

CACV 286/2011

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

**CIVIL APPEAL NO 286 OF 2011
(ON APPEAL FROM HCAL 126/2010)**

BETWEEN

TK

Applicant

and

MICHAEL C JENKINS, ESQ

Respondent

DIRECTOR OF IMMIGRATION

Interested Party

Before: Hon Cheung CJHC, Stock VP and Fok JA in Court

Date of Hearing: 16 October 2012

Date of Judgment: 21 November 2012

J U D G M E N T

Hon Cheung CJHC:

The facts

1. This is an appeal from the judgment Lam J (as he then was) handed down on 21 October 2011 whereby the judge dismissed the applicant's application for judicial review of the respondent's decision dated 19 July 2010. By that decision, the respondent dismissed the applicant's appeal by way of petition to the Chief Executive under article 48(13) of the Basic Law against the Director of Immigration ("the Director")'s decision refusing his torture claim.

2. For the sake of preserving the applicant's anonymity, I will, like Lam J, replace relevant names with letters.

3. The applicant is a national of Pakistan. He used to live in A in Pakistan. He is unmarried, with two brothers and a married sister. In 2009, the applicant and a friend called C wanted to buy some land in A for business. They entered into an agreement with D to purchase a piece of land at the price of 300,000 rupees. This was about half the market price but the person who introduced them to D had explained that D was short of money. The price was duly paid and completion of the purchase was to take place after one week. After a week, the applicant and C returned to D's office to complete the purchase. This time D was accompanied by three men whom the applicant had not seen before. One of these men was armed with a pistol. D told the applicant and C that there was no land for sale which led to a fierce argument between D and his associates and the applicant and C. A fight developed during which D punched C two or three times, and the applicant was himself slapped by

one of the other men. The applicant, knowing that at least one of these associates was armed, ran out of the room to escape. The applicant told C to run as well but C was stopped before he could leave. On reaching the street, the applicant heard the sound of a single gunshot.

4. The applicant went home but in the evening went to see E who is an old family friend. E told the applicant that C was dead and that he (the applicant) should leave Pakistan otherwise his life would be in danger. E arranged for the applicant to stay with E's friend in city F, until the applicant could leave Pakistan. The applicant stayed in hiding in city F for a month and a half whilst his visa application for China was being processed. He said that he visited his younger brother (who was then staying with their sister in city B) shortly before leaving Pakistan to collect some money which he used to pay for his journey to the Mainland.

5. There is no dispute that the applicant regards D as being a person who regards himself as above the law and who would not hesitate to carry out a threat to kill. He wields considerable influence in the area; one reason why he was able to act in the way he did over the land transaction. This influence derives, the applicant claims, from the fact that D's elder brother is a member of, and holds some official position in, a major political party in Pakistan. D himself is a supporter of the political party and a student religious organisation which seems to be associated with the political party.

6. E told the applicant that the police was connected to D and his gangsters and it would be dangerous for the applicant to seek help from the police. During his stay in city F, he received a phone call from

E warning him not to return to A as D and his gangsters were looking for him.

7. The applicant left Pakistan for the Mainland on 1 November 2009. He arrived at Shenzhen on 5 November 2009. He entered Hong Kong illegally and he was arrested by the police on 19 December 2009.

The Director's decision

8. On 22 December 2009, the applicant lodged a torture claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). His claim was processed under the Government's "enhanced administrative screening mechanism". It comprises a two-tier screening process – the first before an immigration officer of the Director; and the second before an adjudicator who is delegated with the authority from the Chief Executive to determine petitions relating to torture claims under article 48(13) of the Basic Law. Thus far, all the adjudicators appointed, including the respondent, are retired judges or magistrates.

9. The applicant's torture claim failed at the first tier of screening. In the Director's letter dated 7 June 2010, the applicant was told that in the Director's view, the nature of the acts he complained of did not amount to torture within the meaning of the CAT for want of official consent or involvement; the applicant's credibility relating to his account of the events was in doubt; it was not accepted that there would be any real risk that he would be subjected to torture upon return to Pakistan on the facts as claimed; and there was nothing to indicate that

the Pakistan authority would fail to accord state protection to the applicant after his return to Pakistan. The last reason given for the rejection of his torture claim was as follows:

“(E) Internal Relocation

- a) The source of your alleged problems in Pakistan is the dispute over the land in [A] concerned. Any alleged risk from [D] is localized and thus is avoidable by leaving your home village upon your return to Pakistan.
- b) Hence, even if the alleged threats against you were real, you could avoid them by relocating to other parts of Pakistan. Being an able-bodied adult of 28 years old with working experience and has close family link in Pakistan, it is not considered unduly harsh for you to internally relocate to an area other than your home village in Pakistan should there be an imminent need for you to do so upon return.”

The adjudicator’s decision

10. The applicant’s appeal by way of petition to the adjudicator (the respondent) under the second-tier of screening also failed. In his decision dated 19 July 2010, the adjudicator did not find any grounds that would prevent the applicant’s return to Pakistan. He noted that no official of Pakistan was in any way concerned in, connected with, consented to or acquiesced in the endangering of the applicant’s life in any way. He took the view that even taking into account the conditions in Pakistan (that is, that corruption is widespread in the government in general and the police in particular), there was nothing to suggest that D was above the law with the consent or acquiescence of the state.

11. The adjudicator went on to say:

“33. But if I am wrong about this, I am of the view that the Petitioner would not be at risk if he was to live away from the area of [A] where [D] has influence. As I noted earlier, I do not believe that [D] is in a position to influence events throughout

the whole of Pakistan and I am satisfied that any risk to the Petitioner would dissipate if he were to relocate himself away from [A].”

Lam J’s decision

12. The applicant challenged the adjudicator’s dismissal of his petition by way of judicial review. In his judgment dated 21 October 2011, Lam J disagreed with the adjudicator on the question of state acquiescence. The judge took the view that on the “extended meaning” of acquiescence arising from a breach of the state’s duty of due diligence, the adjudicator should at least have directed the Director to seek information from his counterpart in Pakistan as to the security in A in respect of the habitual gangster activities of D.

13. However, the judge upheld the adjudicator’s decision on the ground of “internal relocation”. The judge held that the burden of proof in relation to internal relocation rested on the applicant. He ruled that internal relocation in a country was not automatically negated as a matter of law simply because there was a consistent pattern of gross, flagrant or mass violations of human rights in that country. He found that the issue of internal relocation had been squarely raised by the Director before the adjudicator and he agreed with the adjudicator that the applicant had not discharged the burden of proof in relation to that issue. Reading paragraph 33 of the adjudicator’s decision (extracted above) in its context, the judge concluded that he saw no ground for setting aside the decision of the adjudicator on internal relocation by way of judicial review:

“95. Further, I do not consider the general evidence relied upon by the Applicant as sufficiently connected with the Applicant’s personal concern to trigger a duty on the part of

Adjudicator to direct further inquiry by the Director on the issue of internal relocation. Mr Dykes submitted that because of the endemic corruption in the police force, the Applicant would not be safe no matter which city he relocated to. Counsel also drew the court's attention to the distances between A and the two proposed cities of relocation. But this must be considered in conjunction with other factors relevant to the risk of the Applicant being located by D in the other cities: the population in the other cities, the unlikelihood of D pursuing the Applicant outside A given the nature of dispute between them, the localized influence of D.

96. Mr Dykes contended that the Adjudicator should have asked for information to verify that the influence of D was only restricted to A. I do not agree. The only evidence as to the gang activities of D was confined to events at A. Though D was associated with a student religious organization called ATI, there was no suggestion that the dispute between the Applicant and D would lead to a hunt of him by the ATI. The Applicant did not produce any concrete evidence to support his assertion that D would look for him if he stay at F or B."

The appeal

14. Aggrieved by the judge's decision, the applicant appealed. In the notice of appeal as well as the written submissions, the applicant put forward various grounds and arguments to contend that the judge was wrong on the question of internal relocation, which is the sole subject matter of this appeal. At the hearing of the appeal, Mr Philip Dykes SC (Mr Nigel Bedford with him) very helpfully focused his arguments for the applicant on one single matter, namely, whether sufficient inquiry had been made regarding D's territorial reach in Pakistan. Essentially, Mr Dykes contended that given the high standards of fairness that are required in screening torture claims, it was incumbent upon the Director to take the initiative and make inquiry with the relevant authority in Pakistan to find out more about the territorial reach of D. Failing that, the adjudicator should have directed the Director to do so at the petition stage. In the absence of such inquiry, there was simply no or insufficient

evidential basis to make any determination on the question of internal relocation in the present case.

15. Mr Paul Shieh SC (Ms Grace Chow with him), appearing for the Director as interested party to resist the appeal, contended otherwise.

The general principles

16. Before turning to these arguments in greater detail, it is useful to set out the relevant general principles relating to the screening of torture claimants under the enhanced administrative screening mechanism, particularly when this is the first case decided under the enhanced mechanism which reaches the Court of Appeal.

17. First, *what is the issue?* The ultimate issue is whether Hong Kong is entitled to “expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”: article 3(1) of the CAT. In this regard, torture is defined in article 1 to mean “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

18. The issue accordingly turns on whether “there are substantial grounds for believing that [the torture claimant] would be in danger of being subjected to torture (as defined)” if he were to be returned to the country in question.

19. Secondly, *who has the burden of proof?* The burden of proof rests on the torture claimant to prove that there are substantial grounds for believing that he would be in danger of being subjected to torture: *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, para 51.

20. But this is subject to the requirement of “high standards of fairness” that the Director and the adjudicator must respectively observe in determining a torture claim. The reasons for demanding high standards of fairness in the screening process have been explained authoritatively by the Court of Final Appeal in *Prabakar*, para 44. In short, high standards of fairness are required because to the claimant, “life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved”. Such high standards of fairness require that the torture claimant be given “every reasonable opportunity to establish his claim”: para 51.

21. Furthermore, high standards of fairness mean (non-exhaustively):

“53. ... First, the difficulties of proof faced by persons in this situation should be appreciated. The person concerned may have fled from the country concerned with few belongings and documents and his level of education may be relatively low. The situation is analogous to that of persons seeking refugee status under the Refugee Convention. And the guidance provided by UNHCR in its Handbook for the determination of refugee status provides a useful reference for dealing with claims relating to torture.

54. Secondly, it would not be appropriate for the Secretary to adopt an attitude of sitting back and putting the person concerned to strict proof of his claim. It may be appropriate for the Secretary to draw attention to matters that obviously require clarification or elaboration so that they can be addressed by the person concerned. For example, in the present case, the respondent’s letter of 5 March 1999 stated that “proof

documents” were available but could not be supplied due to the absence of photocopying facilities. The Secretary should obviously have looked into this.

55. Thirdly, an understanding of country conditions at the time of the alleged torture in the past as well as at the present time is usually relevant to the assessment of the claim. This is recognised by the policy. UNHCR may be able to supply relevant information. And published materials are available from various sources including well-respected non-governmental organizations. The Secretary should obtain any such information and materials and take them into account.”

22. How the requirement of high standards of fairness would modify or otherwise affect, in practice, the burden of proof as it is otherwise generally understood would obviously depend on the circumstances of each individual case. As was pointed out in *Prabakar* (para 53), many if not most of these torture claimants may have fled from their countries concerned with few belongings and documents and their levels of education may be relatively low. The difficulties of proof faced by them in this situation should be fully appreciated to meet the high standards of fairness required. High standard of fairness may therefore require the Director to conduct investigation and obtain relevant information and materials on general country conditions depending on the facts and issues raised in a case.

23. On the other hand, it should be noted that in *Prabakar*, the Court of Final Appeal was concerned with an unrepresented torture claimant, whereas under the enhanced screening mechanism, a torture claimant is represented and assisted by the Duty Lawyers Scheme. Within reasonable bounds, the torture claimant’s side is expected to conduct its own investigation and obtain information and materials that it requires to prove its case. Ultimately, the matter boils down to commonsense and fairness.

24. Moreover, as Mr Shieh submitted, high standards of fairness may, depending on the facts, require the Director or the adjudicator to probe further into an answer or an omission. For instance, where it is readily apparent that something had 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. But again everything depends on the facts. There may be no duty to keep probing or inquiring where the objective circumstances made 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.

25. High standards of fairness certainly do not entitle the torture claimant, having stated a claim, “to simply sit back and require the Director to disprove it”. The exercise of determining whether a claim made under article 3(1) of the CAT is valid must be one of “joint endeavour”. *CH v Director of Immigration* [2011] 3 HKLRD 101, para 47.

26. In the court below, the screening process has been described as “inquisitorial” in nature (paragraph 30 of the judgment). This is not a description used in *Prabakar*. Depending on the type of legal system involved, the context and the type of proceedings one is concerned with, the word “inquisitorial” may bear different meanings and may refer to different degrees of involvement by the decision-maker in terms of carrying out investigation and establishing the true facts. Indeed, in the present case, both sides have advanced arguments based on what they believe an inquisitorial screening process requires the decision-maker to do in terms of conducting investigation and discovering primary facts.

27. In my view, the description is at best a shorthand for the high standards of fairness required of the screening process. It is prone to create unnecessary confusion and arguments. Its use in the present context should be avoided.

28. Thirdly, *what is the standard of proof?* Here, one must differentiate between two things. The first is proving the risk of torture, that is, the likelihood or probability of the torture claimant being subjected to torture if he were to be expelled, returned or extradited to a particular country. It is in this context that one sees the literature and case law saying that the “standard of proof” required is “more than a mere possibility” but not needing to be “highly likely”. All these are used to describe the *risk* of torture occurring in the country concerned. Thus, in the latest *Guidelines* (February 2011 version) issued by the Director for handling claims under the enhanced screening process, para 36, under “Standard of Proof”, one finds this undisputed statement:

“... In Article 3 of the Convention, ‘substantial grounds’ is required to establish a claim, which is more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision’s conditions. The risk of torture must go beyond mere theory or suspicion. The risk does not have to meet the test of being ‘highly probable’, but it must be ‘personal and present’. For the purposes of Article 3 of the Convention, a foreseeable, real and personal risk of being tortured must exist in the country to which a person is returned.”

29. Whilst the decision-maker must take into account all relevant considerations including, where applicable, the existence in the country concerned of “a consistent pattern of gross, flagrant or mass violations of human rights” (article 3(2) of the CAT), that alone does not as such constitute a sufficient ground for determining that a particular person will

be in danger of being subjected to torture upon his return to that country. Additional grounds must exist to show that the person will be “personally at risk”. This is because the aim of the determination under the CAT is to establish “whether the individual concerned would be personally at risk of being subjected to torture in the country to which she would return”. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her circumstances. *AS v Sweden*, CAT/C/25/D/149/1999, UN Committee Against Torture (CAT), 15 February 2001, para 8.3.

30. However, there is a second type of proof in relation to which the standard of proof is also relevant. In deciding whether there are “substantial grounds for believing” that the torture claimant would be in danger of being subjected to torture in the state in question, the Director and the adjudicator would need to make findings of primary fact. To take the present case as an example, one needs to decide whether the applicant’s story about what happened to him and his friend, C, back in Pakistan was true or not. In relation to the primary facts comprising the applicant’s story, the Director and adjudicator had to make findings of fact. The burden lay with the applicant to convince the Director and the adjudicator that what he said was true (subject to the high standards of fairness described above).

31. So far as the standard of proof in relation to the primary facts is concerned, one applies the civil standard, that is, the balance of probabilities: *Rasaratnam v Canada (Minister of Employment and*

Immigration) [1992] 1 FC 706; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FC 589.

32. Fourthly, *the question of internal relocation (otherwise known as “internal flight”)*. This is a concept common to refugee law and torture claims. The rationale is simple: if the risk of persecution or torture is a localised one, and it is not unreasonable or unsafe for the refugee or claimant to relocate to another part of the country in question (the “internal relocation alternative”), there is no justification for affording international protection under either the Refugees Convention 1951 or the CAT.

33. There may be different reasons why the risk of torture is a localised one. For instance, where the torturer is not the state or a “state agent”, he may not be prepared, willing or able to pursue the claimant outside of the local place in question or to the internal relocation alternative(s) concerned. Or meaningful state protection against the risk of torture is available to the claimant outside of the local place in question or in the internal relocation alternative(s) where the risk of torture is non-existent or insubstantial. If the risk of torture is for one reason or another a localised one, one must move on to ask whether it is reasonable to expect the torture claimant to relocate to the alternative place or any of the alternative places under consideration or whether it would be unduly harsh to expect him to do so.

34. Lord Bingham described the analogous task of the decision-maker, in the context of a refugee claim under the Refugees Convention 1951, in the following terms in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 21:

“.... The UNHCR Guidelines of July 2003 similarly observe, at para 7I(b):

‘National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.’

There can, however, be no absolute rule and it is, in my opinion, preferable to avoid the language of presumption. The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. The source of the persecution giving rise to the claimant’s well-founded fear in his place of ordinary domicile may be agents of the state authorised or directed by the state to persecute; or they may be agents of the state whose persecution is connived at or tolerated by the state, or not restrained by the state; or the persecution may be by those who are not agents of the state, but whom the state does not or cannot control. These sources of persecution may, of course, overlap, and it may on the facts be hard to identify the source of the persecution complained of or feared. There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department* [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts.”

35. Fifthly, *who bears the burden of proof regarding internal relocation?* In my view, the question of whether there is an internal relocation alternative is part and parcel of whether or not the claimant is a Convention refugee or, in our present context, a genuine CAT claimant, in relation to which the claimant, as explained, bears the burden of proof. It is for the claimant to make out his case. In relation to the internal relocation issue, he accordingly bears the burden of proof : *Rasaratnam, supra*; *Thirunavukkarasu, supra*; *R v Secretary of State for the Home*

Department, ex parte Salim [2000] Imm AR 6; *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449; *Aziz v Secretary of State for the Home Department* [2003] EWCA Civ 118 (23 January 2003); *GH Iraq v Secretary of State for the Home Department* [2004] Imm AR 707; *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852 (5 July 2007); Macdonald & Toal, *Immigration Law and Practice in the United Kingdom* (8th ed), vol 1, para 12.47.

36. It should be noted, however, that there is literature which suggests that the burden of proof rests on the host country to establish an internal relocation alternative: UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, paras 33 to 35; University of Michigan, *The Michigan Guidelines on the Internal Protection Alternative*, 9-11 April 1999, para 14. But on a closer analysis, the burden on the host country is, put at the highest, an "evidentiary" one only: Hathaway & Foster, *Internal protection/relocation/flight alternative as an aspect of refugee status determination* in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, chap 6.1 (p 357), pp 370 and 413-414, and footnote 196.

37. In the local context, it is quite unnecessary to debate whether the suggested evidential burden exists as such. Given the high standards of fairness required of the screening process, it must be incumbent, in most if not all cases, upon the Director to clearly raise the issue of internal relocation, identify specifically or generally (as fairness and

circumstances may require) the place(s) that could provide a safe haven to the torture claimant if returned to his country, make known or supply to the torture claimant the materials that he intends to rely on in relation to this issue, offer to the torture claimant whatever assistance in terms of gathering relevant information and materials that it is fair and right for the Director (as opposed to the torture claimant and his legal representatives) to seek and obtain, and to afford the torture claimant a proper opportunity to deal with the issue so raised. Whether one calls that an evidential burden is more a matter of semantics than substance.

38. Sixthly, *what is the “standard of proof” regarding internal relocation?* Here, the issue is as much a matter of evaluation and conscientious judgment as it is a matter of fact. There is therefore no “standard of proof” as such applied. The question is simply whether, taking all relevant matters into account, the return of the claimant would be unreasonable or unduly harsh. Everything capable of having a bearing on the question is to be taken into account. The decision-maker may have to take into account the cumulative effect of a whole range of disparate considerations. In respect of some of these considerations, the decision-maker may be satisfied that they probably did occur or are occurring, while in respect of others, he may only think that there is a serious possibility that what the claimant or his witnesses are saying is correct: *Karanakaran, supra*, at p 470d-f; *Macdonald & Toal, op cit*, at p 851. An “individualised, holistic assessment” is called for: *AH (Sudan) v Secretary of State for the Home Department* [2008] AC 678, paras 20, 27-28.

39. The decision-maker must ask whether there is in the country in question an alternative place of sufficient – not absolute – safety to

which the applicant can move without undue hardship: *Secretary of State for the Home Department v IA (Pakistan)* [2008] EWCA Civ 580 (22 May 2008), para 11. Sedley LJ, giving the judgment of the English Court of Appeal, went on to explain (paragraph 13):

“When in §26 (see below) the tribunal find that ‘the evidence does not suggest ... that Rabwah is safer than anywhere else’ they are, with respect, adopting what is arguably the same relativist fallacy as the Home Secretary. The comparison is not between two places, each more or less safe or unsafe. It is between the appellant’s well-founded fear, whatever its source, and the possibility of living free from that fear somewhere else in the same country. So, for example, an individual may be found to have experienced persecution, and to have good reason to fear its recurrence, in an area otherwise known to be quite safe. If they are able to relocate to a place which, albeit not in general so safe, affords them reasonable protection from any recurrence of the particular persecution, their fear of it will no longer be well-founded. If not, then the fact that their persecution was a unique event does nothing to diminish their claim to international protection. As the tribunal themselves say at the end of §19, ‘the question for an individual is whether he is at risk, not whether everybody is at risk’.”

40. Finally, *judicial review*. A decision of the adjudicator under the enhanced screening mechanism is subject to judicial review. However, the court does not sit on appeal from the adjudicator’s decision. It only plays a supervisory role in the judicial review. The standard of review is that of “rigorous examination and anxious scrutiny”: *Prabakar*, para 45.

The parties’ arguments on internal relocation

41. In the present appeal, all arguments turned on the question of internal relocation. Mr Dykes accepted that the issue was fairly raised by the Director at least at the petition stage. In the Director’s opening written submissions before the adjudicator, the Director clearly suggested

that there were meaningful internal relocation alternatives open to the applicant. The Director submitted that the applicant's option included staying in city B, where he had arranged his younger brother to stay with his younger sister prior to his departure for the Mainland; or staying in city F where he had remained without encountering any problems for one and a half months immediately after the incident with D until he left for the Mainland; or staying "in any other part of Pakistan where the [ruling political party] is less powerful (for instance, city G)".

42. Mr Dykes accepted that his client was aware of the issue and was given an adequate opportunity to deal with it before the adjudicator. Indeed, the applicant gave evidence before the adjudicator, including evidence on the question of internal relocation.

43. As mentioned, Mr Dykes' arguments boiled down to one thing, that is, that there had been insufficient inquiry by the Director on D's territorial reach, and the adjudicator had failed to direct the Director to make the necessary inquiry.

44. Mr Dykes based his arguments primarily on paragraph 64 of the judge's judgment:

" Be that as it may, given the need to subject a decision of this nature to anxious scrutiny, it would not be right for this court to gloss over this point simply because it had not been taken before the Adjudicator. Given the evidence as to the general condition of Pakistan and the doubt cast on the due diligence of the police authority at A by the specific findings at para.30 as regards the futility of reporting the fraud and killing and the lack of adverse consequences for D in respect of his behaviour, and having regard to the inquisitorial nature of the proceedings, the Adjudicator should at least direct the Director to seek information from his counterpart in Pakistan as to the security in A in respect of the activities of D. I understand the inquiry may not be fruitful. But it should be undertaken in order

to fulfill the high standard of fairness prescribed by *Prabakar* in the processing of a CAT claim.”

45. Counsel argued that had the adjudicator directed the Director to make the necessary inquiry with the relevant authority in Pakistan, more could have been found out in relation to the territorial reach of D, without which, it was simply impossible for the adjudicator to properly determine the question of internal relocation. His decision should therefore be disturbed by the court on judicial review on that basis.

Paragraph 64 of the judgment below

46. I disagree. Paragraph 64 of the judgment was said in the context of the judge’s dealing with the question of state acquiescence in the wider sense, that is, state acquiescence based on “indifference or inaction” that amounted to “a form of encouragement and/or de facto permission”: UN Committee Against Torture (CAT), *General Comment No 2: Implementation of Article 2 by State Parties* (24 January 2008), para 18, cited by the judge in paragraph 57 of his judgment. The judge’s focus was on the lack of inquiry by the Director with the Pakistan authority on the question of “whether the local police (viz those in A) ought to have grounds to believe that D had been habitually involved in gangster activities” (paragraph 61 of the judgment) and therefore the question of “the security [of the applicant] in A in respect of the activities of D” (paragraph 64 of the judgment). In other words, the judge was focusing his mind on finding out more about the local police’s possible indifference or inaction in relation to the activities of D in A. This was a very different matter from making inquiry with the Pakistan authority on the territorial reach of D in other parts of Pakistan.

47. I therefore reject Mr Dykes' argument that once the judge concluded that the adjudicator had failed to direct the Director to make the inquiry described in paragraph 64 of his judgment, the judge should have gone on to hold that there had been a failure on the part of the adjudicator to direct the Director to find out from the Pakistan authority the territorial reach of D. In my view, the one thing does not follow from the other.

Inquiring on D's territorial reach

48. But this still leaves the free-standing question of whether there was sufficient inquiry on D's territorial reach.

49. Before one dwells further on this question of inquiry, it is essential to step back and see things in context. Putting the question of territorial reach aside for the time being, the crucial question regarding internal relocation in the present case is whether D is likely and able to pursue the applicant to the places suggested and whether meaningful state protection from the harm feared is available there, given that D is, as it were, a, or similar to a, "non-state agent".

50. Furthermore, the nature of the dispute giving rise to the risk of torture must also be borne in mind. The dispute is essentially a private one over the buying and selling of a piece of land at half the market value. D has already pocketed the price but is still keeping the land. According to the applicant, D or his associates have already murdered one of the co-purchasers. The Director's suggestion is that the applicant should keep himself away from D. The question about D's "territorial reach" must therefore be seen in its proper context.

51. Turning to the question of inquiry, it has to be remembered that the applicant bears the burden of proof on the question of internal relocation. True it is that this must be read subject to the high standards of fairness required. But, as mentioned, high standards of fairness must be considered in the context of the individual case. The applicant's torture claim is not a classic case of state torture. He is not alleging that he is a victim of state torture. Nor is he alleging that D is a state agent or is actively backed by the state in his pursuit of him. Rather, his case is one of state acquiescence in the sense that the police at A is (taken at the highest) indifferent to and takes no action against the criminal activities of D so that he does not have any local protection at A. There is no suggestion of any known criminal activities by D outside of A. Rather the suggestion is that D is a "powerful" and influential person – his brother is a political figure in the ruling political party in Pakistan – possibly a member of Parliament or someone even "bigger", and D is a supporter of a nationwide student organisation that has involvements in violent activities.

52. Unlike the torture claimant dealt with by the Court of Final Appeal in *Prabakar* or those involved in the subsequent case of *FB v Director of Immigration* [2009] 2 HKLRD 346, the applicant is and was throughout legally represented. If they had found it advisable to do so, the applicant and his legal representatives could have obtained for themselves without much difficulty a great deal of information which they now say the Director or the adjudicator should have obtained for them. For instance, it would not have been difficult for the applicant to identify the brother of D and find out what exactly his position (if any) in Pakistan is. What is his name? Is he really a member of Parliament?

What does he do and what is his reputation in general? In this day of the internet, one would have thought that a great deal of information would be freely and easily available on the computer. If the applicant and his legal representatives have not seen fit to obtain and supply such information to the adjudicator, I do not believe that high standards of fairness would require the adjudicator to direct the Director to obtain such information for the applicant. After all, there was no request by the applicant or his legal representatives to the Director, or to the adjudicator to direct the Director, to obtain such information (or any other information) for the applicant, nor was there any suggestion of any difficulties in obtaining such information (or any other information) for the purposes of the screening process. In my view, the bottom line of the high standards of fairness required of the screening process is fairness. And fairness, in the present case, did not require the adjudicator or the Director to find out any such information for the represented applicant, at least in the absence of any request for assistance and an explanation of the difficulties (if any) encountered or anticipated.

53. It is also instructive to imagine what sort of inquiry that the Director can reasonably and realistically be expected to make with the government or regional government of Pakistan. As mentioned, the applicant has not suggested that D has any activities, criminal or otherwise, in the places suggested by the Director to which the applicant may possibly relocate. The judge has already accepted the evidence as to the general conditions of Pakistan in terms of corruption in the government in general and in the police in particular. Indeed, all this was accepted by the adjudicator as representing the general conditions in Pakistan: paragraphs 17 to 20 of the adjudicator's decision. In the

absence of specifics, any inquiry by the Director with the Pakistan authority would be most general in nature, and one cannot reasonably expect the Director to obtain any answers other than very general ones.

54. As Lord Bingham pointed out in the passage of his judgment in *Januzi* already extracted above, there is a “spectrum of cases” regarding the source of the persecution (or, in the present context, torture) giving rise to a claimant’s fear. The more closely the persecution or torture is linked to the state, and the greater the control of the state over those acting or purporting to act on his behalf, the more likely (other things being equal) that a victim of persecution or torture in one place will be similarly vulnerable in another place with the state. The converse may also be true.

55. The present case certainly falls within the other end of the spectrum. State involvement is passive in the sense of indifference or inaction. The places suggested by the Director are apparently reasonable places for relocation where, on the face of it, the risk of torture is either non-existent or insubstantial. The Director has supplied the general information regarding B and F to the applicant and placed the information before the adjudicator. The materials show that they are large cities with a population of millions. With the burden on him to make out a case of torture, the applicant was expected to put forward his best materials to establish the risks at these alternative places, with the assistance of his legal representatives. If he encountered any difficulties in collecting relevant evidence, he was expected, through his legal representatives, to raise this with the Director or the adjudicator and ask the Director (directly or through the adjudicator) to make inquiry for him.

56. In the present case, none of this has happened. I do not believe that in those circumstances, high standards of fairness required the adjudicator to direct the Director to make the inquiry suggested.

The adjudicator's conclusion on internal relocation

57. On the evidence available, the adjudicator was entitled to conclude that the applicant had failed to show that it was unsafe and therefore unreasonable for him to relocate to any of the alternative places suggested by the Director. There is and was no suggestion that it would otherwise be unreasonable or unduly harsh to require him to do so. There is therefore no basis for interfering with the adjudicator's decision even after subjecting it to rigorous examination and anxious scrutiny. In paragraph 33 of the adjudicator's decision, he may have overstated his conclusion by finding positively that the applicant would not be at risk if he were to live away from the area of A where D has influence and that any risk to the applicant would dissipate if he were to relocate himself away from A. He need not have gone that far. But the bottom line is that the burden of proof lies with the applicant and it is quite plain that he has failed to discharge that burden, the high standards of fairness required of the screening process notwithstanding.

Outcome

58. In my view, the judge has reached the correct conclusion. I would dismiss the appeal with costs to the Director. I would grant a certificate for two counsel. I would also order legal aid taxation of the applicant's own costs.

Hon Stock VP:

59. I agree with the judgment of the Chief Judge.

Hon Fok JA:

60. I agree with the judgment of the Chief Judge.

Hon Cheung CJHC:

61. Accordingly, the court makes the orders disposing of the appeal as set out in paragraph 58 above.

(Andrew Cheung)
Chief Judge of the
High Court

(Frank Stock)
Vice President

(Joseph Fok)
Justice of Appeal

Mr Philip Dykes SC and Mr Nigel Bedford, instructed by Barnes & Daly
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