

Case Summary for:  
**UBAMAKA EDWARD WILSON v. SECRETARY FOR SECURITY AND ANOTHER<sup>1</sup>**

<b>Court:</b>	Court of Final Appeal (“CFA”)
<b>Judges:</b>	Chief Justice Ma, Mr. Justice Chan PJ, Mr. Justice Ribeiro PJ, Mr. Justice Tang PJ and Lord Walker of Gestingthorpe NPJ
<b>Applicant (and Counsel):</b>	Ubamaka Edward Wilson (Mr. Richard Gordon QC, Mr. Hectar Pun and Mr. Timothy Parker (instructed by Tso Au Yim & Yeung and assigned by the Legal Aid Department))
<b>Respondent (and Counsel):</b>	Secretary for Security and Director of Immigration (Mr. Benjamin Yu SC, Professor Malcolm Shaw QC, Mr. Anderson Chow SC and Ms. Grace Chow (instructed by the Department of Justice))
<b>Date heard:</b>	4-6 December 2012
<b>Date promulgated:</b>	21 December 2012
<b>Full text:</b>	<a href="https://v2.hklii.hk/en/cases/hkcfa/2012/87">https://v2.hklii.hk/en/cases/hkcfa/2012/87</a>
<p><b>ABSTRACT:</b> The Applicant challenged the validity of a deportation order on constitutional grounds. He claimed that the proposed deportation would violate his constitutional rights of not being subjected to double jeopardy and cruel, inhuman and degrading treatment or punishment (“CIDTP”) under the Hong Kong Bill of Rights Ordinance (Cap. 383) (the “BORO”). While the Court ruled that the Applicant could not rely on the right against double jeopardy due to the statutory effect of section 11 of the BORO (which precludes the claiming of certain constitutional rights where immigration decisions are involved), the Applicant may legitimately challenge the deportation order if he could establish a real risk that he would face CIDTP if repatriated to his home country Nigeria. The distinction was made on the basis that the right against CIDTP is a non-derogable and absolute right which supersedes all immigration considerations. The Applicant’s claim was nevertheless unsuccessful because his circumstances did not attain a minimum level of severity which amount to CIDTP and warranted the Court’s intervention.</p>	
<b>Key words:</b>	Section 11 of the Bill of Rights Ordinance (Cap. 383); immigration reservation; deportation; non-refoulement; torture; cruel, inhuman and degrading treatment or punishment (CIDTP); minimum level of severity; genuine and substantial risk; double jeopardy; non-derogable and absolute rights; territorial limits

The Justice Centre is grateful for the assistance rendered by Morrison & Foerster on this case summary.

<sup>1</sup> [2012] HKCFA 87. Also cited as: (2012) 15 HKCFAR 743, [2013] 2 HKC 75, and FACV15/2011.

## SUMMARY:

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### Facts and Procedural History:

The Applicant is a Nigerian national who was convicted of drug trafficking in Hong Kong in 1991. While serving his prison sentence in 1998, the Applicant learnt that Nigeria had created a new offence to punish Nigerian nationals who brought Nigeria into disrepute as a result of being convicted of drug offences in a foreign country (the “**Nigeria Offence**”).<sup>2</sup> In 1999, the Secretary for Security issued a deportation order against the Applicant under section 20(1)(a) of the Immigration Ordinance (the “**IO**”). In September 2006, the Applicant applied for refugee status. In March 2007, the Applicant lodged a separate claim under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In December 2007, the Applicant’s application for refugee status was unsuccessful. The Applicant was released after serving 16 years in prison in Hong Kong in December 2007, and was immediately placed in administrative detention under section 32 of the IO pending deportation to Nigeria.

On 25 July 2008, the Applicant instituted judicial review proceedings against the Respondents challenging the validity of the deportation order and the administrative detention. The Applicant was released from the detention on recognizance shortly before he filed the proceedings.<sup>3</sup> The focus of the judicial review then turned to the constitutionality of the deportation order, which the Applicant opposed and claimed he would be exposed to the risk of being re-prosecuted for the same drug trafficking offence twice by the Nigerian authority had he been deported back to the country.

As a result of the risk of being re-prosecuted in Nigeria, the Applicant argued that the deportation order had violated two of his constitutional rights under section 8 of the BORO (the “**BOR**”): (i) the right against double jeopardy pursuant to Article 11(6) of the BOR (the “**Article 11(6) Right**”) and (ii) the right against being subjected to CIDTP pursuant to Article 3 of the BOR (the “**Article 3 Right**”). The Applicant contested that his Article 3 Right was non-derogable pursuant to section 5(2)(c) of the BORO, and must not be displaced by section 11 of the BORO. Section 11 of the BORO precludes persons not having the right to enter and remain in Hong Kong (such as the Applicant) from relying on the constitutional protections specified in the BOR to contest immigration-related matters, such as the deportation order.<sup>4</sup>

Both the Court of First Instance (the “**CFI**”) and the Court of Appeal (the “**CA**”) rejected the Applicant’s argument on double jeopardy for two reasons. First, the language of section 11 of the BORO expressly precluded the Applicant from invoking the Article 11(6) Right against execution of the deportation order when immigration issues were concerned (*para 27*). Second,

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<sup>2</sup> Section 22 of the National Drug Law Enforcement Agency Act (Decree No 33 of 1990).

<sup>3</sup> This was because the Court of Appeal had held in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 that detention under section 32 of the IO violated Article 5(1) of the BORO on the basis that the grounds and procedure for detention were not sufficiently certain and accessible.

<sup>4</sup> Section 11 of the BORO reads, “As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.” See <https://v2.hkllii.hk/en/legis/ord/383/s11>.

the Article 11(6) Right only provides protection against double jeopardy within a single state or jurisdiction and does not operate transnationally (such as Nigeria) (*para 29*).

On the other hand, the CFI did agree with the Applicant's argument on CIDTP and quashed the deportation order accordingly.<sup>5</sup> The CFI opined that section 11 did not displace the Applicant's reliance on the Article 3 Right because the right against being subjected to CIDTP is a peremptory norm under customary international law and accordingly enjoys supremacy over section 11 of the BORO. The CFI found the execution of the deportation order would amount to CIDTP because the Applicant would have to experience severe frustration at the prospect of facing another trial and imprisonment in relation to the same drug offence in Nigeria (*paras 178 and 179*).

The CA reversed the CFI's decision and reinstated the deportation order against the Applicant,<sup>6</sup> basing its decision on two grounds. First, no jurisprudence had established that the Article 3 Right was a peremptory norm (*para 37*). Second, the Applicant's factual circumstances fell short of approaching the level of ill-treatment required to constitute CIDTP (*para 38*).

As a result of the CA's decision, the Applicant lodged this appeal to the CFA (the "**Court**"). The Applicant's appeal against the reinstatement of the deportation order was based on four grounds, namely (i) the right against double jeopardy, (ii) the right against being subjected to CIDTP, (iii) the right against being subjected to CIDTP being a peremptory norm that prohibits refoulement of persons facing a risk of CIDTP, and (iv) the fact that the deportation should be sent back to the Director of Immigration (the "**Director**") for reassessment in light of new facts.

#### **Issues:**

1. Whether section 11 of the BORO is constitutional;
2. If so, whether section 11 is capable of displacing the constitutional protection provided by Article 3 of the BOR despite its non-derogable character as conferred by section 5(2)(c) of the BORO; and
3. If section 11 is not capable of displacing Article 3, whether the Applicant's circumstances amounted to CIDTP and justified quashing the deportation order.

#### **Judgment:**

The Court ruled that section 11 of the BORO is constitutional. While section 11 may preclude people from relying on some of the constitutional protections under the BOR when it comes to immigration matters, it must not deprive a person of his right against being subjected to CIDTP in any event because such right is non-derogable and absolute.

The Applicant's circumstances did not amount to CIDTP and the Court dismissed his appeal.

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<sup>5</sup> [2009] HKCFI 352.

<sup>6</sup> [2010] HKCA 332.

## Reasons for Judgment:

### (1) Constitutionality of section 11 of the BORO

The Court held that section 11 of the BORO is consistent with Article 39 of the Basic Law (“BL”) and constitutionally valid. The Court discussed the history of section 11 and found it has been validly made part of the Hong Kong laws by way of Article 160 of the BL since the handover in 1997 (*para 76*). Additionally, the Hong Kong courts have always viewed section 11 as consistent with Article 39 in a plethora of landmark constitutional law cases.<sup>7</sup> The general effect of section 11 is that persons not having the right to enter and remain in Hong Kong cannot rely on certain constitutional protections under the BOR to challenge immigration legislations (*para 94*).

### (2) Relationship among sections 5 and 11 of the BORO and Article 3 of the BOR

Despite the general effect of section 11, the Court ruled that the scope of section 11 is nevertheless limited by section 5 of the BORO (*para 115*). Section 5 stipulates that a State must not take away certain constitutional protections from its people (i.e., non-derogable) even “in time of public emergency which threatens the life of the nation”. A list of these non-derogable situations is provided in section 5(2). Section 5(2)(c) specifically names the Article 3 Right as a non-derogable right, alongside Article 2 (i.e., right to life) and some other Articles. The Court opined that if the Article 3 Right is not derogable even in time of public emergency, it is “impossible” to imagine a scenario where it could be displaced by section 11 immigration considerations (*para 106*).

In addition to being a non-derogable right, the Court ruled that the Article 3 Right is also an absolute right (*para 114*)<sup>8</sup>. An absolute right means that the government cannot justify any infringement upon the Article 3 Right with a proportionality analysis (*para 145*).<sup>9</sup> The legal source of this right being absolute is derived from persuasive jurisprudence of the European Court of Human Rights (the “ECHR”) and the UK courts (*paras 108 to 111*). For example, the Court cited *Soering v United Kingdom*<sup>10</sup> that the prohibition on CIDTP is “absolute” (*para 109*), and *R (Limbuella) v Secretary of State for the Home Department*<sup>11</sup> that the Article 3 Right is “cast in absolute terms without exception or proviso or the possibility of derogation” (*para 111*).

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<sup>7</sup> The Court discussed these cases in paras 93 to 95. These cases include *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, *Tam Nga Yin v Director of Immigration* (2001) 4 HKCFAR 251, and *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480.

<sup>8</sup> The Court noted in *para 106* that not all the non-derogable rights listed in section 5(2)(c) of the BORO are also to be classified as absolute.

<sup>9</sup> The proportionality analysis was laid down in the landmark CFA case of *Hysan Development Co Ltd v Others v Town Planning Board* [2016] HKCFA 66. It involves a four-step process of which the court will ask (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; (iii) whether the measure is no more than necessary for that purpose; and (iv) whether pursuit of the societal interest results in an unacceptable harsh burden on the individual. See *paras 134 to 135* at <https://v2.hklii.hk/en/cases/hkcfa/2016/66>.

<sup>10</sup> (1989) 11 EHRR 439.

<sup>11</sup> [2006] 1 AC 396.

Following on from the non-derogable and absolute character of the Article 3 Right, the Court concluded the relationship among sections 5 and 11 of the BORO and Article 3 of the BOR as follows:

*“Accordingly, any apparent conflict between s.5 and s.11...should be resolved by giving precedence to s.5, according decisive weight to the non-derogable and absolute character of the rights protected by BOR art.3...Section 11 must be understood to exclude the application of HKBORO and BOR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong except insofar as the non-derogable and absolute rights protected by BOR art.3 are engaged.” (para 115) (emphases added)*

### (3) Application to the facts

Regarding the first ground on double jeopardy, the Court found that the Applicant’s reliance on the Article 11(6) Right must fail. As the Article 11(6) Right is neither non-derogable (i.e., not being a right listed under section 5 of the BORO) nor absolute, section 11 of the BORO applied and precluded the Applicant from relying on the Article 11(6) Right to argue for non-refoulement (*para 162*). Besides, the Court accepted that the Article 11(6) Right “only applies within the territorial limits of the HKSAR” just like most of the constitutional protections under the BORO (*para 164*). Therefore, the Applicant’s potential risk of facing double jeopardy in Nigeria did not avail his case.

Regarding the second ground on CIDTP, the Court reiterated that section 11 of the BORO could not preclude the Applicant from relying on the Article 3 Right (*para 169*). To successfully avail himself to the Article 3 Right, however, the Applicant’s circumstances must satisfy two factual requirements and overcome “a very high threshold” in doing so (*para 172*).

First, the ill-treatment which the Applicant would face if deported to Nigeria must attain “a minimum level of severity”. Citing *R (Limbuella)* at *para 173*, the Court regarded such ill-treatment to be one that “involves actual bodily injury or intense physical or mental suffering...showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance”. The assessment of this minimum is “relative”, as it depends on “all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue”.

Second, the Applicant must face “a genuine and substantial risk of being subjected to such mistreatment”. The degree of risk that the Applicant must establish is “substantial...or strong grounds for believing...if deported...he faces a ‘real risk’ of being subjected to torture or CIDTP” (*para 174*). Once the Applicant adduces evidence on the “real risk”, it is for the authority to dispel any doubts about it. Citing ECHR case *Al Husin v Bosnia and Herzegovina*, the Court opined that it would take a rigorous approach in assessing the “real risk”.<sup>12</sup> The Court would “assess the risk at the time of the proceedings, taking account of information that has come to

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<sup>12</sup> [2012] ECHR 232.

light after the deportation decision was taken in order to ensure the Court is able to make a 'full and up-to-date assessment' of the current situation" (*paras 175 and 176*).

On the facts, the Court found the Applicant's ground on CIDTP must also fail because his evidence "fell far short" and did not meet the two requirements for establishing CIDTP (*para 184*). The Applicant based his CIDTP ground on the risk of double jeopardy (*para 177*). However, the Court found that the "severe mental and psychological blow" and the severe "frustration" that the Applicant might experience at the prospect of facing "another trial and imprisonment in relation to precisely the same conduct" in Nigeria was nothing close to meeting the "very high threshold" of the two requirements for establishing CIDTP (*para 182*). The Court emphasized the need for "actual bodily injury or intense physical or mental suffering...capable of breaking an individual's moral and physical resistance" to establish CIDTP. Additionally, the Court considered a letter from the Director to the Applicant dated 14 August 2008 (the "**Letter**"), which the Court regarded as "latest available evidence" (*para 184*). The Letter included research on the Nigeria Offence, which suggested that there was conflicting evidence as to whether the Applicant would be prosecuted upon his return due to the fact that there had been very few convictions to date as at 2008 (*para 183*). Accordingly, the Court rejected the Applicant's CIDTP ground.

Regarding the third ground on peremptory norm, the Court did not entertain this ground in detail because it was introduced for the first time at trial and its introduction would not make a material difference to the outcome (*para 185*).

Regarding the fourth ground on remitting the case for the Director's consideration as new facts came into light, the Court rejected this ground as there had been no evidence that the Director had failed to take account of the so-called new facts (i.e., the appalling prison conditions in Nigeria) (*para 186*).

### **Other Considerations:**

#### (1) Three practical consequences if the Article 3 Right is made non-derogable and absolute

At paras 141 to 160, the Court discussed three general practical consequences in relation to an applicant once he/she could duly establish the risk and severity of the prospective ill-treatment pursuant to Article 3.

The first consequence is that the authority cannot deport the applicant and expose him/her to CIDTP risks. This is the case regardless of his/her conduct or character which resulted in the deportation in the first place (*para 142*). The Court cited ECHR case *Chahal v United Kingdom*, which stated "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" in cases where the proposed deportee could establish a real risk of CIDTP upon deportation.<sup>13</sup> This is even the case, citing UK case *RB (Algeria) v Home Secretary*,<sup>14</sup> if the proposed deportee "posed a threat to national security" (*para 144*).

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<sup>13</sup> (1996) 23 EHRR 413.

<sup>14</sup> [2010] 2 AC 110.

The second and related consequence is that the authority cannot justify any infringement upon the absolute Article 3 Right on the ground that the deportation satisfies a proportionality analysis (*para 145*). Citing *R (Limbuella)*, the Court opined that “proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment” (*para 145*).

The third consequence is that the constitutional protection offered by the Article 3 Right, unlike most of other protections under the BORO which only apply in Hong Kong, operates transnationally. The Court noted that the rights under the International Covenant on Civil and Political Rights (the “**ICCPR**”), as incorporated into the BORO, generally only operate within the territorial limits of Hong Kong. However, “an exception [has] been made in respect of BOR art.3 because of the absolute character and non-derogable character of the prohibition of CIDTP and the severe and irreparable harm it entails” (*para 164*). The Court cited *Soering v United Kingdom* that this exception was made to reflect the object and purpose of the ICCPR, which is “the collective enforcement of human rights and fundamental freedoms” (*para 155*). As a result, the Hong Kong authority will be under a duty not to deport a person back to a country which he/she will be subjected to CIDTP even though the risk of CIDTP happens outside Hong Kong.

## (2) Relationship between non-derogable and absolute rights

A right having a non-derogable character by virtue of section 5 of the BORO does not automatically mean that it is also an absolute right (*paras 135 to 136*). Citing General Comments No. 24 of the Human Rights Committee at para 136, the Court explained that some rights are regarded as non-derogable for an array of reasons not necessarily because they are peremptory norms. As a result, some non-derogable rights may be permitted to be qualified by section 11 of the BORO if such infringement is justifiable upon a proportionality analysis (*para 135*).<sup>15</sup> The Court did not attempt to define which rights are absolute or not.

## (3) Significance limited to the Article 3 Right and the Article 11(6) Right only

The Court emphasized that the significance of this judgment is confined to only the Article 3 Right and the Article 11(6) Right, as other constitutional rights under the BORO were not argued before the Court.

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### **Legal Provisions considered:**

1. Basic Law of the Hong Kong Special Administrative Region: Articles 39, 154(2) and 160  
<https://v2.hklii.hk/en/legis/instrument/A101/longTitle>
2. Hong Kong Bill of Rights Ordinance (Cap. 383): sections 5, 8 (Articles 3 and 11(6)) and 11  
<https://v2.hklii.hk/en/legis/ord/383/full>

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<sup>15</sup> Section 5(2)(c) provides seven other non-derogable rights. These include Article 2 (right to life), Article 4(1) (no slavery), Article 4(2) (no servitude), Article 7 (imprisonment for breach of contract), Article 12 (no retrospective criminal offences or penalties), Article 13 (right to recognition as person before law), and Article 15 (freedom of thought, conscience and religion).

3. Immigration Ordinance (Cap. 115): sections 20(1)(a) and 32  
<https://v2.hklii.hk/en/legis/ord/115/full>
4. National Drug Law Enforcement Agency Act of Nigeria: section 22  
<https://nigeria.tradeportal.org/media/NDLEA%20Act.pdf>

## Key Cases cited:

1. *Al Husin v Bosnia and Herzegovina* [2012] ECHR 232 (assessment of a real risk of CIDTP must be rigorous. Once the applicant adduces evidence capable of showing there are substantial grounds for believing that he/ she would be exposed to a real risk of CIDTP, it is for the government to dispel any doubts about it)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/2012/232.html>
2. *Chahal v United Kingdom* (1996) 23 EHRR 413 (right against being subjected to CIDTP is absolute even in expulsion cases)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1996/54.html>
3. *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 (the ICCPR as applied to Hong Kong was subject to the immigration reservation as reflected in section 11 of the BORO)  
<https://v2.hklii.hk/en/cases/hkcfa/2002/30>
4. *Ireland v United Kingdom* (1978) 2 EHRR 25 (Article 3 Right is a non-derogable and absolute right)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1978/1.html>
5. *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (the court will apply a generous and purposive approach when interpreting constitutional documents)  
<https://v2.hklii.hk/en/cases/hkcfa/1999/72>
6. *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66 (right against being subjected to CIDTP is an absolute right without exception or proviso or the possibility of derogation so any infringement upon the right cannot be justified by a proportionality analysis; to sufficiently establish CIDTP risk, the circumstances have to meet the high threshold of “minimum level of severity” and “genuine and real risk”)  
[https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2005/UKHL\\_2005\\_66.html](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2005/UKHL_2005_66.html)
7. *R (Ullah) v Special Adjudicator* [2004] UKHL 26 (right against being subjected to CIDTP is absolute; most ICCPR rights have territorial limits except for the Article 3 Right)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2004/26.html>
8. *RB (Algeria) v Home Secretary* [2009] UKHL 10 (right against being subjected to CIDTP is absolute and is capable of preventing a person from being deported despite he/she may pose a threat to national security)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2009/10.html>
9. *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187 (some rights such as right not to be tortured are non-derogable under any circumstances because they form the irreducible core of human rights)  
<https://v2.hklii.hk/en/cases/hkcfa/2004/43>
10. *Soering v United Kingdom* (1989) 11 EHRR 439 (while States have general freedom to control their borders, ICCPR Contracting States are obliged not to expel a person facing CIDTP risk to a country of which he/she has a real risk of facing CIDTP)  
<https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1989/14.html>