



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2868 1552)
10 January 2012

Mr CHOW Wing-hang,
Principal Assistant Secretary (Security)D
Security Bureau
10/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, HONG KONG

Dear Mr Chow,

Bills Committee on Immigration (Amendment) Bill 2011

I am writing to seek your clarification on paragraphs 2 to 5 of LC Paper No. CB(2)710/11-12(01) (the Paper) which was considered by the Bills Committee at the meeting held on 5 January 2012. According to the Administration, it is not necessary and is indeed difficult to set out in the Bill all the factors that will be taken into account in the determination of a torture claim. Reference is also made to the determination mechanism and the relevant legislative provisions in other jurisdictions (such as the United Kingdom) where the relevant factors are generally not set out in their legislation.

As you may note from the research paper prepared by the Research Division of the Legislative Council Secretariat on "Mechanisms for handling torture claims in selected jurisdictions" (RP05/10-11) for the Panel on Security, in the United Kingdom and Australia, the United Nations Convention Against Torture (CAT) is not incorporated into their laws, but is implemented through other means. On the other hand, in the United States, statutory provisions have been enacted under its domestic law to implement Article 3 of CAT.

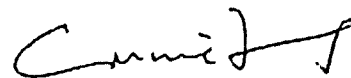
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It is noted that under the statutory procedures for raising a torture claim in the United States, there is an express provision providing that in assessing whether it is more likely than not that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered. Examples of such evidence are also specified in the provision. These include : (a) evidence of past torture inflicted upon the applicant; (b) the possibility of relocating the applicant to an area of the country of removal where he or she is not likely to be tortured; (c) where applicable, evidence of gross, flagrant, or mass violations of human rights committed within the country in question; and (d) any other relevant information about conditions in the country of removal. Since the purpose of the Bill, like the relevant statute in the United States, is to provide for a statutory procedure for determining claims made under Article 3 of CAT, will the Administration consider setting out the factors for determining a torture claim in line with the approach adopted under the United States regime?

As you know, in Hong Kong, international law does not by itself become domestic law unless legislation to that effect is enacted to incorporate the relevant international law. Now that the Administration proposes to introduce a statutory mechanism to replace the administrative scheme for processing torture claims, please consider the implications of not incorporating clause 2 of Article 3 of CAT (the relevant clause) into the Bill having regard to the above principle. For example, is it possible to argue that the relevant clause does not become part of Hong Kong law? To avoid such argument, will the Administration consider incorporating the relevant clause into the Bill?

I would appreciate it if you could let me have the Administration's reply in both languages as soon as possible, preferably, before the next meeting to be held on 16 January 2012.

Yours sincerely,



(Connie FUNG)
Senior Assistant Legal Adviser

c.c. DoJ (Attn: Ms Fanny IP, SALD and Mr Henry CHAN, GC)
Clerk to Bills Committee (Attn. : Ms Sharon TONG, PCS(2))
LA