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PRESS RELEASE

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The Ubamaka v Secretary for Security & Anor Case

Statement of the Hong Kong Bar Association

1. On 21 December 2012 the Court of Final Appeal handed down its judgment in *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* (FACV 15/2011). The judgment is highly significant and will have immediate impact on the screening of persons seeking protection in Hong Kong from maltreatment in their own countries.

2. Since 2004, the Administration has been considering claims for protection against forcible return to face torture only under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("the CAT Convention") if a person could show a substantial risk of return to torture as defined therein. It had taken this position on the basis that it owes no other duty to persons claiming asylum in Hong Kong on the basis of risk of serious harm in their countries of origin. This stance was adopted by the HKSAR contrary to the recommendations of United Nations experts that comprehensive legislation be put in place to assess the risk of returning those facing serious human rights violations, not limited to torture.

3. The CFA has now determined that this position was fundamentally flawed. In *Ubamaka*, the Court rejected the arguments advanced by the Respondent that it was under no duty to consider the Appellant's claim that he would be exposed to cruel, inhuman or degrading treatment or punishment ("CIDTP"). Article 3 of the Hong Kong Bill of Rights prohibits torture and CIDTP. The Secretary/Director had asserted that such claims did not have to be considered before removal from Hong Kong, relying on a reservation to the Hong Kong Bill of Rights Ordinance relating to decisions affecting "entry into, stay in and departure from" the SAR, which it claimed permitted Immigration decisions to be made and executed without regard to the protections afforded by the Bill of Rights.

4. In their judgment, the CFA has taken a positive step towards recognition and enforcement of the basic rights entrenched by the Bill of Rights. The CFA found that the right not to be subjected to torture and CIDTP was absolute – a "universally minimum standard" – and that the reservation was not intended to and could never detract from the prohibition

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5. Thus far, the Administration has not commented on the judgment other than to say that it is studying it. It would appear that the Secretary for Security will have no option but to re-screen the several thousand claimants who have been denied protection on the sole basis that they failed to show the substantial risk that they would be subjected to torture if returned, this time applying the test that the CFA has by its judgment declared it always should have been applying. It is now time for the HKSAR Government to take the sensible and pragmatic step of adopting a comprehensive and procedurally fair system of assessment of claims for protection, and ending the artificial practice of screening only under one provision of the multiple international instruments which together form the umbrella of protection from return to all serious human rights violations.

6. The prospect of forcing persons to recount for a second or third time their harrowing stories, thereby subjecting them to the trauma of recounting their stories again, is disquieting, to say the least. . Even more importantly, the reputation of Hong Kong as a territory upholding universally recognized values stands to suffer further damage unless the screening standard and procedure is immediately rectified in accordance with the CFA ruling.

7. The Hong Kong Bar Association now calls on the Administration to confirm that it will act in full compliance with the judgment in *Ubamaka*, and take immediate steps to cease the repatriation of persons inadequately and incompletely screened. Although the HKSAR Government does not have obligations under the Convention Relating to the Status of Refugees 1951, it should, as a matter of practicality, and as urged upon by the legal profession over the years, combine the tests for torture, CIDTP and refugee persecution in one domestic screening exercise so as to ensure that no person who seeks protection under the Hong Kong

legal system is denied it and no person is returned to a place where there are substantial grounds that they will face serious mal-treatment, whether that is persecution, cruel, inhuman or degrading treatment or punishment, or torture. Further, in terms of public resources management, there is a good deal to be said in favour of a single domestic screening exercise as opposed to separate and scattered screenings under different instruments.

Dated: 18th February 2013.

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