



**Joint submission of the Law Society and the Bar Association
to the LegCo Security Panel
on Framework for Legal representation of
Convention Against Torture (“CAT”) Claimants and Asylum seekers**

For consideration at the meeting on 29 September 2009

Introductory remarks

1. This further submission is intended to update members of the Panel on developments since the last meeting of 6 July 2009.
2. The Joint Profession notes that we have not been invited to send a representative or representatives to attend this meeting. We understand that the Panel anticipated that the current meeting would be for the Security Bureau to announce a finalised agreement with the legal profession on the provision of legal representation for CAT claimants. As yet, no agreement has been reached and there are a number of outstanding issues to be addressed, as will appear in this paper. In so far as it is suggested by the Security Bureau that such an agreement is imminent or has been reached in principle, we respectfully disagree. As such, we consider that it is important that the Joint Profession be heard at the meeting and be ready to address the issues by responding to questions from the floor. We are willing to send representatives for the Panel meeting on 29 September to assist in the discussion if invited.

Acceptance of judgment in FB

3. As the Panel is aware, we have reached a critical juncture in the setting up of a scheme for the screening of CAT claimants.
4. Since the last meeting, the Administration has announced in open court that it will not be appealing the judgment in FB handed down 5 December 2008. Moreover, the Administration has expressed its full acceptance of the ruling, including the reasons for the decision.
5. In making these further comments, we bear in mind the promise by the Administration during the Panel meeting in February 2009 that a legislative framework would be introduced by the end of 2009.

Developments since July and remaining issues

○ Guidelines on the new scheme

6. The Guidelines for the new screening system involving first instance determination by the Director of Immigration and an appeal mechanism from negative decisions are not yet finalised.
7. Since July 2009, the Joint Profession has made further comments on the proposed scheme, and has expressed its concerns on a number of aspects, in writing and in conference with the Security Bureau. A number of specific areas of concern remain. Among them, are:
 - (1) These cases involve determinations of the highest importance and gravity, concerning as they do the most fundamental of human rights. We do not consider that the Administration truly appreciates the difficulties which will be faced by claimants, and the heavy burden on the legal practitioner who is to undertake the difficult and complex task of presenting the claimants case. In the materials prepared by the UNHCR for training of Immigration Officers who have been conducting training since the CFA decision in *Prabakar*, the following slides were presented:

Context of decision-making
<p>Why is the decision-making so challenging?</p> <ul style="list-style-type: none">• Making decisions that affect the lives of vulnerable men, women & children• Lack of certainty due to insufficient COI and unverifiable information about applicant's personal circumstances• Differences of opinion re: interpretation 1951C or CAT• Inadequate training, support and resources for staff?

Context of decision-making

What is refugee status determination?

What are CAT determinations?

- International human rights and refugee law
- Respect for procedural fairness
- Legal criteria re: assessing credibility, standard of proof & burden of proof

The most difficult decision-making duty there is!

These two slides were among the evidence reluctantly revealed by the Administration in the proceedings before Saunders J. in FB.

- (2) The time permitted for the completion of the principal document on which the decision is to be based, namely the Questionnaire is grossly inadequate. At present, the Administration considers that 14 days is sufficient for this to be done. The Joint Professional bodies have stressed the impossibility of this and have expressed the view that a more reasonable period would be 90 days from the service of the Notice on the CAT claimant. This is the minimum period it is likely to take, given
- The fundamental importance of the document and the possibility of serious prejudice (in terms of credibility) of a misplaced word or incorrect statement
 - The onus on the applicant to supply evidence
 - The work involved in gathering information, particularly in those cases where there are copious previous interview notes to be examined, and other documents to be obtained from the client and/or the Immigration Department by request under the Personal Data (Privacy) Ordinance.
 - The difficulties which may be presented by obtaining interpreters.
 - The fact that this is a new system and the interface between the new DLS office and lawyers is untried.
- (3) Prosecution. The Joint Profession remains very concerned that the Guidelines as they stand leave open the possibility that CAT claimants could be prosecuted for the offence of providing false information to the Director, in connection with the material submitted. This is contrary to FB and to the assurance that the Director and Secretary “fully accept” that judgment.
- (4) Medical examinations. The Administration proposes that the only medical examination to be conducted at public expense will be by a medical practitioner chosen by the Director. That, plainly, does not accord with the highest standards of fairness, and is in our view likely to result in more judicial challenges rather than less. Apparently, and despite urgings on our part, the Administration is stubbornly refusing to alter its position.

○ **Training**

8. The Joint Profession has been actively involved since the last meeting on designing and implementing a training programme through the Academy of Law as the DLS conceded it did not have the resources or the expertise to train the profession. Provisional dates have been fixed for the first such programme to take place from 14 to 17 December 2009. We have taken into consideration the anxiety of the Administration to implement a fresh scheme as soon as possible. However, taking account of the commitments of overseas experts, and the work involved in setting up the programme, these are very likely to be the earliest dates for such programme.
9. The Academy of Law has sought funding for the programme through the PSDAS, and a formal response approving the funding in part is now in hand. There is a considerable shortfall in the budget, due to restrictions governing the PSDAS on e.g. airfares and accommodation, but we have discussed this matter with the Administration to explore avenues to meet the shortfall.

○ **Commencement of Screening**

10. It is absolutely vital that lawyers acting for CAT claimants receive proper training before undertaking this work.
11. The Joint Profession is not aware of any lawyers who are able to handle these cases competently without proper training. At the last meeting with SB on 22 September 2009, it was suggested that the DLS start assigning lawyers *before* the training is conducted. The Joint Profession wish to make it clear that *neither the Bar Association nor the Law Society will approve the signing by DLS of any agreement enabling the assignment of lawyers who have not undergone the training conducted by the Academy of Law.*

○ **Role of the UNHCR**

12. Panel members will recall that on the last occasion there was much discussion as to the unsatisfactory system presently in place by which the assessment of claims for refugee status are conducted by the UNHCR, not the HKSARG.
13. We have recently learned that the Administration have agreed with the UNHCR to second officers from the Immigration Department to work in the UN office in Yau Ma Tei as “Experts” and conduct interviews of refugee claimants, formulate recommendations on such claims and generally assist in the process. This arrangement was brokered with the UNHCR earlier this year, and is set out in a Memorandum of Understanding between the HKSARG and the UNHCR dated 20 January 2009. This document was supplied to the Joint Profession on 21 September 2009.
14. The HKSARG’s engagement with the process of refugee status determination and its assistance provided at taxpayers expense, renders it all the more difficult to understand why the HKSARG is maintaining the position that it will not conduct such screening side-by-side with CAT assessment.

15. Members of the Panel will recall that the Administration's position that it would not conduct RSD was purely and simply "because we are not bound to do so". That issue is to be addressed by the Court of Appeal next month, in the case of *C*. Irrespective of a legal duty to conduct RSD, the Administration's position makes little sense, and the interface of materials passing between a procedurally unfair decision-making process which is immune from judicial scrutiny to the CAT determination process which is not, will result in more rather than less judicial reviews being taken from such decisions.
 16. Furthermore, the "interface" with the UNHCR and the use by the CAT decision-maker of materials gleaned through a procedurally unfair process in the CAT screening will greatly increase the difficulty in advising and representing a client who may have both lodged a claim with the UNHCR and one with the HKSARG under CAT.
- Fees
17. The Panel will note that the HKSARG has considered setting up a scheme for legal representation within the current Legal Aid system or alternatively the Duty Lawyer system. As it has transpired, the Legal Aid system was not seriously considered apparently because this would have necessitated legislative amendments to the Legal Aid Ordinance and subsidiary legislation made thereunder. The DLS has been approached to assist in setting up a separate office to take instructions from CAT claimants and to assign duty lawyers to represent such claimants.
 18. The paramount concern of the Joint Profession is that CAT claimants receive competent advice and assistance from lawyers who have the necessary expertise. The Duty Lawyers currently serving on the DLS do not have such expertise and therefore a separate panel of lawyers who have been specially trained must be established.
 19. The remuneration that lawyers receive for handling CAT claims should be sufficient to attract the calibre and experience of lawyer that is needed to competently handle CAT claims. The Administration proposes that the current fee structure for Duty Lawyers handling criminal matters in Magistracies form the basis of the fees for CAT cases. The quality of the legal representation provided to CAT claimants cannot be compromised. We firmly maintain the view that a claimant, who faces possible torture or worse if his claim is wrongly rejected, requires the services of senior members of the legal profession who have received specialist training. Such people are, naturally, in demand for other work, and are most unlikely to accept assignments for such fees.
 20. The Joint Profession has therefore informed the Security Bureau that the proposed rates are not adequate. The Joint Profession is willing to consider a compromise rate that would enable the scheme to be implemented, subject to the Training process being completed. Such rate would be somewhere between High Court party-and-party civil rates for solicitors of three or more years experience and the \$671 rate per hour currently proposed by the Administration. A comparison with overseas rates is unrealistic, given the much higher overheads borne by Hong Kong practitioners.
 21. The Joint Profession have been advised that the Security Bureau have encountered "internal difficulties" in securing commitment for higher fees. No further information as to why there is no movement on fees is forthcoming.

22. The Joint Profession *will not approve the signing of any agreement by the DLS on the basis of the current fee structure.*

Conclusion

23. The Joint Professional bodies support the introduction at the earliest feasible time, of a workable, sustainable system of screening of CAT claimants and refugees, fully compliant with the high standards laid down by *Prabakar* and in *FB*.
24. As Saunders J noted in *FB*, the decision facing the CAT claimant is “momentous” and one which “may affect his life, limb and fundamental right not to be subjected to torture”. The Joint Profession remains gravely concerned that the new system proposed fails in a number of critical respects to comply with those high standards.
25. The Joint Profession is ready to approve the signing by the DLS of an agreement with the Administration *after* appropriate changes have been made to the system, and a reasonable fee basis has been implemented.

**The Law Society of Hong Kong
The Hong Kong Bar Association
24 September 2009**

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