was very often, if not invariably, a good and sufficient reason in itself for holding an oral hearing, the converse was not necessarily true. It was worth repeating that the absence of any material dispute on the primary facts, though always relevant, might not by itself be a sufficient reason for not holding an oral hearing. Everything must depend on the facts and context in an individual case. *R v Secretary of State ex parte Doody* [1994] 1 AC 531, [1993] 3 All ER 92, *R (West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755, [2005] 1 WLR 350 and *Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289, (2004) 7 HKCFAR 187, [2004] HKCU 638 considered (paras 22-36).

*Considerations of particular relevance to screening torture claimants*

(2) The question of whether an oral hearing should be afforded must be decided by an adjudicator at the petition stage after considering all relevant circumstances. First, the fundamental human right of the claimant to be free from torture was an absolute human right, which admitted of no exception. It was a weighty consideration favouring the holding of an oral hearing. Furthermore, the exercise of determining whether a torture claim was valid was one of 'joint endeavour'. If any of the requirements could not be fully satisfied without an oral hearing – and the torture claimant should be given the benefit of any doubt, an oral hearing should be held. *Secretary for Security v Sakthevel Prabakar* (above) and *TK v Jenkins* [2013] 1 HKC 526 applied (paras 37-39).

(3) Secondly, an adjudicator should ask himself whether there was anything in the torture claimant's story, the evidence and information available, the legal issues raised, the arguments mounted, the decision of the Director, the written petition of the claimant, and so forth, which was material to the determination of the CAT claim, and which high standards of fairness would require the torture claimant to be given an opportunity to be heard orally (or further in writing), before a decision was made on the torture claim. In the current context, the holding of an oral hearing (if justified) was a convenient, but might not be the only possible, way of addressing the concern involved. It was for the adjudicator, in the exercise of his discretion, to take the most effective and fairest way to approach the concern in question (paras 40-44).

(4) Thirdly, an adjudicator should consider whether there was or were any advantage(s) of holding an oral hearing as opposed to merely deciding the petition on paper. Sometimes, an oral hearing was preferable to written representations simply because of the nature of the issues or arguments involved. By nature,

written submissions did not afford the flexibility of oral presentations. The assumption must be that an oral hearing has the potential to make a difference. *Goldberg v Kelly* (1970) 397 US 254, *R (West) v Parole Board* (above) and *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] 1 All ER 369, [2013] 3 WLR 1020 considered. *New World Development Co Ltd v Stock Exchange of Hong Kong Ltd* [2005] 2 HKC 506 referred to (paras 45-46, 49).

(5) A desire to save time, trouble and expense could not be a relevant consideration to not holding an oral hearing. An adjudicator seized of a petition at the second tier of the screening process did not sit on appeal from the first-tier decision. Rather, he was there to conduct a hearing (oral or on paper), make his own findings of fact, and come to his own decision on the torture claim. An oral hearing reflected the torture claimant's 'legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute'. When it came to procedural fairness, particularly when high standards of fairness were required, the process itself was as important as the outcome, quite apart from the fact that very often process actually determined outcome. *R (Osborn) v Parole Board* (above) considered (paras 52-54).

*The refusal to hold an oral hearing*

(6) *LP v Secretary of State for the Home Department (LP)* and *TK v Secretary of State for the Home Department (TK)* set out a principled approach, based on evidence, towards assessing the relevant personal risk to the torture claimant if returned to Sri Lanka. However, both in terms of evidence and in terms of approach, A's petition did not make use of or directly follow these two cases, and this must have been obvious to an experienced adjudicator. Given that and given the high standards of fairness required, R should have referred A or his legal representative to these cases and invited further submissions from them, preferably by means of an oral hearing. It could not be over-stated that the screening process was not an adversarial process; rather it was in the nature of a joint endeavour, requiring cooperation and interaction amongst the applicant, the Director and the adjudicator. *TK v Secretary of State for the Home Department* [2009] UKAIT 00049 (11 December 2009) and *LP v Secretary of State for the Home Department* [2007] UKAIT 00076 (8 August 2008) considered (paras 56-68).

(7) An oral hearing would have been helpful in: (i) probing and clarifying what happened to A's brother-in-law; (ii) determining whether A's scars were scars which appeared to have been caused by battle-related injuries; and (iii) providing an opportunity for A or his legal representative to address the computerised information available to the Sri Lankan authorities at Colombo International Airport. R had erred in not holding an oral hearing or otherwise not giving the A and his legal representative an opportunity to make further submissions. This was a material procedural irregularity which vitiated the decision on the petition. The decision should be quashed and the petition reheard (paras 69-75, 78).

**Obiter**

*The systemic challenge*

(8) The Brief Notes and the Practice Directions were no more than guidelines. There was no evidence to suggest that they had been treated as tramlines by the

adjudicators. *R v Wakefield Metropolitan District Council, ex parte Pearl Assurance Plc* [1997] EWHC Admin 228 (5 March 1997) referred to (para 87). A

**Cases referred to**

*Chow Shun Yung v Wei Pih* [2003] 4 HKC 341, [2004] 1 HKLRD 1, (2003) 6 HKCFAR 299, (2003) 10 HKPLR 633 (CFA) B

*FB v Director of Immigration* [2009] 1 HKC 133, [2009] 2 HKLRD 346 (CFI)

*Goldberg v Kelly* (1970) 397 US 254 (SC, US)

*Liu Pik Han v Hong Kong Federation of Insurers Appeal Tribunal* [2005] 3 HKC 242 (CFI)

*LP v Secretary of State for the Home Department* [2007] UKAIT 00076 (8 August 2008) (UKAIT) C

*New World Development Co Ltd v Stock Exchange of Hong Kong Ltd* [2005] 2 HKC 506 (CA)

*R v Secretary of State ex parte Doody* [1994] 1 AC 531, [1993] 3 All ER 92, [1993] 3 WLR 154 (HL) D

*R v Wakefield Metropolitan District Council, ex parte Pearl Assurance Plc* [1997] EWHC Admin 228 (5 March 1997)

*R (Osborn) v Parole Board* [2013] UKSC 61, [2014] 1 All ER 369, [2013] 3 WLR 1020 (SC, Eng) E

*R (West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755, [2005] 1 WLR 350 (HL)

*RS, Re* [2013] HKCU 1912; (CACV 206/2012, Lam, Barma JJA and Macrae J, 20 August 2013, unreported) (CA)

*Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289, (2004) 7 HKCFAR 187, [2004] HKCU 638 (CFA) F

*TK v Jenkins* [2013] 1 HKC 526, (2013) 18 HKPLR 140 (CA)

*TK v Secretary of State for the Home Department* [2009] UKAIT 00049 (11 December 2009) (UKAIT)

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**Legislation referred to**

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 [UK]
Asylum and Immigration Tribunal (Procedure) Rules 2005 [UK] r 15
Basic Law of the HKSAR art 48(13)
Hong Kong Bill of Rights art 10 H
Immigration Act 2009 [NZ] ss 233, 234
Immigration Ordinance (Cap 115) Part VIIC
Migration Act 1958 [Aust] s 425

**Other sources referred to**

*Brief Notes for Adjudicators (Torture Petitions) on Handling Petitions Lodged by Unsuccessful Torture Claimants* paras 7, 7.2(d), 11.1, 11.2, 15.1 I

*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

*Practice Directions for Adjudicators (Torture Petitions)* paras 6.1, 14.1

A [*Editorial note*: for freedom from torture, see *Halsbury's Laws of Hong Kong*, Vol 31 (2011 Reissue) [210.120]–[210.126].]

**Appeal**

This was an appeal by a torture claimant/applicant against a judicial review of Au J (see [2013] 3 HKC 87) refusing his challenge, amongst other things, to the 1st respondent's dismissal of his petition under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The facts appear sufficiently in the following judgment.

*Nigal Kat and Ernest CY Ng (Daly & Associates) for the applicant.*

*Paul Shieh SC and Grace Chow (Department of Justice) for the 2nd respondent and interested party.*

*Attendance of the 1st respondent, unrepresented, was excused.*

## Cheung CJHC:

*The facts*

1. This is an appeal from the judgment of Au J handed down on 8 March 2013, whereby the learned judge dismissed the applicant's application for judicial review (see [2013] 3 HKC 87).

2. The applicant is a torture claimant. His torture claim failed before the Director of Immigration (the interested party). His petition to the Chief Executive against the Director's decision was dismissed by the 1t respondent as adjudicator (delegated with the authority to hear such petitions by the Chief Executive) without an oral hearing. The application for judicial review was launched to challenge, amongst other things, the 1st respondent's dismissal of the petition.

3. For reasons that will become apparent, this appeal turns essentially on the question of whether an oral hearing should have been held to determine the petition, on which question this judgment will therefore focus. In the light of the conclusion that I have reached, I will be brief with the personal background and details pertaining to the applicant's claim for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Indeed, for the purposes of this judgment, the essential facts of the applicant's case for protection under CAT may be taken (with necessary anonymisation) from the summary given by the 1st respondent in para 9 of her decision dated 5 January 2012:

> '• The Petitioner was born in A in Sri Lanka on 3 January 1968. He lived in B until 1981 when his family moved to C in the north of Sri Lanka.
>
> • Whilst still as schoolboy, the Petitioner began painting propaganda posters and banners for the Eelam People's Revolutionary Liberation Front ('EPRLF') under the mentorship of an EPRLF supporter called Mr D. He signed his artwork in the name of 'E'.

• In or around 1984 the Petitioner was rounded up by the Sri Lankan Army ('SLA'), together with other young men and ill-treated. He still bears a scar on the right side of his scalp from this incident.

• In or around 1984 or 1985 he witnessed Mr D shot and killed a SLA soldier.

• In or around 1985 or 1986, the SLA burnt down houses in reprisal for an attack on one of the army's convoys. The Petitioner's home was one of the homes destroyed. The family then moved to F. After moving to F, the Petitioner did not paint any more posters for the EPRLF.

• The Petitioner's whole family has links to the Liberation Tigers of Tamil Eelam ('LTTE'). His father worked in the cultural division of the LTTE. His brothers G and H also joined the LTTE. H died fighting for the LTTE. His brother I worked in the intelligence unit of the LTTE. I helped formulate the plans used in the attack of SLA bases.

• The Petitioner's sister married a man called J, a lawyer trained in a law school run by the LTTE. J fought for the LTTE during the conflict.

• Fearing that he would be conscripted by the LTTE, the Petitioner's parents, advised him to go to Colombo. He left for the capital in 1988.

• En route to Colombo, the Petitioner was taken captive by the EPRLF and taken to the K Training Camp. The Petitioner escaped from the camp and went to Colombo.

• The Petitioner found work in the L Stores, but was spotted by M, who came from C. He was questioned whether he had brought any weapons to Colombo from the EPRLF. He escaped from his interrogators.

• With the help of N, a family friend, the Petitioner found work in the O Stores. One day in June 1990 he was taken away by the police on suspicion of being a LTTE member. En route to the police station, he was assaulted. At the station he was beaten with batons and fire hoses. After 14 days he was released, but prior to his release, the police took his fingerprints and a photograph. He was evicted from his boarding house because he had been 'branded' a LTTE supporter.

• During the years from 1990 to 1995, the police were routinely rounding up young Tamil males in Colombo. The Petitioner was stopped approximately 100 times by the police. On about 20 of these occasions, he was detained overnight, and assaulted by the police. Once he was rounded up with other Tamils and beaten in front of a church. On another occasion in 1998, some men came to the shop and slashed him with a weapon. He had to get medical attention for the injury in a hospital.

• By the use of a bribe, he obtained a Colombo residence document.

A • In May 2002, he was coerced into providing shelter for 2-3 LTTE members. In the same month his brother I came to visit. I narrowly avoided capture and escaped from Colombo with their sister and her family.

• As a result of this last incident, the Petitioner decided to 'escape the problems in my home country' and 'save my life'. He made arrangements to leave for
B Hong Kong.'

4. The applicant first came to Hong Kong on 10 January 2003 with a passport bearing his real name. He was refused permission to land and repatriated to Sri Lanka the following day. He returned to Hong Kong two
C months later, using a passport under a false name. He was allowed to stay as a visitor but he overstayed. In July 2003, he sought recognition of his refugee status from the United Nations High Commissioner for Refugees (UNHCR), which was refused in February 2004. He appealed the refusal, but the appeal was dismissed in July 2004. Before that, in March 2004, the
D applicant was arrested and charged with using a false identity to enter Hong Kong. He was convicted and sentenced to 6 months' imprisonment.

5. On 7 July 2004, whilst still serving his sentence, the applicant raised his CAT claim on the basis that he would be subjected to torture if he were to be refouled to Sri Lanka. He claimed that he would suffer in the hands
E of the Sri Lankan Police, the Sri Lankan Army (SLA), the paramilitary groups associated with the SLA, and/or the Sri Lanka Government, including the paramilitary units of the Eelam People's Democratic Party (EPDP) and/or the Eelam People's Revolutionary Liberation Front, as he is a Tamil and had been involved with anti-government activities.

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*The first-tier screening*

6. The applicant's CAT claim was screened by the Director and rejected in April 2008 under the so-called 'pre-*FB* regime'. After the decision of
G Saunders J in *FB v Director of Immigration* [2009] 1 HKC 133, [2009] 2 HKLRD 346, which held that the then screening process was unfair and unlawful in various material aspects, the CAT screening process was revised generally, and the applicant therefore underwent screening for a second time.

H 7. Under the revised or post-*FB* screening process, the applicant's CAT claim was first considered by an officer from the Torture Claim Assessment Section of the Immigration Department, who interviewed the applicant in the presence of his legal representative assigned by the Duty Lawyer Service. By a letter dated 7 December 2011, the screening officer,
I on behalf of the Director of Immigration, rejected the applicant's CAT claim on two grounds. First, the Director did not believe the applicant's story as a matter of credibility. Secondly, the Director did not accept, even on his own story, that the applicant would be subjected to any real risk of torture if he were to return to Sri Lanka. The letter of rejection was a long

one, and detailed reasons were given in support of the two grounds of rejection. A

*The petition*

8. In accordance with the post-*FB* screening procedure and pursuant to art 48(13) of the Basic Law, the applicant petitioned to the Chief Executive against the Director's determination. He did it by means of a written petition dated 20 December 2011 prepared by his lawyer on his behalf. Annex A to the petition set out the grounds of petition. Understandably, the grounds dealt with both the question of credibility and the question of real or personal risk of torture if the applicant should return to Sri Lanka. B C

9. Annexed also to the petition was a document entitled UNHCR Eligibility Guidelines on Assessing the International Protection Needs of Asylum-seekers from Sri Lanka dated 5 July 2010 issued by the UNHCR, which provided relevant country information on Sri Lanka (COI). The petition relied on (amongst other things) the COI to contend that the applicant's risk profile was such that there was a personal risk of his being subjected to torture if he were to return to Sri Lanka. It suffices to note at this stage that the COI set out a number of potential risk profiles of people who required a particularly careful examination of possible risk. Five groups of people were described in the COI, and the first group comprised persons suspected of having links with the LTTE. It is plain from the petition that the applicant contended that he was someone with a similar potential risk profile. D E

10. The Director chose not to file anything in opposition to the petition. It was placed before the 1st respondent as adjudicator for determination. She decided not to hold an oral hearing, but to determine the petition on paper. Pausing here, it should be mentioned that under the post-*FB* revised screening process (which has since been replaced by a new system of screening introduced by the new Part VIIC of the Immigration Ordinance (Cap 115) with effect from 3 December 2012), there was no right to an oral hearing at the petition stage, and the matter was left to the discretion of the adjudicator concerned. Guidelines on how this discretion was to be exercised were set out in the Brief Notes for Adjudicators (Torture Petitions) on Handling Petitions Lodged by Unsuccessful Torture Claimants under art 48(13) of the Basic Law (Brief Notes), paras 11.1, 11.2 and 15.1; as well as the Practice Directions for Adjudicators (Torture Petitions) (Practice Directions), paras 6.1 and 14.1. These were public documents issued by the Security Bureau to assist adjudicators in performing their tasks. Moreover, the standard-form documents used in the screening process repeatedly warned a torture claimant that he had to put in all material that he would like to rely on in support of his claim. And in the Notice of Petition, the torture claimant was specifically instructed that: 'it is important that you include all details as a decision may be taken F G H I

based on the information provided in this Notice only'. In section 4 of the standard form petition, entitled 'Oral Hearing', it was stated that: 'If the circumstances warrant, the Security Bureau will arrange an oral hearing with you.'

11. Returning to the applicant's petition, as mentioned, the 1st respondent decided against holding an oral hearing, despite a request to that effect in the petition. She did not give reasons for her refusal.

12. The 1st respondent dismissed the petition on paper. In her reasoned decision, she did not deal with the question of credibility, the first ground of rejection relied on by the Director. She was content 'to assume that the events alleged by the Petitioner did occur in the manner described in his Interview and the factual portions of the Questionnaire' (para 10). She went on to dispose of some alleged risks of torture suggested by the applicant relating to non-state parties, such as the paramilitary groups associated with the SLA and with the EPDP. The 1st respondent then dealt with the state parties. She took the view that the facts as presented by the applicant, when read as a whole, were insufficient to conclude that he would be at 'personal, foreseeable, present and real risk of torture' if refouled to Sri Lanka (para 37). In reaching that conclusion, she had borne in mind and made reference to various matters set out in para 17 of her decision which she had applied to the facts before her. Paragraph 17 of her decision reads:

'The assessment of the personal risk to the Petitioner was made by reference to:

(i) the risk factors to Tamils identified in cases in the United Kingdom [27];

(ii) the risk factors identified in the various decisions of the Committee Against Torture [28];

(iii) the series of questions posed in para 8 of General Comment No.1 of the Committee Against Torture dated 21 November 1997 [29]; and with regard to

(iv) 'The Potential Risk Profiles' in Annex B (i.e. references supplied by the Petitioner)'.

Footnotes 27 to 29 read:

'27 TK (Tamils, LP updated) Sri Lanka CG [2009] UKAIT 00049; & LP (LTTE area, Tamils, Colombo, risk?) Sri Lanka CG [2007] UKAIT 00076[;]

28 Inter alia KK v Switzerland CAT/C/31/D/186/2001; SV, his wife and daughter v Canada CAT/C/26/D/49/1996;

29 Paragraph 8, General Comment No.1: Implementation of art 3 of the Convention in the context of art 22, dated 21/11/97, A/53/44, Annex IX, General Comment No.1 (General Comments)'.

*The legal proceedings*

13. The application for judicial review came before Au J. In his careful judgment, the judge dealt with, methodically, the various points of challenge raised on behalf of the applicant. He held, in short, that there was no systemic procedural unfairness in respect of the absence of an oral hearing at the petition stage. He held that there was no absolute right to an oral hearing, it was all a matter of discretion, a torture claimant had been given sufficient notice of the possibility of there being no oral hearing, and there was no duty on the part of the adjudicator to give reasons for not holding an oral hearing before deciding the petition. The judge also rejected the contention that the torture claimant should be provided with an opportunity to make representations in response to the reasons for not holding an oral hearing.

14. The judge then dealt with and rejected the contention that the Brief Notes and Practice Directions relating to the holding of oral hearings amounted to a fetter by the Secretary for Security on the adjudicator's discretion to determine whether to hold an oral hearing in a particular case. He held that the Brief Notes and Practice Directions were no more than guidelines, which were not meant to and did not fetter the adjudicator's discretion.

15. The judge then turned to the substantive challenges against the 1st respondent's decision in the present case. He noted the applicant's contention that the 1st respondent had made material errors of fact in coming to her decision, and she had also erred in her conclusions by reason of illogicality, irrationality and/or her drawing unfounded inferences of fact against the applicant. The judge went on to deal with these allegations one by one and rejected them all.

16. Furthermore, the judge also noted the applicant's argument that the lack of an oral hearing in the circumstances of the present case amounted to procedural unfairness (para 98). However, the judge did not, in his detailed judgment, specifically deal with this contention. All he said, in para 113 of his judgment, was that the 1st respondent had come to the conclusion that, even accepting all the evidence put before her, the applicant had failed to prove his CAT claim that he was personally at risk. The judge commented that even applying high standards of fairness, it was still reasonably open to the 1st respondent to make/draw her findings, inferences or conclusions in the light of the applicant's burden to prove his case, as well as his own evidence put before the 1st respondent. The judge therefore concluded that there was no procedural unfairness in the circumstances of the present case.

17. Having come to those conclusions, the judge rejected the application for judicial review with costs, and thus this appeal.

18. In this appeal, Mr Nigel Kat (Mr Ernest Ng with him) essentially repeated his arguments for the applicant before the judge, but with a shift

in emphasis which I will presently describe. For the Secretary for Security and the Director of Immigration, Mr Paul Shieh SC, leading Ms Grace Chow, supported the judge's decision and opposed the appeal.

19. I will first deal with what I consider to be the main issue of this appeal, and in the process I will deal with the competing arguments. Once that is done, the remaining challenges and arguments will fall into their proper places, and they will be mentioned accordingly (where appropriate).

*General principles on whether to hold an oral hearing*

20. As I see it, the appeal turns on the question of holding an oral hearing.

21. In this regard, it is helpful to first remind ourselves the general principles pertaining to the holding of oral hearings as a question of procedural fairness, particularly in the context of screening torture claimants.

22. *First* and foremost, the ultimate question is one of fairness. *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, 560D.

23. *Secondly*, 'the standards of fairness' are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. In other words, 'the requirements of fairness' are flexible and are closely conditioned by the legal and administrative context. *Ex p Doody*, at p 560E; *R (West) v Parole Board* [2005] 1 WLR 350, para 27.

24. Where, as here, 'life and limb are in jeopardy and [the torture claimant's] fundamental human right not to be subjected to torture is involved', high standards of fairness must be observed by the decision-maker when making the relevant administrative decision. *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, para 44.

25. *Thirdly*, an opportunity to make 'worthwhile representations' (*Ex p Doody*, at p 560G), or 'effective representations' (*West*, at para 35), is an important requirement of fairness in most if not all situations:

> '... (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

(*Ex p Doody*, at p 560F-G/H).

26. *Fourthly*, it does not follow from the requirement of an opportunity to make worthwhile or effectiverepresentations that there must be an *oral* hearing held before a decision is made. Put another way, there is no absolute right to an oral hearing. Amongst other things, the question of whether an oral hearing should be afforded must depend on the standards of fairness required, the nature of the decision-making process in question, the procedural history of the matter including whether there has been an oral hearing before, the interest at stake and the importance of the decision (in terms of its outcome and consequence), the issues involved, and how the presence or absence of an oral hearing would affect the quality of the opportunity to make worthwhile or effective representations.

27. In *Chow Shun Yung v Wei Pih* [2003] 4 HKC 341, , (2003) 6 HKCFAR 299, the Court of Final Appeal discussed general principles pertaining to the right to a hearing in civil cases guaranteed under art 10 of the Hong Kong Bill of Rights in the following terms:

> '37.1 The right to a hearing is not absolute but may be subject to limitation if the restriction pursues a legitimate aim, if there is a reasonable proportionality between the means employed and the aim sought to be achieved, and if the restriction is not such as to impair the very essence of the right: eg, *Ashingdane v United Kingdom(A/93)*(1985) 7 EHRR 528 at para 57 and *TolstoyMiloslavsky v United Kingdom (A/323)*[1996] EMLR 152 at para 59.
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> 37.2 The right to a hearing arises under art. 6(1) only in relation to 'the determination of [a person's] civil rights and obligations', the equivalent BOR 10 words being 'in the determination of his rights and obligations in a suit at law'. The right is therefore engaged only where the rules and proceedings in question are decisive of the substantive rights of the person in question, and has no application to merely interlocutory or case management issues: *Jacobsson v Sweden (No 2)* (No 8/1997/792/993, 19 February 1998) at para 38;*Al-Fayed v United Kingdom* (A/294-B) (1994) 18 EHRR 393 at para 56; and *APIS v Slovakia* (No 39754/98) (Admissibility decision).
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> 37.3 In relation to first instance hearings, the right to a hearing generally entails an entitlement to an oral hearing held in public unless there are exceptional circumstances that justify dispensing with such a hearing (*Fredin v Sweden (No 2)*(No 20/1993/415/494) at para 21; and *Fischer v Austria (A/312)* (1995) 20 EHRR 349 at para 44). It also generally requires the court to give reasons for its decision and to pronounce its judgment in public (*Hiro Balani v Spain* (A/303-B) (1995) 19 EHRR 566 at para 27).
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> 37.4 However, even at first instance, the right to a hearing does not always require oral submissions. Where no findings of fact are needed and oral submissions are considered unnecessary, the court may properly decide the case on the basis of written submissions: *Jacobsson v Sweden (No 2)* (No 8/1997/792/993, 19 February 1998), at para 49.

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37.5 Whether proceedings on appeal are consistent with the protected right is judged by asking whether the purposes of the Article have substantially been met, taking into account not merely the appeal, but the entirety of the proceedings, looking realistically at what the court's powers were and how the applicant's interests were presented and protected before the court: *Pretto v Italy* (A/71) (1984) 6 EHRR 182 at para 27; Helmers v Sweden (No 22/1990/213/275, 26 September 1991 at para 31; *Ekbatani v Sweden* (A/134) (1988) 13 EHRR 504 at para 28.

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37.6 Thus, where there has been a fair and public hearing at first instance, relatively little is required to give effect to the right at the appellate stage. Where, for instance, dismissing the appeal on legal grounds indicates that the appellate court is merely approving and making final the decision below, there may be no violation of the right where the appeal is dismissed without a hearing and without publicly pronouncing judgment, but with the court merely serving its written decision on the applicant: *Axen v Germany (A/72)* (1983) 6 EHRR 195; see also *Sutter v Switzerland* (No 8209/78, 23 January 1984).'

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28. It should be noted that *Chow Shun Yung* was concerned with the judicial process, rather than an administrative decision. On the other hand, 'life and limb' were not at stake in *Chow Shun Yung*, and the court was not addressing its mind specifically to administrative decisions that were required to observe high standards of fairness.

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29. *Fifthly*, while the presence of material factual disputes which cannot be decided on paper is very often, if not invariably, a good and sufficient reason in itself for holding an oral hearing, the converse is not necessarily true. There is an inherent limit to what written, as opposed to oral, representations can achieve, even putting aside the question of factual disputes, such that in appropriate cases, the applicable standards of fairness would require the holding of an oral hearing even when all facts are agreed. This has been explained by Lord Bingham in *West*, a case concerning the UK Parole Board's decision not to recommend the re-release of a prisoner who had been released on licence after serving a portion of his sentence of imprisonment, and who had been recalled to prison by the Secretary of State. There, Lord Bingham pointed out that in considering what procedural fairness in a particular case requires, account must first be taken of the interest at stake. In the case under consideration, the judge observed, on the one side there was the safety of the public, with which the Parole Board could not gamble; on the other, there was the prisoner's statutory right, albeit a conditional one, to be free (para 30).

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30. The judge then, importantly, pointed out that the question of whether an oral hearing should be held is not to be decided by whether there are factual disputes, but whether an oral hearing 'may well contribute to achieving a just decision'. Quoting a US Supreme Court case, the judge pointed out the limitations of written submissions. This was what he said:

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'31. While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision. The possibility of a detainee being heard either in person or, where necessary, through some form of representation has been recognised by the European court as, in some instances, a fundamental procedural guarantee in matters of deprivation of liberty: *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, 407, para 76, *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 409, para 60, *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, 83-84, para 51 and *Waite v United Kingdom*(2002) 36 EHRR 1001, 1014-1015, para 59. Although ruling in a very different legal context, the Supreme Court of the United States, in a judgment delivered by Brennan J in *Goldberg v Kelly* (1970) 397 US 254, 269 helpfully described the value of an oral hearing:

> 'Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.''

31. Lord Bingham then went on to describe the approach of the Court of Appeal below, which appeared to focus on whether there was any dispute on the primary facts as the touchstone for deciding whether there should be an oral hearing (para 34), and observed, importantly, that he did not think that the common law duty of procedural fairness was 'as constricted as has hitherto been held and assumed' (para 35). He said:

> '35 The common law duty of procedural fairness does not, in my opinion, require the board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.'

32. In the more recent case of *R (Osborn) v Parole Board* [2013] 3

A WLR 1020, a case on a decision of the Parole Board by a single member on paper not to recommend a prisoner's release or transfer to open conditions despite a request for an oral hearing, the UK Supreme Court reaffirmed the importance of holding an oral hearing, not only when the primary facts were in dispute.

B 33. Lord Reed JSC, with whom the other four judges all agreed, held that in order to comply with common law standards of procedural fairness, the Parole Board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, 'whenever fairness to the prisoner requires such a hearing in the light of the facts of C the case and the importance of what is at stake' (para 2(i)). He summarised his views in para 2(ii):

> 'It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the D following. (a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation. (b) Where the board cannot otherwise properly or fairly make an independent assessment of E risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the F board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many hears in custody are likely to fall into the first of these categories. (c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in G order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him. (d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a 'paper' decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues H which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews.'

34. The judge specifically warned against any temptation to refuse oral hearings 'as a means of saving time, trouble and expense': para 2(viii).

I 35. In a section of his judgment starting at para 80, Lord Reed JSC elaborated his views:

> '80. What fairness requires of the board depends on the circumstances. As these can vary greatly from one case to another, it is impossible to lay down rules of universal application. The court can however give some general guidance.

81. Generally, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and, as was said in *West* [2005] 1 WLR 350,the importance of what is at stake. The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide. It is presumably because of the possibility of such assistance that the board must hold an oral hearing under rule 11(2)(a) in any case where an indeterminate sentence prisoner appears to the single member panel to be potentially suitable for release or for a transfer to open conditions. The assumption must be that an oral hearing has the potential to make a difference. But that potential may also exist in other cases. The board's annual report for 2005-2006 contains a statement by a psychiatrist member of the board which demonstrates how valuable oral hearings can be:

> 'I find the oral hearings particularly rewarding in that the evidence on the day can sometimes illuminate a situation sufficiently to turn around my preliminary view of the case. There is no substitute for being able to hear from, and ask questions of the prisoner.'

82. The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

83. When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional: a factor on which Lord Bingham placed emphasis in *West*. In relation to cases concerning post-tariff indeterminate sentence prisoners, it has been said more than once that the board should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff: *R v Parole Board, Ex p Bradley* [1991] 1 WLR 134, 146; *R v Parole Board, Ex p Wilson* [1992] QB 740, 747.

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85. In accordance with the guidance provided in *West,* an oral hearing is required when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted.

86. An oral hearing is also necessary when for other reasons the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by

A the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist.'

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36. These extracts speak for themselves, and I do not propose to make a précis of the various points made regarding the circumstances under which an oral hearing should be held in order to comply with the applicable standards of fairness. However, it is worth repeating that the C absence of any material dispute on the primary facts, though always relevant, may not by itself be a sufficient reason for not holding an oral hearing. Everything must depend on the facts and context in an individual case.

D *Considerations of particular relevance to screening torture claimants*

37. Generally speaking, the screening of torture claims is no different than others. The question of whether an oral hearing should be afforded must be decided by the adjudicator at the petition stage after considering E all relevant circumstances. Obviously, each case would turn on its own facts, and it is neither desirable nor possible to set out exhaustively what the relevant considerations are or may be. Nonetheless, in most if not all cases, there are several matters, which overlap to some degree, which the adjudicator should bear in mind.

F 38. *First*, the interest at stake and the potential consequence of the decision. This has been emphasised in the recent authorities referred to above. In the context of a CAT claim, what is involved is the fundamental human right of the claimant to be free from torture. That is an absolute human right, which admits of no exception. It may be recalled that in the G parole boardcases, what was involved was a conditional right to liberty created by statute. Here, one is concerned with a fundamental right to be free from torture. The other side of the same coin is that the potential consequence of the adjudicator's decision is grave. As has been mentioned many times, life and limb are potentially at risk, and thus the high H standards of fairness required in the first place. This is a weighty consideration favouring the holding of an oral hearing.

39. Furthermore, as has been pointed out in the authorities, high standards of fairness require the Director, or for that matter, the adjudicator to adopt an active role in screening a CAT claim. They are not I permitted to simply sit back and put the torture claimant to strict proof of his claim. Depending on the facts, it may be appropriate for them to draw attention to matters that obviously require clarification or elaboration so that they can be addressed by the claimant. For instance, where it is readily apparent that something has gone amiss such as the proof documents in

*Prabakar* that the applicant there had mentioned but was unable to produce and did not produce, or that a point has obviously been overlooked or missed out. On the other hand, there may be no duty to keep probing or inquiring where the objective circumstances make it reasonably clear that the applicant and those representing him are aware of what he has to show and has already produced or mentioned all that he wants to produce or mention. The exercise of determining whether a torture claim is valid is one of 'joint endeavour'. *Prabakar*, para 54; *TK v Jenkins* [2013] 1 HKC 526, paras 21, 24 and 25. In the present context of whether to hold an oral hearing, a very *practical* result of all these requirements based on the high standards of fairness involved is that if any of these requirements cannot be fully satisfied without an oral hearing – and the torture claimant should be given the benefit of any doubt, an oral hearing should be held.

40. *Secondly*, an adjudicator should ask himself whether there is anything in the torture claimant's story, the evidence and information available, the legal issues raised, the arguments mounted, the decision of the Director, the written petition of the claimant, and so forth, which is material to the determination of the CAT claim, and which high standards of fairness would require the torture claimant to be given an opportunity to be heard orally (or further in writing), before a decision is made on the torture claim. For instance, if there is any point, factual or legal, that is troubling the adjudicator, which the adjudicator is not sure that an oral hearing or further submissions from the applicant cannot help answer or otherwise clarify, that is a strong pointer towards an oral hearing or (where appropriate) further written representations. An adjudicator simply cannot assume, no matter how good the legal representative of the torture claimant may be, that the legal representative (or for that matter, the torture claimant) would be able to foresee all the points that might be troubling the adjudicator after reading the petition and supporting material.

41. It does not mean that the adjudicator is obliged to send the torture claimant an advance copy of his decision in draft for his comment, before he can make a final decision on the petition, as the judge seems to have thought. This is, in my view, not an all-or-nothing situation.

42. Another example is where the adjudicator is of the view that a certain factual or legal point is relevant to the determination in question which has not been dealt with adequately or at all in the petition. An obvious situation is where the adjudicator is aware of an important authority on a material point which has been omitted or touched on superficially only in the petition. This is all the more important if the authority is one against the torture claimant. But, even if the authority is in his favour, circumstances may be such that it should still be fairly drawn to the attention of the applicant so that he can, if he wishes, fully develop

A and make use of the authority and other related cases or matters to his advantage in pursuing his petition.

43. A further example is the situation where the material placed before the adjudicator calls for some further probing, questioning or inquiry as a matter of fairness. This is particularly so if the absence of such further B probing, questioning or inquiry would mean the adjudicator's drawing an inference adverse to the applicant by using common sense or his deciding the issue or even the entire CAT claim by reference only to the burden of proof. In screening a CAT claim, common sense may or may not be a reliable guide, depending, sometimes at least, on the circumstances C prevailing in the foreign country or place concerned. What is 'common' sense in Hong Kong could be 'uncommon' sense in another place, and *vice versa*. As for deciding an issue or the CAT claim *solely* on the burden of proof, this should be regarded as a means of last resort given that the screening process is not an adversarial one, but one which is in the nature D of a joint endeavour.

44. It has been foreshadowed in the above discussion that in this context, the holding of an oral hearing (if justified) is a convenient, but may not be the only possible, way of addressing the concern involved. Depending on circumstances, a further opportunity to put in written E representations to deal with the point in question could equally suffice to satisfy the requirements of high standards of fairness. It is for the adjudicator, in the exercise of his discretion, to take the most effective and fairest way to approach the concern in question.

F 45. An adjudicator should consider a *third* question in deciding how to exercise his discretion to order an oral hearing, that is, whether there is or are any advantage(s) of holding an oral hearing as opposed to merely deciding the petition on paper (whether based on the original petition or based on the petition plus further written representations submitted at the G request of the adjudicator).

46. In this regard, it should be remembered that by nature, written submissions do not afford the flexibility of oral presentations. They do not permit the person involved to mould his arguments to the issues the decision-maker appears to regard as important: per Brennan J in *Goldberg* H *v Kelly* (1970) 397 US 254, 269, cited by Lord Bingham in *West*, para 31. As Lord Reed JSC put it in *Osborn*, para 81, 'the assumption must be that an oral hearing has the potential to make a difference'.

47. Looking at the matter from the perspective of the decision-maker, at least my own experience on the bench is that I tend to get a better, more I focussed and thorough, understanding of the real issues and arguments involved in a case after hearing the parties orally, regardless of whether this would lead to a change of mind from my initial view formed after reading the papers only, save in the simplest and most straightforward of cases. This tends to be so regardless of how well the written submissions

have been prepared and how careful I have read the papers. I believe my experience is shared by many other decision-makers to different extents. A

48. And of course, one should also bear in mind that written submissions do vary in their quality, depth, usefulness and so forth. Whether the torture claimant is represented would of course also make a huge difference. But even if he is, a great deal would still depend on how the legal representative perceives the facts and issues that are involved, and how he chooses to present his case and arguments. If an adjudicator finds – from his point of view at least – a poorly written petition, or one which is not sufficiently detailed, or one which leaves material matters undealt with, this would be a strong pointer to an oral hearing, A good example of this, albeit decided in a different context, is the case of *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal* [2005] 3 HKC 242, where Lam J (as he then was) held that an oral hearing should be held by the Insurers Appeals Tribunal given the serious nature of the charge, its consequences and the dispute raised by the applicant as to her state of mind at the time when she made the subject declarations. Relevantly, the judge also took into account the sketchy nature of her written submissions such that there were many aspects calling for an opportunity to clarify at an oral hearing, in reaching his decision (para 40). B C D

49. Sometimes, an oral hearing is preferable to written representations simply because of the nature of the issues or arguments involved. Some arguments are best to be dealt with orally. In *New World Development Co Ltd v Stock Exchange of Hong Kong Ltd* [2005] 2 HKC 506 (reversed by the Court of Final Appeal on a separate point), Reyes J observed, in a different context: E F

> '142. There may be questions which arise when committee members read the submissions. Those will presumably have to be dealt with orally. There may be factual issues which will need to be clarified in oral examination and cross-examination. There may be intricate points of law or fact which, difficult to explain on paper, are more easily communicated through face-to-face interaction with committee members.' G

50. From experience, where what is in issue concerns, for instance, the drawing of inference, the application of common sense, the giving of weight, or the assessment of risk, that is, matters involving essentially evaluation and judgment, oral arguments may well be a better means of representation than written submissions. By the nature of things, these are matters that might admit of more than one correct answer (and thus many possible arguments and counter-arguments), matters that could possibly be approached from different perspectives, and matters on which reasonable men might well differ. Where this is the case, it would be as difficult for the legal representative – even those who are skilled and experienced – to anticipate, when preparing the petition, all such possible arguments and perspectives which may happen to attract (or trouble) the adjudicator after H I

reading the petition, as for the adjudicator to be really sure that he has fully grasped all these possible arguments and perspectives so that nothing would be gained by having an oral hearing.

51. There are a number of *miscellaneous* points that should also be noted. Sometimes, one is tempted to decide the question of whether there should be an oral hearing by reference to the merit of the issue in question, or more precisely, the merit of the issue as it appears on paper. As has been pointed out by Lord Reed JSC in *Osborn*, para 88, this sort of approach would not allow for the possibility that an oral hearing may precisely be necessary in order for the torture claimant to have a fair opportunity of establishing the merit of the issue in question, and thus involves 'circular reasoning'.

52. It cannot be over-emphasised that a desire to save time, trouble and expense cannot be a relevant consideration to not holding an oral hearing. That said, it does not follow that an oral hearing, if indicated, has to be lengthy. All that is required is a reasonable opportunity to be heard, and in terms of time, an oral hearing of a reasonable duration.

53. The fact that at the first tier, there was already an interview by the Director's officer with the torture claimant (in the presence of his legal representative) is of course a relevant consideration to take into account. What has or what has not been covered at the interview, or in the Director's subsequent letter of rejection, must also be seriously considered. But none of them can, generally speaking, be conclusive on the question of whether there should be an oral hearing at the petition stage. After all, it is common ground that an adjudicator seized of a petition at the second tier of the screening process does not sit on appeal from the first-tier decision. Rather, he is there to conduct a hearing (oral or on paper), make his own findings of fact, and comes to his own decision on the torture claim.

54. Ultimately, what is in issue is the question of fairness, and in the present context, high standards of fairness are involved. It is worth repeating that the purpose of holding an oral hearing is not only to assist the adjudicator in his decision-making, but also to reflect the torture claimant's 'legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute': *Osborn*, para 82. Whilst some might find 'where he has something useful to contribute' begging the very question that has to be answered, what has just been quoted actually highlights, in my view, the fact that when it comes to procedural fairness, particularly when high standards of fairness are required, the process itself is as important as the outcome, quite apart from the fact that very often process actually determines outcome.

55. By way of comparison and for the sake of completeness, it should be noted that in the United Kingdom, Australia and New Zealand, broadly

speaking, oral hearing is the norm rather than the exception: see the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK); the Asylum and Immigration Tribunal (Procedure) Rules 2005 (UK), r 15; the Migration Act 1958 (Australia), s 425; the Immigration Act 2009 (New Zealand), ss 233 and 234.

*The refusal to hold an oral hearing in the present case*

56. With all these general principles in mind, I move on to deal with the challenge against the 1st respondent's decision on the petition in the present case, in terms of the refusal to hold an oral hearing.

57. At the hearing of this appeal, the main contention of Mr Kat on the absence of an oral hearing was that the 1st respondent failed to tell the applicant that she was assessing the personal risk to the applicant by reference to, amongst other things, 'the risk factors to Tamils identified in cases in the United Kingdom', that is, *LP v Secretary of State for the Home Department* [2007] UKAIT 00076 (8 August 2008); and *TK v Secretary of State for the Home Department* [2009] UKAIT 00049 (11 December 2009). This was a point rather obscurely touched on in the Amended Form 86 (para 187), and it assumed only minor significance at the hearing before the judge, as may be gleaned from the written submissions before him. Not surprisingly, his judgment did not deal with this point in any detail. The point featured as ground 12 of the grounds of appeal in the notice of appeal. On appeal, it became Mr Kat's main point of attack, and it was fully dealt with in the respective written submissions of counsel and orally at the hearing. Having considered the history of the proceedings, the importance of the point, the interest of the applicant (as torture claimant) and the question of possible prejudice, I take the view that this point should be entertained on appeal.

58. In short, the argument is this. In the petition, the applicant relied on the COI concerning Sir Lanka prepared by the UNHCR. It was annexed to the petition as Annex B. It contained general information on the country after the end of civil war there in May 2009. It set out five potential risk profiles, and in the petition, it was said on behalf of the applicant that he fell within the first profile, that is, persons suspected of having links with the LTTE.

59. The petition did not refer to the UK Asylum and Immigration Tribunal cases referred to by the 1st respondent. In fact, the COI did not refer to these cases, save and except that in footnote 35 (there were altogether 90 footnotes), there was, towards the end of the lengthy footnote, a reference to *TK*. Footnote 35 was inserted to support a reference in the text that according to some reports, young Tamil men may be disproportionately affected by the implementation of security and antiterrorism measures on account of their suspected affiliation with the LTTE.

A 60. A quick look at the two UK cases referred to by the 1st respondent would immediately reveal why she would wish to refer to these cases (amongst others) in assessing the personal risk of torture to the applicant if he were to be sent back to Sri Lanka. These two cases, known as CG cases (CG stand for Country Guidance) for Sri Lanka, did not only decide
B the claims before the tribunal in the two cases. In these two CG cases, the tribunal also examined in great detail, with extensive references to available factual and expert evidence, information and material, the actual situation in Sri Lanka in terms of the risk of torture to Sri Lankans, particularly those of Tamil ethnicity. The cases therefore serve as 'country
C guidance' cases, for deciding similar cases involving asylum seekers and torture claimants from Sri Lanka. *LP* was decided in 2007 when the civil war was still going on. Amongst other things, it described the factual situation in Sri Lanka, and listed 12 factors which might make a person's return to Sri Lanka in violation of his fundamental rights. Whilst the list
D was not intended to be exhaustive, understandably it was of great importance to those having to deal with this type of case. The 12 factors were (para 238):

'(i) Tamil ethnicity.

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(ii) Previous record as a suspected or actual LTTE member or supporter.

(iii) Previous criminal record and/or outstanding arrest warrant.

(iv) Bail jumping and/or escaping from custody.

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(v) Having signed a confession or similar document.

(vi) Having been asked by the security forces to become an informer.

(vii) The presence of scarring.

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(viii) Returned from London or other centre of LTTE activity or fund-raising.

(ix) Illegal departure from Sri Lanka.

(x) Lack of ID card or other documentation.

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(xi) Having made an asylum claim abroad.

(xii) Having relatives in the LTTE.'

61. *LP* was decided before the end of civil war in May 2009, with the
I Sri Lankan Government declaring victory over the Tamil rebels. The significance of the subsequent CGcase, *TK*, lies with the fact that it was heard and decided after the end of civil war, and thus provides a good glimpse into the situation in Sri Lanka in terms of possible improvement of the situation there following the end of hostility. The conclusion

reached in *TK* is, sadly, that things have remained very much the same. Amongst other things, *TK* confirms that the 12 factors set out in *LP* remain applicable even after the end of the civil war. Like *LP*, *TK* also contains many factual matters and information concerning Sri Lanka. Of particular interest to our present caseis the information on the risk on return at Colombo International Airport, described in paras 78-82 of the decision. In short, it describes the technological means and procedures which the Sri Lankan authorities now possess at the airport to identify Tamils of concern to them. In particular, the computer records that the authorities now have include information on family members.

62. By way of contrast, the COI on Sri Lanka issued by the UNHCR, although produced after *TK*, is much more general and sketchy in terms of the information provided and of the situation on the ground. It does not mention the list of factors identified in *LP* and found to be still applicable after the end of civil war in *TK*. Certainly, it does not mention the computerisation of data and information, which are now available to the Sri Lankan authorities at Colombo International Airport, or that the information now includes the information of family members.

63. Mr Kat's point was simple. There was nothing wrong with the 1$^{st}$ respondent wanting to refer to *LP* and *TK* to assess the personal risk to the applicant. Indeed, she was obliged to do so. However, she erred when she did so without first telling the applicant of her intention to do so, and affording him an opportunity to be heard orally in relation to the same.

64. Mr Shieh, defending the 1st respondent's decision, queried whether *LP* and *TK* were not known to the legal representative of the applicant, and suggested that, in fact, in the petition, some of the risk factors set out in *LP* had already been mentioned in substance, although the names of the two CG cases were not. Leading counsel also pointed out that in the COI annexed to the petition, *TK* was actually mentioned in footnote 35, as noted above. At one stage, Mr Shieh also suggested that *TK* and *LP* are well known cases and are cited by everybody, so there was no need for the 1st respondent to bring them to the attention of the applicant or his legal representative. However, Mr Shieh very fairly withdrew from his sweeping statement and accepted that there was no evidence on what he had said. Nor did he suggest that the court could take judicial notice of what he had asserted.

65. In my view, certainly, both *LP* and *TK* are highly important decisions in the present context. They contain many details and information about the situation in Sri Lanka. But not only that – they also set out a principled approach, based on evidence, towards assessing the relevant personal risk to the torture claimant if returned to the country. In other words, these two cases are of great significance both in terms of facts and evidence, and in terms of the approach to the task of risk assessment, the very issue the 1st respondent had to decide in relation to the petition.

A The 1st respondent was therefore quite right to refer to the two cases for the purposes of assessing the personal risk of torture to the applicant if returned to Sri Lanka.

66. On the other hand, it is plain that the petition did not rely or fully rely on the facts and evidence provided in *LP* and *TK* about the relevant B situation in Sri Lanka. For instance, there was nothing in the petition or the COI to deal with specifically the situation in Sri Lanka after the end of civil war, whereas in *TK*, one can see, by reference to each and every one of the 12 factors, what the post civil war situation in Sri Lanka now is. Secondly, it is plain that the petition did not adopt the principled approach C to assessment of risk in terms of the 12 factors set out in *LP* and maintained by *TK*. The petition only mentioned and discussed some factors. (The same observations can be made in relation to the first tier process including the Director's letter of rejection.)

D 67. In other words, both in terms of evidence and in terms of approach, the petition of the applicant did not make use of or follow directly *LP* and *TK* as such, and this must have been obvious to an experienced adjudicator. Given that and given the high standards of fairness required, the 1st respondent should have referred the applicant or his legal E representative to *LP* and *TK* and invited further submissions from them, preferably (and in fact very conveniently) by means of an oral hearing. This must be the position even if the 1st respondent had thought that *LP* and *TK* were well known to the legal representative of the applicant. For high standards of fairness would still have required the 1st respondent to F tell the applicant and his legal representative in that scenario that in her view, these two cases contained important and relevant information and stated an approach which she found useful and which she intended to follow, and to give the applicant and his legal representative an opportunity to rethink whether they should want to put in further G submissions in relation to them or to realign the petition in the light of the approach in those two cases. *A fortiori*, if the 1st respondent had thought that the absence of any specific and direct reliance on *LP* and *TK* was due to an omission or ignorance on the part of the applicant's legal representative.

H 68. It cannot be over-stated that the screening process is not an adversarial process; rather it is in the nature of a joint endeavour, requiring cooperation and interaction amongst the applicant, the Director and the adjudicator.

69. At the hearing, Mr Kat also relied on various other matters and I features in the present case to say that an oral hearing should have been given. For instance, Mr Kat pointed out that according to the petition, the applicant's brother-in-law used to be a LTTE lawyer and he was detained for that reason in 2009. He has since not been allowed to practise law in Sri Lanka and can only work as a farmer. The 1st respondent was not

impressed by the argument and pointed out that after his detention in 2009, the brother-in-law was fielded by the Government to run in a local election, and that showed that the Government was no longer suspicious of him. The 1st respondent also said the fact that the brotherinlaw was not allowed to practise law in Sri Lanka could be due to innocent reasons.

70. I agree with Mr Kat that these were precisely the sort of matters that should have been probed and clarified at an oral hearing, rather than left to the drawing of inference based on common sense and assumptions.

71. Mr Kat also placed reliance on the applicant's scars, a risk factor set out in *LP*, in that battle-related scars would tend to increase the risk of suspicion by the authorities. The 1st respondent did not think much about this factor. She said that the situation in the country 'should be improved now that the civil war is over' (para 29).

72. I agree with Mr Kat that this was not an acceptable way of treating the scars in the present case because the 1st respondent had before her *TK* to the effect that the presence of scarring remained a significant risk factor even after the civil war (para 144).

73. Mr Shieh sought to counter this by pointing out that the risk factor relating to scarring was only concerned with 'battle–related' injuries. He submitted that the scars that the applicant has were not caused by battle-related injuries.

74. With respect, that missed the point. The question is not whether as a matter of fact, the scars were caused by battlerelated injuries. The real question is whether they are scars which appear to have been caused by battle-related injuries. In any event, one scar is on the applicant's right scalp caused by his hitting his head repeatedly against a metal bolt on the bench of a truck in which the applicant was forced to travel. The other scar was caused by his being slashed with a weapon causing a wound extending from his neck across his chest and under his left armpit. The attackers were three men wearing army boots who attacked him after asking him whether he was a Tamil and demanding him to produce his ID card, back in 1998. In the present case, an oral hearing would have been helpful because at the hearing, the scars could have been shown to the 1st respondent and she could have made an informed decision on the risk (if any) involved.

75. The computerised information available to the Sri Lankan authorities at Colombo International Airport now includes, according to *TK*, information about family members. In the present case, various family members of the applicant are linked to LTTE. One therefore has to assume that the computer records available at the airport would reveal such family connections. That, certainly, is something that should be carefully and seriously borne in mind in assessing whether there is any real, personal risk of torture to the applicant if he were to be returned to Sri Lanka. The 1st respondentdid make an assessment of the risk that the applicant would

face at the airport if he were to be so returned. She certainly had in mind *LP* and *TK* when doing so, as can be seen from paras 33 to 36 of her decision. However, what is not satisfactory is that her assessment was done without the benefit of input from the applicant and his legal representative at an oral hearing, which was never given. Both as a matter of substantive merit and as a matter of procedure, this is unsatisfactory. One just cannot say for sure what counter arguments the applicant or his legal representative might have been able to raise in answer to the points made by the 1st respondent in paras 33 to 36 of her decision, had their attention been specifically drawn to *LP* and *TK*, and had they been given an opportunity to orally address the 1st respondent.

76. In this regard, it should be noted that in para 191 of the Amended Form 86, which was verified by the applicant on oath, it was said:

> 'Had she conducted an oral hearing, the Applicant's representatives would, for example, have been able to:
>
> a. Draw her attention to the evidence on the matters in §15 and §24, §25 of her Decision of which she wrongly found there was 'no evidence';
>
> b. Draw her attention to the latest authoritative COI from the UNCAT Committee itself, published on 8th December 2011, which reported on continuing torture in Sri Lanka in 2011 by state actors including the police [ST-14], which was not considered in the Decision; and
>
> c. Consider and assist her in applying the CG decisions of *LP* and *TK* to the country evidence when assessing the personal risk profile of the Appellant, in which she erred as set out under Grounds 2 and 3 below.'

77. I have already alluded to the limited relevance of the interview by the Director's officer at the first tier to the question of whether there should be an oral hearing at the petition stage generally. In the present case, it should also be noted that *LP* and *TK* (and the 12 risk factors) did not really feature as such at the first tier screening process including the interview. This, in my view, further reduces the relevance of the interview to the question of whether there should be an oral hearing at the petition stage.

*My conclusion on the refusal to hold an oral hearing*

78. For all these reasons, I have come to the conclusion that the 1st respondent has erred in not holding an oral hearing or otherwise not giving the applicant and his legal representative an opportunity to make further submissions. This was a material procedural irregularity which vitiated the decision on the petition. For this reason alone, the decision should be quashed and the petition reheard.

79. Given this conclusion of mine, and the fact that the petition will

have to be dealt with again, it is neither necessary nor desirable for me to deal with the other arguments raised in this appeal relating to the merits of the applicant's petition. It will have to be dealt with afresh, and it is not for the court to usurp the function of the adjudicator in terms of deciding the petition on its merits.

*The systemic challenge*

80. I would be brief with Mr Kat's systemic challenge against the Brief Notes and Practice Directions governing the hearing of petitions in so far as they relate to the holding of oral hearings. This challenge is now academic so far as deciding the present appeal is concerned. An additional reason for my brevity is this. As mentioned, there is now in place a new system of screening introduced by the new Part VIIC of the Immigration Ordinance. Under the new system, whilst there is still, as before, no absolute right to an oral hearing, which remains a matter of discretion on the part of the adjudicator dealing with a petition, the relevant provisions pertaining to oral hearing in the Brief Notes and Practice Directions are no longer there.

81. The Brief Notes say:

'7.1 The *Prabakar* judgment ... states that the Authority to determine torture claims has to comply with high standards of fairness having regard to the momentous importance of the decision to the individual concerned as life, limb and his fundamental rights not to be subjected to torture were involved. According to the judgment, the high standards of fairness should be approached as follows:

(a) While the Claimant has the burden of establishing the torture claim, he should be given every reasonable opportunity to do so. The difficulties faced by these claimants should be appreciated. He may have fled from the country concerned with few belongings and documents and his level of education may be relatively low. It would not be appropriate for the Authority to adopt an attitude of sitting back and putting the claimant to strict proof of his claim. It may be appropriate for the Authority to draw attention to matters that obviously require clarification or elaboration so that they can be addressed by the claimant.

...

7.2 The CFI's judgment in *FB and others v Director of Immigration* ... provides further requirements on the high standards of fairness in handling torture claims as follows:

...

(d) In most cases of a petition, the relevant factors will favour the view that an oral hearing should be permitted as an aspect of procedural fairness. It

A does not follow that every petition will require both an oral hearing or the Petitioner to be represented at that hearing. It will be necessary for the authority in each case to have regard to the appropriate relevant considerations and to make an appropriate determination.

B ...

11. Oral Hearings

11.1 The Adjudicator assigned to handle a petition shall review the case based on available information and decide whether to conduct an oral hearing or whether the petition is to be handled by means of a paper review. An oral C hearing may be dispensed with where the Adjudicator is satisfied that the petition can be justly determined on the papers. In deciding whether an oral hearing is needed, the Adjudicator will take into account the circumstances of the case, including but not limited to considerations that all relevant evidence has been presented and the determination of the facts shall be based on clear D and cogent reasons.

11.2 An oral hearing should normally be conducted if the Adjudicator finds that:

(a) There are credibility issues crucial to the Decision of the petition which E were not adequately addressed during the interviews or supported in the assessment by the Director;

(b) New evidence is raised in the petition stage that is relevant to the Decision (including any change in conditions in the Claimant's country of origin) and F clarification via correspondence is inexpedient or insufficient and that holding an oral hearing is therefore required;

(c) An apparent breach of procedural requirement has occurred which could have limited the ability of the Claimant to establish his claim (e.g. inadequate G interpretation, denial of the opportunity to present relevant evidence, etc.)

...'

82. The Practice Directions relevantly provide:

H '6. Oral Hearings

6.1 An Adjudicator may, without conducting an oral hearing, consider the materials submitted by the parties and proceed to make his final Decision regarding a petition. Where the circumstances warrant, the Adjudicator may I conduct an oral hearing on a petition.

...

14. Paper Reviews

> 14.1 If after considering the Notice of Petition and relevant information available including any further particulars which may have been furnished by either party, the Adjudicator is satisfied that the petition is of such a nature that it can be justly determined without an oral hearing, he may dispense with an oral hearing and proceed to decide whether or not to allow the petition. He will make a Decision on the petition by way of a Paper Review without further notice to any party. Although an Adjudicator may dispense with an oral hearing in the above circumstances, he must ensure that in the event the Director makes any submissions in relation to a petition, the Petitioner has at least an opportunity of responding by way of written representations.
>
> ...'

A B C

83. Mr Kat's argument, in short, was that these provisions only pay lip service to the high standards of fairness required, and to Saunders J's observation in *FB*, repeated in para 7.2(d) of the Brief Notes, that in most cases of a petition, the relevant factors will favour the view that an oral hearing should be permitted as an aspect of procedural fairness. Paragraphs 11.1 and 11.2 of the Brief Notes, counsel argued, actually guide the adjudicator's discretion away from considering all relevant considerations, for instance, any request the torture claimant may make for an oral hearing or why, or the need for him to answer any new law or an approach not raised at the first tier. There is no reference to unrepresented petitioners or whether that should carry any weight in the decision. Mr Kat argued that para 11.1 wrongly 'guides' or directs the adjudicator that 'all relevant evidence has been considered' which begs the question the adjudicator is bound to ask at that point.

D E

84. Mr Kat was also very critical with the wording of paras 11.1 and 11.2 of the Brief Notes, as not reflecting sufficiently the high standards of fairness required and Saunders J's observation that in most cases, the relevant factors would indicate that there should be an oral hearing.

F

85. Mr Kat also referred to some statistics to show that oral hearings are rarely held at the petition stage.

G

86. Counsel argued that this court (differently constituted) had reached a 'plainly wrong' conclusion in *Re RS* [2013] HKCU 1912, CACV 206/2012, 20 August 2013, on this point.

H

*My views on the systemic challenge*

87. In my view, the Brief Notes and for that purpose, the Practice Directions, are no more than guidelines. They constitute 'guidance and not tramlines' (*R v Wakefield Metropolitan District Council, ex parte Pearl Assurance Plc* [1997] EWHC Admin 228 (5 March 1997), per Jowitt J), and there is no evidence to suggest that they have been treated as such (that is, as tramlines) by the adjudicators – all experienced retired judges or judicial officers.

I

88. As for the statistics, there is simply insufficient material to draw

any meaningful inference from the figures. For all we know, there could be innocent explanations for the statistics. They do not entitle one to infer that the Brief Notes or Practice Directions have been treated as tramlines rather than guidance, or that there is any institutional reluctance to hold an oral hearing.

89. The Brief Notes and Practice Directions must be read as a whole. There is no warrant to single out and focus on para 11 of the Brief Notes. If anything, the Brief Notes have already told the reader, in para 7, that the screening process must observe high standards of fairness, and, specifically in para 7.2(d), that in most cases, the relevant factors would suggest that there should be an oral hearing held at the petition stage. Paragraph 11.1 then says that 'an oral hearing may be *dispensed with* where the adjudicator is satisfied that the petition can be justly determined on the papers' (emphasis added). Some might say that this is not helpful because it begs the question of what is a just determination. But that is a separate point. For present purposes, what is of importance is that para 11.1 is obviously premised on the earlier para 7.2(d), and what it says is that where, however, a petition can be justly determined on paper, an oral hearing may be 'dispensed with'. I do not see this as an incorrect or unfair misrepresentation of the position in law.

90. Paragraph 11.2 goes on to list, non-exhaustively, some of the more obvious situations where an oral hearing should normally be held. The author of the document should not be criticised for using general words when giving general examples. In my view, Mr Kat's criticisms of the wording of the paragraph only mean that there is room for improvement in terms of drafting. However, the baseline here is that these Brief Notes (and Practice Directions) are not statutes, and the words are not to be read, and are not intended to be construed, as if they were contained in an Act of Parliament.

91. Likewise, I do not think the relevant contents of the Practice Directions – which should be read together with the Brief Notes – are so unsatisfactory that they should actually be regarded as unfair and objectionable in the public law sense.

92. This is not to say that the drafting of the relevant provisions in the Brief Notes and Practice Directions cannot be improved on. The court is not told whether it is intended that these provisions will in one way or another feature in the new system. But if they are intended to be re-cycled for such use, what is said in this judgment should be fully taken into account and the provisions revised accordingly.

93. I would reject this ground of challenge.

*Other arguments*

94. Given the conclusion that I have reached, I would not deal with the other relatively minor arguments raised by Mr Kat in support of his

client's appeal.

*Disposition*

95. For the reasons given, I would allow the appeal and set aside the order made by the judge, and in substitution therefor, I would make an order that the decision of the 1st respondent on the petition be brought up and quashed, and direct that the petition be dealt with afresh by another adjudicator. I would dismiss the rest of the application for judicial review. I would give the costs below to the applicant together with a certificate for two counsel. There shall be legal aid taxation of the applicant's own costs.

96. As for the costs of this appeal, I would make an order *nisi* that the applicant shall also have the costs of the appeal, together with a certificate for two counsel. Likewise, there shall be legal aid taxation of the applicant's own costs of the appeal.

**Lam VP:**

97. I agree.

**Poon J:**

98. I agree.

**Cheung CJHC:**

99. Accordingly, we dispose of this appeal as indicated in paras 95 and 96 above.

Reported by Alfred Sit