LC Paper No. CB(2)2179/11-12(01)

香港特別行政區政府
保安局

香港添馬添美道 2 號

The Government of the
Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.:

來函檔號 Your Ref.:

Tel : 2810 2506
Fax : 2868 1552

25 May 2012

Ms Grace Wong
Administrator
Duty Lawyer Service
Room 2707-8, Gloucester Tower
The Landmark, 15 Queen's Road Central
Central, Hong Kong

Dear Ms Wong,

Immigration (Amendment) Bill 2011

Further to our tele-conversation on 22 May 2012 on the captioned, I would like to express, once again, our appreciation for the Duty Lawyer Service's interest and support on the enhanced administrative scheme for processing torture claims and the proposed statutory scheme underpinned by the Immigration (Amendment) Bill 2011.

You may wish to note that we have taken on board some helpful suggestions from the legal professional bodies, including the proposal to make it a standard arrangement for an immigration officer to interview a claimant upon receipt of his completed torture claim form. We will also move further amendment to the Bill such that a claim substantiated by the Appeal Board could only be revoked by the Appeal Board with justifications (i.e. revocation cannot be done by the Immigration Department ("ImmD") for claims substantiated by the Appeal Board). In regard to the submission of the Joint Working Group on CAT of the Legal Professional to the Bills Committee on 21 May on transitional provisions, we have consulted legal advice and explained our response to the Bills Committee at its meeting on 22 May. This is attached for your reference. (*Annex A*)

We have also considered carefully the views of the legal profession on the timeframe for claimants to return the torture claim forms. We note an earlier view that amidst an average of 48 days required for completing a form, some 20 days were actually the time taken by the ImmD in preparing the personal data of a claimant. To address the concern, the ImmD has undertaken to, upon the claimants agreement, provide the personal data of the claimant on the day the torture claim form is served to him. In this regard, the claimant and his duty lawyer, as appropriate, will have a total of clear 28 days exclusive for their preparation of the form. Furthermore, the claimant or his duty lawyer may apply for further extension of time with justifiable reason(s) under section 37Y(3) of the Bill. The ImmD will also make it clear in the guidance notes for claimants and duty lawyers that a claimant may submit to the ImmD supplementary information or documents after returning the form, in addition to the established arrangement that a claimant may provide supplementary information or documents at the interview arranged by the immigration officer. We believe that the clear 28 days, which represent the minimum time allowed for a claimant to complete and return the form is on a par with the practices by other common law jurisdictions. Indeed, we are not aware of any common law jurisdictions providing a longer timeframe to this end.

We enclose herewith relevant Bills Committee papers on the Administration's proposal on Committee Stage Amendments (*Annex B*). Thank you again for the unfailing support rendered by the Duty Lawyer Service in this endeavour.

Yours sincerely,

(W H CHOW)
for Secretary for Security

c.c. Clerk to Bills Committee (Attn.: Mrs Sharon TONG, PCS(2))

Annex A

香港特別行政區政府
保安局

香港添馬添美道 2 號

The Government of the
Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.:

來函檔號 Your Ref.:

Tel : 2810 2506
Fax : 2868 1552

22 May 2012

Mrs Sharon Tong
Principal Council Secretary 2
Council Business Division
Legislative Council Secretariat
Legislative Council Complex
Central
Hong Kong

Dear Mrs Tong,

**Immigration (Amendment) Bill 2011 –
Transitional Provisions**

I write in response to the joint submission from the Law Society of Hong Kong and the Hong Kong Bar Association, dated 21 May 2012, regarding the captioned matter ("the joint submission").

2. As explained to the Bills Committee earlier, the transitional provisions would not shield any decision of adjudicators under the enhanced administrative scheme from judicial review if there are procedural flaws. All decisions made under the administrative scheme are subject to the same requirement of meeting high standards of fairness required of torture claim decisions. We note that the two legal professional bodies did not disagree to this understanding in the joint submission (paragraphs 2 and 6 of the joint submission.)

3. Screening procedures under the enhanced administrative and the statutory schemes are essentially the same. The mere fact that the statutory scheme provides further enhanced procedural safeguards does not render the protection afforded by the current scheme inadequate or ineffective. For example, in regard to the number of adjudicators / appeal board members to

consider a petition / appeal (paragraph 4 of the joint submission), the Convention Against Torture does not require that a torture claim or a petition / appeal by an aggrieved claimant be considered by a specific number of adjudicators. The mere fact that a petition / appeal is considered by one adjudicator / appeal board member does not make its procedure "less fair" to the claimant concerned than otherwise.

4. All current adjudicators are retired judges and magistrates who fully meet the qualifications for being a member of the future statutory Appeal Board. We see no reason to support "reconstituting petitions as appeals under the statutory scheme afresh", or to assume that adjudicators may not be re-appointed under the statutory scheme, as suggested in paragraph 5 of the joint submission.

5. The legality of certain aspects of the enhanced administrative scheme has been upheld by the court in recent judicial review cases. In the latest judgment delivered by the court on 9 May 2012 dismissing an application for leave for judicial review against a decision made by an adjudicator rejecting a torture claim petition on the ground that there was no oral hearing in the petition process (*Marcelo De Vera Centeno v Director of Immigration* HCAL 50/2012)(at Annex), the court noted that "in my judgment, the system is in accordance with the law." (paragraph 15 of the judgment).

6. Other issues were raised on the appeal process in paragraphs 8 to 12 of the joint submission. On whether an oral hearing is required during an appeal, it is noted that the court in *FB v Director of Immigration* HCAL 51/2007 also makes it clear that not every petition would require an oral hearing and that it would be necessary for the adjudicator to make such decision after considering individual case circumstances. In the judgment mentioned in paragraph 5 above, the court reiterated that "... the matter [of whether to conduct an oral hearing] is in the hands of the adjudicator, and the adjudicator is to make a decision as to whether there should be an oral hearing by reference to the criteria set out in these paragraphs (practice directions)" (paragraph 14 of the judgment). The current practice observes the above requirements.

7. Furthermore, adjudicators may, depending on case circumstances, call for new evidence from either the claimant or ImmD where they consider it appropriate for fair determination of a case, and this is the practice under both the enhanced administrative and the statutory schemes.

8. Indeed, there are similar transitional provisions in overseas practices to ensure smooth transition and operation of the relevant screening mechanism after a change of law in the matter. For example, under the legislative amendment exercise in the United Kingdom in 2005 to enact new provisions and to revoke the Immigration and Asylum Appeals (Procedure) Rules 2003, it

is provided that anything done under the previous scheme shall continue to have effect and be treated as done under the new authority.

9. Our proposed transitional provisions ensure that claimants' rights will be protected under the statutory scheme after enactment and commencement of the Bill, and that all claims will continue to be processed in a fair and effective manner under the statutory scheme by reducing procedural abuse. We have carefully and thoroughly considered concerns raised by the legal professionals in the joint submission, but do not see a need to propose further amendments to the transitional provisions for reasons set out in paragraphs above.

Yours sincerely,

W H Chow

(W H CHOW)
for Secretary for Security

c.c. Joint Working Group on CAT under the Law Society of Hong Kong and the Hong Kong Bar Association (Attn: Ms Joyce Wong)

Ms Connie Fung, Senior Assistant Legal Advisor

Annex

HCAL 50/2012

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 50 OF 2012

IN THE MATTER of an application by Mr Marcelo De Vera Centeno (the Applicant) for leave to apply for judicial review (Order 53, rule 3(2))

and

IN THE MATTER of the written determination made by the Director of Immigration on 31 October 2011 refusing the Applicant's claim under the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

---

BETWEEN

MARCELO DE VERA CENTENO Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before: Hon Lam J in Court

Date of Hearing: 9 May 2012

Date of Judgment: 9 May 2012

JUDGMENT

1. In this matter, the applicant seeks leave for judicial review to challenge a decision of the adjudicator made on the petition of the applicant in respect of a decision of the Director of Immigration under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. On 30 November 2011, the adjudicator, having considered the matter on paper, dismissed the petition. In the written decision, the adjudicator set out her reasons for dismissing the petition. In essence, the adjudicator came to these conclusions. First, there is no official involvement or acquiescence to the matters which the applicant said to give rise to a risk of being subject to pain and suffering. As such, the matters relied upon by the applicant do not come within the definition of torture under the Convention. The second major finding of the adjudicator was that there was no real or foreseeable risk of personal violence on the applicant.

3. The adjudicator came to those findings on the assumption that what the applicant said to have happened was true. The adjudicator also took into account of the applicant's complaint that there were some police mishandling of the matter after his brother-in-law was killed. This is apparent from paragraph 37 and paragraph 38 of the decision.

4. In support of his application the applicant has filed with the court a document which purports to be his affidavit although it has not been signed by him. I was told today that this document was prepared by a solicitor on his behalf and it set out all he wishes to rely upon in support of his application for judicial review.

5. In the Form 86 itself, the applicant did not set out any grounds for seeking relief. Bearing in mind that the applicant acts in person, I am prepared to treat what he said in this draft affidavit as setting out his grounds.

6. In his affidavit he basically repeats his story. But in paragraphs 27 and 28 he raised a point about procedural fairness. He said that the procedure for processing his torture claim was flawed because he was not given the chance of an oral hearing. That is not quite correct insofar as one refers to the proceedings before the Immigration Department. He had been interviewed by officials from the Immigration Department. But it is correct that as far as the petition is concerned, the adjudicator did not direct any oral hearing.

7. At today's hearing before this court, again the applicant repeated his story about the events in the Philippines. He placed emphasis on the fact that the police kicked him before taking away the corpse and also that during the autopsy, the police told him not to get involved in the matter. He also told me that the killer was tried and was sentenced to gaol for 6 years. The killer has now been released, having served his sentence. The applicant said the killer has gone to his home to look for him after he was released. The applicant has also told me that he

was blamed by his wife's family for the death of the brother-in-law because he did not do anything to help him when he was attacked.

8. As I said in the course of the hearing, the purpose of judicial review is not for this court to reopen the matter and hear evidence and deal with the matter afresh. In the exercise of its supervisory jurisdiction, the court in a judicial review is to examine whether the adjudicator, in dismissing the petition, has made any error of law or handled the matter without compliance with the high standard of fairness as required by the law. The high standard of fairness has been explained by the Court of Final Appeal in the case of *Secretary for Security v Prabaker* [2004] 7 HKCFAR 187.

9. As far as the reasoning of the adjudicator is concerned, having considered the matter with regard to the submissions of the applicant, subjecting it to the high degree of scrutiny, I do not think she has made any error in coming to those two essential findings. She has given sufficient reasons for coming to those findings which are rational and sound.

10. The real question that I have to consider is the applicant's complaint of lack of oral hearing before the adjudicator. A similar complaint has been considered by Saunders J in the case *FB v Director of Immigration* [2009] 2 HKLRD 346. On the facts of that particular case, Saunders J concluded that the system was unfair. But it is important to note His Lordship said at paragraph 216 in that judgment that it does not follow from his conclusion that every petition requires an oral hearing or the petitioner being represented at the hearing:

> "It may be necessary for the Secretary in each case to have regard to the appropriate relevant considerations and to make an appropriate determination."

11. On the facts of that case, one of the important issues is credibility. That is why Saunders J said at paragraph 217:

> "To deny him an oral hearing in those circumstances was unfair."

12. After the decision of *FB v Director of Immigration* a new practice has been implemented. In the latest version of the Notes for Adjudicators for handling petitions, there is a section dealing with oral hearings. Paragraph 11.1 says:

> "The adjudicator assigned to handle a petition shall review the case based on available information and decide whether to conduct an oral hearing or whether the petition is to be handled by means of a paper review. An oral hearing may be dispensed with where the adjudicator is satisfied that the petition can be justly determined on the papers. In deciding whether an oral hearing is needed, the adjudicator will take into account the circumstances of the case, including but not limited to considerations that all relevant evidence has been presented, and the determination of the facts shall be based on clear and cogent reasons."

13. Paragraph 11.2 refers to some matters which normally suggest there should be oral hearing. The matters are as follows:

(a) there are credibility issues crucial to the decision of the petition which were not adequately addressed during the interviews or supported in the assessment by the Director;

(b) new evidence is raised in the petition stage that is relevant to the decision, including any change in condition in the claimant's country of origin, and clarification via

correspondence is inexpedient or insufficient, and that holding of an oral hearing is therefore required;

(c) an apparent breach of procedural requirement has occurred which could have limited the ability of the claimant to establish his claim, for example, inadequate interpretation, denial of the opportunity to present relevant evidence.

14. Therefore, as a matter of procedural design for dealing with petitions, there are provisions for oral hearing. But the matter is in the hands of the adjudicator, and the adjudicator is to make a decision as to whether there should be an oral hearing by reference to the criteria set out in these paragraphs.

15. In my judgment, the system is in accordance with the law. One has to remember that the decision of the Director as well as that of the adjudicator are administrative decisions. In the context of administrative decisions, under the common law there is no absolute right to oral hearing. The leading case is *Lloyd v McMahon* [1987] AC 625. At page 702, Lord Bridge said as follows:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the right of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguard as will ensure the attainment of fairness."

16. In the case of *R v Army Board of the Defence Council ex parte Anderson* [1992] QB 169 at 187, Lord Justice Taylor also discussed the relevant principles. He said as follows:

> "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to the task, it is for them to decide how they will proceed, and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing."

17. I myself have applied these principles in the case of *Liu Pik Han v Hong Kong Federation of Insurers Appeal Tribunal* HCAL50/2005 11 July 2005. At paragraph 1(iii) in that judgment, I said:

> "From the authorities it is clear that there is no absolute rule that a tribunal must give a party an oral hearing in order to satisfy the requirement of Article 10. Where the submissions of the parties do not raise any issue of fact or of law which were of such a nature as to require an oral hearing for their disposition, oral hearing could be dispensed with. However, as observed by Permanent Judge Ribeiro, when there are disputes of facts, especially when the resolution of such disputes may hinge on one's impression as to the credibility of a witness or a party, a fair hearing within the meaning of Article 10 involves an oral hearing being held."

18. Recently I have applied these principles in the case of *Au Hing Sik Charles v Commissioner of Police* HCAL74/2010, a decision on 20 December 2011.

19. These principles apply equally in the context of petition against decisions on the Convention against Torture. In my judgment, they are consistent with the high standard of fairness required under *Prabakar*.

20. Applying these principles to the present case, we have to examine what were in issue in the petition. Miss Choi has produced to this court a copy of the petition of the applicant and it was this petition that the adjudicator had to deal with. The adjudicator had to ask herself in the light of the issue raised in this petition whether, applying the criteria set out in the Notes, there should be an oral hearing.

21. The petition basically reiterated some matters of fact which had already been set out in the decision of the Director of Immigration. Again, the applicant laid emphasis on his being kicked at the chest by police officers. He suggested there was police involvement in the matter and he made the point that he feared that somebody might kill him if he were sent back to the Philippines.

22. As I have said, the adjudicator proceeded to deal with the matter on the assumption that the version of the applicant was truthful. As such, there is no issue of fact, nor is there any conflict of evidence. The crucial issues are whether, on the facts as presented by the applicant, the requirement under the Convention with regard to torture has been satisfied. It is a matter of judgment in evaluating the risk based on the applicant's story.

23. Applying the principle of law set out in the Convention and the cases, the petition did not raise any complicated issues which require elaboration in an oral hearing. Nor was there any introduction of new evidence. Neither was there any suggestion that there was any procedural unfairness which prevented the applicant from presenting his story and his case adequately before the Director of Immigration.

24. In these circumstances, I do not think it is reasonably arguable that the adjudicator's decision not to hold any oral hearing is wrong in law. Therefore, I cannot be satisfied that this is a proper case where the matters raised by the applicant are reasonably arguable or that his intended judicial review enjoyed a realistic prospect of success.

25. I therefore refuse leave.

(M H Lam)
Judge of the Court of First Instance
High Court

Applicant in person

Miss Bethany Choi, SGC of the Department of Justice, for the Respondent

Annex B

Legislative Council Bills Committee on
Immigration (Amendment) Bill 2011
The Administration's proposal on Committee Stage Amendments

Purpose

This paper sets out the Administration's response to Members' suggestions on the Bill.

Timeframe for returning torture claim form

2. At present, the Immigration Department ("ImmD") requires claimants to return the torture claim form within 28 days after they received the form. Where necessary, they may apply to the ImmD for an extension of time for returning the form. Generally speaking, extension applications with reasonable grounds will be approved. In the first three months of this year, it takes on average 40 days for claimants to return the torture claim form.

3. By experience, duty lawyers providing assistance to claimants will usually request the ImmD to provide all personal data of the claimants held by the ImmD pursuant to procedures under the Personal Data (Privacy) Ordinance. Drawing reference to the same period, i.e. the first three months of this year, the ImmD provided the relevant data within 14 days.

4. As regards reasons given to support applications for an extension of time to return the claim form, some claimants indicated that their requests for personal data from the ImmD took time, whilst some indicated that they were waiting from their home country such documents as letters from relatives, records of case reports and newspaper reports, etc.[1]. Others did not give any particular reason for the application.

5. Some Members suggested that the 28-day timeframe for returning the torture claim form in the Bill should be extended.

6. Having considered the situation described in paragraphs 3 and 4 above, i.e. the average time taken for claimants to return the torture claim form is 40 days, of which 14 days were spent on obtaining their personal

[1] Half of these claimants did not submit the claimed documents in the end.

data, the ImmD decides to enhance its internal procedures for handling personal data requests. Specifically, the ImmD will, with claimants' consent, provide them with their personal data on the same day when the torture claim form is served. Such administrative measure will greatly reduce the amount of time claimants would spend on waiting for their personal data; thus enabling them to make flexible and full use of the 28-day timeframe to complete the torture claim form. Moreover, the ImmD will revise the guidance notes for completion of torture claim form to state that claimants may submit supplementary documents after returning the torture claim form.

7. At the same time, claimants may still exercise their right to apply to the ImmD with reasonable grounds for extension of time for returning the torture claim form.

8. The content of the torture claim form covers mainly claimants' personal information and account of their personal experience which they should know well. Drawing reference to overseas experience, no other signatory State of the Convention Against Torture (CAT) allows claimants more than 28 days to complete or return torture claim forms. With the introduction of those enhancement administrative measures mentioned above, we consider that the 28-day timeframe should be maintained.

Arrangement for interview

9. Some Members suggested that the Bill should make it a mandatory requirement that the ImmD must arrange for an interview after a claimant has returned the torture claim form. We agree to the suggestion and will amend section 37ZB of the Bill to spell out that an Immigration officer must request (in place of "may request") the claimant to attend an interview after he has returned the torture claim form.

Legal representative attending interview

10. Some Members suggested that the Bill should provide for the right of the legal representative of a claimant to attend screening interviews.

11. At present, it is not provided in the legislation relating to immigration control that a person having an interview with officers of the ImmD may be accompanied by a legal representative. That said, the court's judgment in the judicial review case *FB v Director of Immigration* (HCAL 51/2007) is clear that the Director of Immigration must allow a

claimant's legal representative to attend the screening interview in order to ensure fairness. By virtue of this judgment, claimants' rights have been sufficiently protected under the law. In fact, the ImmD has already fully implemented the court judgment by allowing claimants to be accompanied by their legal representative at screening interviews with their consent. We consider that there is no need to amend the Bill in this regard.

Considerations in substantiating claims

12. Some Members suggested that, drawing reference to Article 3(2) of CAT, the Bill should spell out that the ImmD should take into account all relevant considerations at screening, including the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. We agree to this suggestion and will amend section 37ZI.

Reopening of claims after withdrawal

13. Some Members suggested that if the ImmD decides to refuse a claimant's request to re-open a withdrawn claim, the claimant should be allowed a review of the decision by the Appeal Board, which will make the final decision.

14. For claims withdrawn in the course of the process, screening has not yet been completed. Given that, we agree to the above suggestion and will amend sections 37ZE, 37ZG and other provisions relating to the functions and procedures of the Appeal Board.

15. As regards cases whereby the screening process has been completed, we consider that if the claimant's request to make a subsequent claim is rejected by the ImmD, it is not necessary for the Appeal Board to review the decision. This serves to prevent procedural abuse in case some claimants make repeated requests for subsequent claims or review.

Revocation decision

16. Some Members suggested that for claims accepted by the Appeal Board to be substantiated, if there exists any substantial change in the circumstances in future which warrants consideration of revoking the original decision, such revocation should be considered by the Appeal Board, instead of empowering the ImmD to decide on all cases which may need to be revoked. We agree to this suggestion and will amend section

37ZL and other provisions relating to the functions and procedures of the Appeal Board.

Other issues

17. Some Members were concerned whether it is fair that appeals are handled by only one member of the Appeal Board. As the court pointed out in the *FB* judgment, persons handling claims and appeals must possess knowledge on torture claims. When appointing members of the Appeal Board, the Chief Executive will ensure that every member possesses the relevant qualification and the ability to handle appeals[2]. Moreover, the Bill also provides that the Chairperson of the Appeal Board may consider the circumstances of a case and select three members to handle special cases. We consider that an appropriate balance between effective handling of cases and ensuring fairness has been struck in the Bill.

18. Some Members were concerned whether claimants suffering from trauma will be treated in an appropriate and fair manner at the appeal stage. All persons handling claims and appeals will receive training which includes the handling of claimants suffering from trauma. They will process relevant cases appropriately and fairly in accordance with the guidelines. Where necessary, the Administration will make arrangements to assess claimants' mental state and to provide suitable assistance to them by professionals in psychiatry or other related fields. If it is the view of a professional medical practitioner that a claimant is not suitable for attending the appeal hearing, the Appeal Board may obtain relevant information by other means (e.g. written records) or it may postpone handling of the appeal for the time being.

19. Some Members were concerned whether it is appropriate for the Director of Immigration to grant claimants with substantiated claims permission to work only in "exceptional" circumstances. The court pointed out in the judgment of *MA & Ors v Director of Immigration* (HCAL 10/2010) that under "exceptional" circumstances, the Director should give discretionary approval for work applications of persons of substantiated claims.

Security Bureau
April 2012

[2] At present, all adjudicators handling petitions are former judges or magistrates.

LC Paper No. CB(2)1986/11-12(01)

香港特別行政區政府
保安局

香港添馬添美道2號

The Government of the
Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.:

來函檔號 Your Ref.:

Phone : 2810 2099
Fax : 2868 1552

10 May 2012

Mrs Sharon Tong
Principal Council Secretary 2
Council Business Division
Legislative Council Secretariat
Legislative Council Complex
Central, Hong Kong

Dear Mrs Tong,

Immigration (Amendment) Bill 2011

Committee Stage Amendments

I write to enclose for Members' scrutiny the Committee Stage Amendments (CSAs) which the Government will propose (at Annex I), and consolidated version of the Bill after amendment (at Annex II).

2. As explained in the document which we provided to the Bills Committee on 27 April (Reference: CB(2)1859/11-12(02)), the majority of the amendments in the CSAs are proposed in response to Members' suggestions.

3. Other amendments in the CSAs include technical amendment of the Chinese text in response to discussions at previous meetings of the Bills Committee and views of Senior Assistant Legal Adviser, as well as other technical amendments, including amendments to the procedures of the Appeal Board to ensure procedural fairness (to amend section 9 of Schedule 1A to set out that the Director of Immigration must provide to the person who has lodged the appeal a copy of the materials which the Director provides to the Appeal Board; and to amend section 18 of Schedule 1A to set out that if the Appeal Board is satisfied that exceptional circumstances exist, it may consider evidence that was not previously before an immigration officer.)

4. Besides, the Committee has discussed certain drafting matters. After careful consideration, we consider that no amendments are needed. These include –

(a) The use of "State" in the definition of "torture risk State" is consistent with the use of the term in the Convention Against Torture.

(b) Section 37V clearly defines when a torture claim is "finally determined". Reference to the definition in section 37U makes it convenient for readers to locate the provision giving such definition (i.e. section 37V); hence it should not be deleted. This is consistent with the current drafting convention.

(c) Concerning reference to "revocation decision" in section 37V, we will propose amendment to the section to distinguish revocation decisions made by an immigration officer and those by the Appeal Board.

(d) The use of the term "serve" (「送達」 in the Chinese text) is appropriate and consistent with other laws in Hong Kong, e.g. section 14(9) of the Hong Kong Civil Aviation (Investigation of Accidents) Regulations (Cap. 448B) – After the Board of Review has made a report to the Chief Executive, " ... (t)he board shall also serve a copy of the report on all persons who appeared ... before the board".

(e) The use of the term「是非曲直」in the Chinese text of section 18(1) of Schedule 1A is consistent with the use of the term in other laws in Hong Kong to express the same meaning.

Yours sincerely,

(Billy Woo)
for Secretary for Security

Annex I

COMMITTEE STAGE AMENDMENTS

Amendments to be moved by the Secretary for Security

Clause	Amendment Proposed
4(3)	In the proposed section 17I(2)(c), in the Chinese text, by deleting "時限屆滿"and substituting "失效".
7	In the proposed section 37U(1), by deleting the definition of ***revocation decision*** and substituting— "***revocation decision*** (撤銷決定) means— (a) a decision made by an immigration officer under section 37ZL(1); or (b) a decision made by the Appeal Board under section 37ZLA(1);".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (a), by adding "and in respect of which no revocation decision has been made by an immigration officer" before "; or".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (b)(i), by adding "and no revocation decision has been made by the Appeal Board" before "; or".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (b)(ii), by adding "by an immigration officer" after "was made".
7	In the proposed section 37V(1), by deleting "(3) and (4)" and

substituting "(3), (4) and (5)".

7 In the proposed section 37V(3), by adding "by an immigration officer" after "is made".

7 In the proposed section 37V, by adding—

"(5) If a revocation decision is made by the Appeal Board in respect of a substantiated claim, the claim must be treated as finally determined on the making of that decision.".

7 In the proposed section 37ZB(1), by deleting "may".

7 In the proposed section 37ZB(1)(a), by adding "may" before "require".

7 In the proposed section 37ZB(1)(a), by deleting "; or" and substituting "; and".

7 In the proposed section 37ZB(1)(b), by adding "must" before "require".

7 By deleting the proposed section 37ZE(4)(a) and (b) and substituting—

"(a) the decision;

(b) the reasons for the decision; and

(c) the person's right under section 37ZP to appeal against the decision.".

7 By deleting the proposed section 37ZG(5)(a) and (b) and substituting—

"(a) the decision;

(b) the reasons for the decision; and

(c) the person's right under section 37ZP to appeal against the decision.".

7 In the proposed section 37ZG(7), in the Chinese text, by adding "有關" after "適用於".

7 In the proposed section 37ZG(8), in the Chinese text, by adding "有關" after "如就".

7 By deleting the proposed section 37ZI(5) and substituting—

"(5) In determining whether there are substantial grounds for the belief referred to in subsection (3), all relevant considerations are to be taken into account, including, where applicable, the following matters in relation to the conditions in the torture risk State—

(a) whether there is a consistent pattern of gross, flagrant or mass violations of human rights in the torture risk State; and

(b) whether there is any region within the torture risk State in which the claimant would not be in danger of being subjected to torture.".

7 In the proposed section 37ZL, in the heading, by deleting "**decision to accept torture claim etc.**" and substituting "**immigration officer's decision to accept torture claim**".

7 By deleting the proposed section 37ZL(1) and substituting—

"(1) An immigration officer may, on a ground for a revocation decision specified in section 37ZLB, revoke a decision made by an immigration officer under section 37ZI(1)(a) accepting a torture claim as substantiated.".

7 By deleting the proposed section 37ZL(2).

7 In the proposed section 37ZL(4)(a) and (b), by deleting "(1)(a) or (b)" and substituting "(1)".

7 By deleting the proposed section 37ZL(5).

7 By adding—

"**37ZLA. Revocation of Appeal Board's decision to reverse decision rejecting torture claim**

(1) On an application made by an immigration officer, the Appeal Board may, on a ground for a revocation decision specified in section 37ZLB, revoke its decision that reversed a decision made by an immigration officer under section 37ZI(1)(b) rejecting a torture claim.

(2) Before making an application under subsection (1), an immigration officer must give the claimant written notice of the intended application, and the notice must—

(a) state the reasons for the intended application; and

(b) state that the claimant may, within 14 days after the notice is given, inform the immigration officer by written notice of the claimant's objection to the intended application and the reasons for the objection (***objection notice***).

(3) If—

(a) the claimant has not given an objection notice in accordance with subsection (2)(b) and an immigration officer decides to make an application under subsection (1); or

(b) after having considered the claimant's objection notice, an immigration officer decides to make an application under

subsection (1),

the immigration officer must make the application by filing with the Appeal Board a notice of application in a form specified by the Chairperson of the Appeal Board.

(4) As soon as practicable after filing a notice of application, the immigration officer must serve on the claimant a copy of the notice of application.

37ZLB. Grounds for revocation decision

A ground specified in any of the following paragraphs is a ground for a revocation decision mentioned in section 37ZL(1) or 37ZLA(1)—

(a) any information or documentary evidence submitted in support of the claim is false or misleading and the false or misleading information or evidence is material to the substantiation of the claim;

(b) information was not disclosed to an immigration officer or (on an appeal) the Appeal Board and the undisclosed information would undermine, to a material extent, the merits of the claim;

(c) the torture risk giving rise to the claim has ceased to exist due to changes in circumstances of the claimant or the torture risk State.".

7 By deleting the proposed section 37ZO(2) and substituting—

"(2) The function of the Appeal Board is to hear and determine—

(a) an appeal made under section 37ZP; and

(b) an application for a revocation decision under section 37ZLA.".

7 By adding before the proposed section 37ZP(a)—

"(aa) section 37ZE(4) or 37ZG(5) (decision not to re-open a torture claim);".

7 In the proposed section 37ZP(b), by adding "made by an immigration officer" after "decision".

7 In the proposed section 37ZT(2), in the Chinese text, by deleting "經" and substituting "在以下時間".

7 In the proposed section 37ZW, in the Chinese text, by deleting "爲施行本條例，任何人不得只憑藉其酷刑聲請，而視爲在該人留在香港的任何期間屬通常居於香港" and substituting "就本條例而言，任何人在只憑藉其酷刑聲請而留在香港的任何期間內，不得被視爲通常居於香港".

7 By adding—

"**37ZX. Transitional and Savings Provisions**

Schedule 4 provides for the transitional and savings arrangements that apply on, or relate to, the commencement of the Immigration (Amendment) Ordinance 2012 (of 2012).".

12 In the proposed Schedule 1A, by deleting "[ss. 37U, 37ZL" and substituting "[ss. 37U".

12 In the proposed Schedule 1A, in section 1(1), by adding—

"***appeal*** ( ) means—

(a) an appeal made under section 37ZP; or

(b) an application for a revocation decision under section 37ZLA;".

12 In the proposed Schedule 1A, in section 2(5), by deleting "under section 37ZP".

12 In the proposed Schedule 1A, in the Chinese text, in section 2(5), by deleting "訴。" and substituting "訴，".

12 In the proposed Schedule 1A, in section 8(1), by adding "filed under section 37ZQ(1)" after "notice of appeal".

12 In the proposed Schedule 1A, in the Chinese text, in section 8(1), by deleting "在第(2)款的規限下" and substituting "除第(2)款另有規定外".

12 In the proposed Schedule 1A, in section 8(2), by adding "under section 37ZQ(1)" after "notice of appeal".

12 In the proposed Schedule 1A, by renumbering section 9 as section 9(1).

12 In the proposed Schedule 1A, in section 9(1), by adding "and the person who has lodged the appeal" after "provide to the Appeal Board".

12 In the proposed Schedule 1A, in section 9(1)(a)(ii), by deleting "or".

12 In the proposed Schedule 1A, in section 9(1)(b), by adding "of an immigration officer under section 37ZL(1)" after "revocation decision".

12 In the proposed Schedule 1A, in the Chinese text, in section

9(1)(b)(ii), by adding "該" after "考慮".

12 In the proposed Schedule 1A, in the Chinese text, in section 9(1)(b)(iii), by adding "該" after "接納".

12 In the proposed Schedule 1A, in the Chinese text, in section 9(1)(b)(iv), by adding "該" after "撤銷".

12 In the proposed Schedule 1A, in section 9(1)(b)(v), by deleting the full stop and substituting a semicolon.

12 In the proposed Schedule 1A, in section 9(1), by adding—

"(c) if the decision being appealed against is a decision under section 37ZE(4) not to re-open a torture claim withdrawn by the person who made the claim—

(i) a copy of any completed torture claim form relating to the torture claim;

(ii) a copy of the written record of any interview of the person conducted by an immigration officer in considering the torture claim;

(iii) a copy of the person's notice withdrawing the claim; and

(iv) a copy of any evidence in writing provided by the person under section 37ZE(2); or

(d) if the decision being appealed against is a decision under section 37ZG(5) not to re-open a torture claim treated as withdrawn on a person's failure to return a completed torture claim form—

(i) a copy of the written notice under section 37ZG(2) informing the person that the claim is treated as withdrawn; and

(ii) a copy of any evidence in writing provided by the person under section 37ZG(3).".

12 In the proposed Schedule 1A, in section 9, by adding—

"(2) The Director must, as soon as practicable after filing with the Appeal Board a notice of application for a revocation decision under section 37ZLA(3), provide to the Appeal Board and the claimant—

(a) a copy of the completed torture claim form relating to the torture claim in respect of which the application is made;

(b) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim;

(c) a copy of the written notice under section 37ZJ(1) informing the claimant of an immigration officer's decision rejecting the torture claim;

(d) a copy of the written decision given under section 21(2) of this Schedule reversing an immigration officer's decision rejecting the torture claim;

(e) a copy of the written notice under section 37ZLA(2) informing the claimant of an intended application for a revocation decision to be made by the Board under section 37ZLA(1); and

(f) a copy of the claimant's objection notice (if any) referred to in section 37ZLA(2)(b).".

12 In the proposed Schedule 1A, in the Chinese text, in section 14(1), by deleting everything after "送達" and before "的副本" and substituting "載有處長將會在聆訊中倚據的所有文件的文件冊(包括將會作出的陳述)，且須將該文件冊".

12 In the proposed Schedule 1A, in section 18, in the heading, by adding "**in an appeal under section 37ZP**" after "**Board**".

12 In the proposed Schedule 1A, in section 18(1), by adding "under

section 37ZP" after "an appeal".

12 In the proposed Schedule 1A, in section 18(2)(a), by deleting "or".

12 In the proposed Schedule 1A, in the Chinese text, in section18(2)(b), by deleting "按理並不可" and substituting "並非可在合理情況下".

12 In the proposed Schedule 1A, in section18(2)(b), by deleting "made." and substituting "made; or".

12 In the proposed Schedule 1A, in section 18(2), by adding —

"(c) the Board is satisfied that exceptional circumstances exist that justify the consideration of the evidence.".

12 In the proposed Schedule 1A, by deleting section18(3).

12 In the proposed Schedule 1A, by adding —

"**19A. Evidence considered by Appeal Board in an application for revocation decision**

In an application for a revocation decision under section 37ZLA, the Appeal Board—

(a) has the power to review the merits of the case; and

(b) may consider any evidence that the Board considers relevant.

19B. Evidence on oath etc.

For the purposes of sections 18 and 19A of this Schedule, the Appeal Board may—

(a) administer oaths and affirmations;

(b) receive and consider any material by way of oral evidence (on oath or otherwise) or written statements or documents (by affidavit or otherwise).".

12 In the proposed Schedule 1A, in section 21, by adding—

"(1A) On an application for a revocation decision under section 37ZLA, the Appeal Board may allow or refuse the application.".

13 In the proposed Schedule 4, by deleting "**Schedule 4**" and substituting—

"**Schedule 4** [s. 37ZX]".

13 In the proposed Schedule 4, in the Chinese text, by deleting section 2(4)(a) and substituting—

"(a) 須視爲符合以下說明的酷刑聲請：該酷刑聲請遭根據第37ZI(1)(b)條作出的決定駁回，而該決定獲上訴委員會確認；及".

13 In the proposed Schedule 4, in the Chinese text, in section 7, by deleting "就視爲根據本附表提出及繼續的酷刑聲請" and substituting "就根據本附表視爲酷刑聲請並得以繼續".

13 In the proposed Schedule 4, in Table of Transitional Provisions, in item 10, by deleting "37ZL" and substituting "37ZLA".

14 In the proposed Form No. 8, by deleting "36(1A)" (wherever appearing) and substituting "36(1)".

Annex II

37U. Interpretation of Part VIIC

revocation decision (撤銷決定) means—

(a) a decision made by an immigration officer under section 37ZL(1); or

(b) a decision made by the Appeal Board under section 37ZLA(1).

substantiated claim (已確立聲請) means a torture claim—

(a) that is accepted as substantiated under section 37ZI(1)(a) and in respect of which no revocation decision has been made by an immigration officer; or

(b) in respect of which—

(i) a decision rejecting the claim under section 37ZI(1)(b) was made but reversed on appeal to the Appeal Board and no revocation decision has been made by the Appeal Board; or

(ii) a revocation decision was made by an immigration officer but reversed on appeal to the Appeal Board;

37V. When torture claim is finally determined

(1) Subject to subsections (2), (3), ~~and~~ (4) and (5), a torture claim is finally determined once a decision on the claim is made by an immigration officer under section 37ZI.

(2) For a torture claim rejected by a decision under section 37ZI(1)(b), the claim is finally determined—

(a) when the period within which an appeal may be lodged against the decision has expired (if an appeal against the decision has not been lodged within that period); or

(b) when the appeal has been disposed of (if an appeal has been lodged against the decision).

(3) If a revocation decision is made by an immigration officer in respect of a substantiated claim, the claim must, on and from the making of that decision, be treated as not yet finally determined.

(4) For a torture claim covered by subsection (3), the claim is finally determined—

(a) when the period within which an appeal may be lodged against the revocation decision has expired (if an appeal against the revocation decision has not been lodged within that period); or

(b) when the appeal has been disposed of (if an appeal has been lodged against the revocation decision).

(5) If a revocation decision is made by the Appeal Board in respect of a substantiated claim, the claim must be treated as finally determined on the making of that decision.

37ZB. Power to require information etc.

(1) After a completed torture claim form is returned by a claimant, an immigration officer ~~may~~—

(a) may require the claimant to provide the immigration officer with any information or documentary evidence related to the claimant's torture claim that the immigration officer specifies; ~~or~~and

(b) must require the claimant to attend an interview to provide information and answer questions relating to the claimant's torture claim.

(2) Information or documentary evidence required to be provided to an immigration officer under subsection (1)(a) must be provided within the time specified by the immigration officer.

37ZE. Withdrawal of torture claim by claimant

(1) A claimant may, before a torture claim is decided under section 37ZI, withdraw the claim by notifying an immigration officer in writing.

(2) Subject to section 37ZF(3), a torture claim that has been withdrawn under subsection (1) may be re-opened if the person who made the claim provides sufficient evidence in writing to satisfy an immigration officer that—

(a) since the withdrawal, there has been a change of circumstances that—

(i) could not reasonably have been foreseen by the person when the person gave the notification under subsection (1); and

(ii) when taken together with the material previously submitted for the claim, could increase the prospect of success of the claim; or

(b) by reason of special circumstances, it would be unjust not to re-open the claim.

(3) If an immigration officer decides to re-open a person's torture claim under subsection (2), the immigration officer must, by written notice, inform the person of the decision.

(4) If an immigration officer decides not to re-open the person's torture claim, the immigration officer must, by written notice, inform the person of—

(a) the decision; ~~and~~

(b) the reasons for the decision~~.~~; and

(c) the person's right under section 37ZP to appeal against the decision.

(5) If a torture claim is re-opened under subsection (2), subject to subsections (6) and (7), processing of the claim is to continue in accordance with this Part as if the claim had not been withdrawn.

(6) If the period for returning a completed torture claim form in respect of a torture claim under section 37Y(2) has not expired at the time the claim is withdrawn under subsection (1), section

37Y(2) applies to the claim as if for paragraph (a) of that section there were substituted—

"(a) within the period of 28 days after the notice under section 37ZE(3) is given to the claimant; or".

(7) If a completed torture claim form in respect of the torture claim is not returned in accordance with section 37Y(2) as read with subsection (6), the claim is to be treated as withdrawn under section 37ZG(1)—

(a) on the expiry of the 28-day period; or

(b) if a further period is allowed under section 37Y(3), on the expiry of the further period.

37ZG. Deemed withdrawal of torture claim on failure to return completed torture claim form

(1) A torture claim must be treated as withdrawn if the person who made the claim fails to return a completed torture claim form as required under section 37Y(2).

(2) An immigration officer must give the person who made the claim a written notice stating that—

(a) the torture claim is treated as withdrawn under subsection (1); and

(b) the person may apply to re-open the claim under subsection (3).

(3) A torture claim treated as withdrawn under subsection (1) may be re-opened if the person who made the claim provides sufficient evidence in writing to satisfy an immigration officer that due to circumstances beyond the person's control, the person had not been able to return a completed torture claim form as required under section 37Y(2).

(4) If an immigration officer decides to re-open a person's torture claim under subsection (3), the immigration officer must, by written notice, inform the person—

(a) of the decision; and

(b) that the person is required to return a completed torture claim form in respect of the claim to an immigration officer at an address specified in the form within 14 days after the notice is given.

(5) If an immigration officer decides not to re-open the person's torture claim, the immigration officer must, by written notice, inform the person of—

(a) the decision; ~~and~~

(b) the reasons for the decision~~.~~; and

(c) the person's right under section 37ZP to appeal against the decision.

(6) If a torture claim is re-opened under subsection (3), subject to subsections (7) and (8), processing of the claim is to continue in accordance with this Part as if the claim had not been withdrawn.

(7) Section 37Y(2) applies to the torture claim as if for paragraph (a) of that section there were substituted—

"(a) within the period of 14 days after the notice under section 37ZG(4) is given to the claimant; or".

(8) If a completed torture claim form in respect of the torture claim is not returned in accordance with section 37Y(2) as read with subsection (7), the claim is to be treated as withdrawn under subsection (1)—

(a) on the expiry of the 14-day period; or

(b) if a further period is allowed under section 37Y(3), on the expiry of the further period.

37ZI. Decision on torture claim

(1) Unless a torture claim is withdrawn, an immigration officer is to decide whether to—

(a) accept the claim as substantiated; or

(b) reject the claim.

(2) A decision may be made under subsection (1) even if the claimant fails to attend an interview scheduled by an immigration officer under section 37ZB(1)(b) or otherwise fails to proceed with the claim in accordance with this Part.

(3) A torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant were removed or surrendered to a torture risk State.

(4) A torture claim must be rejected in the absence of the substantial grounds for belief referred to in subsection (3).

~~(5) Without limiting subsection (4), if a claimant would be in danger of being subjected to torture in a particular region in the torture risk State but would not be in danger of being subjected to torture in another region in that State, then, in so far as removal of the claimant to that other region is concerned, it must be taken that the claimant would not be in danger of being subjected to torture in that State and the torture claim must be rejected accordingly.~~

(5) In determining whether there are substantial grounds for the belief referred to in subsection (3), all relevant considerations are to be taken into account, including, where applicable, the following matters in relation to the conditions in the torture risk State—

(a) whether there is a consistent pattern of gross, flagrant or mass violations of human rights in the torture risk State; and

(b) whether there is any region within the torture risk State in which the claimant would not be in danger of being subjected to torture.

37ZL. Revocation of immigration officer's decision to accept torture claim ~~etc.~~

(1) An immigration officer may, on a ground for a revocation decision specified in ~~subsection (2)~~section 37ZLB, revoke—

~~(a) a decision made by an immigration officer under section 37ZI(1)(a) accepting a torture claim as substantiated; or~~

~~(b) a decision made by the Appeal Broad under section 21(1) of Schedule 1A reversing a decision made by an immigration officer under section 37ZI(1)(b) rejecting a torture claim.~~

~~(2) Any of the following paragraphs is a ground mentioned in subsection (1)—~~

~~(a) any information or documentary evidence submitted in support of the claim is false or misleading and the false or misleading information or evidence is material to the substantiation of the claim;~~

~~(b) information was not disclosed to an immigration officer or (on an appeal) the Appeal Board and the undisclosed information would undermine, to a material extent, the merits of the claim;~~

~~(c) the torture risk giving rise to the claim has ceased to exist due to changes in circumstances of the claimant or the torture risk State.~~

(3) An immigration officer must give the claimant written notice of a proposed revocation, and the notice must—

(a) state the reasons for the proposed revocation; and

(b) state that the claimant may, within 14 days after the notice is given, inform the immigration officer by written notice of the claimant's objection to the proposed revocation and the reasons for the objection (***objection notice***).

(4) If—

(a) the claimant has not given an objection notice in accordance with subsection (3)(b) and an immigration officer decides to make a revocation decision under subsection (1)~~(a) or (b)~~; or

(b) after having considered the claimant's objection notice, an immigration officer decides to make a revocation decision under subsection (1)~~(a) or (b)~~,

the immigration officer must give the claimant written notice of the revocation decision, reasons for the revocation decision and the claimant's right under section 37ZP to appeal against the revocation decision.

~~(5) A revocation decision takes effect once an immigration officer has given the claimant a written notice under subsection (4).~~

(New)

37ZLA. Revocation of Appeal Board's decision to reverse decision rejecting torture claim

(1) On an application made by an immigration officer, the Appeal Board may, on a ground for a revocation decision specified in section 37ZLB, revoke its decision that reversed a decision made by an immigration officer under section 37ZI(1)(b) rejecting a torture claim.

(2) Before making an application under subsection (1), an immigration officer must give the claimant written notice of the intended application, and the notice must—

(a) state the reasons for the intended application; and

(b) state that the claimant may, within 14 days after the notice is given, inform the immigration officer by written notice of the claimant's objection to the intended application and the reasons for the objection (***objection notice***).

(3) If—

(a) the claimant has not given an objection notice in accordance with subsection (2)(b) and an immigration officer decides to make an application under subsection (1); or

(b) after having considered the claimant's objection notice, an immigration officer decides to make an application under subsection (1),

the immigration officer must make the application by filing with the Appeal Board a notice of application in a form specified by the Chairperson of the Appeal Board.

(4) As soon as practicable after the filing of a notice of application, an immigration officer must serve on the claimant a copy of the notice of application.

(New)

37ZLB. Grounds for revocation decision

A ground specified in any of the following paragraphs is a ground for a revocation decision mentioned in section 37ZL(1) or 37ZLA(1)—

(a) any information or documentary evidence submitted in support of the claim is false or misleading and the false or misleading information or evidence is material to the substantiation of the claim;

(b) information was not disclosed to an immigration officer or (on an appeal) the Appeal Board and the undisclosed information would undermine, to a material extent, the merits of the claim;

(c) the torture risk giving rise to the claim has ceased to exist due to changes in circumstances of the claimant or the torture risk State.

37ZO. Appeal Board established

(1) A board to be known as the "Torture Claims Appeal Board" is established.

(2) The function of the Appeal Board is to hear and determine—

(a) an appeal made under section 37ZP; and

(b) an application for a revocation decision under section 37ZLA.

37ZP. Appeal

A person aggrieved by a decision of an immigration officer may appeal to the Appeal Board if the decision is made in respect of the person under—

(aa) section 37ZE(4) or 37ZG(5) (decision not to re-open a torture claim);

(a) section 37ZI(1)(b) (decision rejecting a torture claim); or

(b) section 37ZL(1) (revocation decision made by an immigration officer).

(New)

37ZX. Transitional and Savings Provisions

Schedule 4 provides for the transitional and savings arrangements that apply on, or relate to, the commencement of the Immigration (Amendment) Ordinance 2012 (of 2012).

12. **Schedule 1A - Torture Claims Appeal Board**

"**Schedule 1A** [ss. 37U, ~~37ZL~~ & 37ZS & Sch. 4]

Torture Claims Appeal Board

1. Interpretation

(1) In this Schedule—

appeal ( ) means—

(a) an appeal made under section 37ZP; or

(b) an application for a revocation decision under section 37ZLA.

member (委員) means a member of the Torture Claims Appeal Board established by section 37ZO.

(2) An expression used in this Schedule has the same meaning as is given to it in section 37U.

(3) In this Schedule, a reference to Part VIIC includes this Schedule and any subsidiary legislation made under section 37ZU.

2. Appointment of members

(1) The Appeal Board comprises the following members appointed by the Chief Executive—

(a) a Chairperson;

(b) at least one Deputy Chairperson; and

(c) a panel of persons whom the Chief Executive considers suitable for selection under section 6 of this Schedule for hearing and determining an appeal.

(2) The Chief Executive may appoint a person as a member if—

(a) the person was formerly a judge or magistrate;

(b) the person is qualified to practise as a barrister, solicitor or advocate in a court in Hong Kong or a common law jurisdiction having unlimited jurisdiction either in civil or criminal matters, and has so practised for a period of or periods totalling not less than 5 years; or

(c) the person, in the opinion of the Chief Executive, is suitably qualified to be a member.

(3) Each appointment is for a term of not more than 3 years and a member may be re-appointed at the end of a term.

(4) An appointment of a member is to be published in the Gazette.

(5) If a person ceases to be a member at a time when the person is involved in the hearing or determination of an appeal ~~under section 37ZP~~, the person may continue to be involved in the appeal as if the person were a member until the appeal is disposed of.

(6) A member may be paid remuneration and allowances at any rates determined by the Chief Executive.

8. Notice of Appeal be served on Director

(1) Subject to subsection (2), the Appeal Board must, as soon as practicable after receiving a notice of appeal filed under section 37ZQ(1), serve a copy of the notice on the Director.

(2) If a notice of appeal under section 37ZQ(1) is filed out of time, the Appeal Board is required to serve a copy of the notice on the Director only if it decides to allow late filing of the notice under section 37ZR(3), and in that event, the Board must serve the notice on the Director as soon as practicable after the decision is made.

9. Director to provide facts

(1) The Director must, as soon as practicable after receiving a copy of a notice of appeal served under section 8 of this Schedule, provide to the Appeal Board and the person who has lodged the appeal—

(a) if the decision being appealed against is a decision under section 37ZI(1)(b) rejecting a torture claim—

(i) a copy of the completed torture claim form relating to the torture claim in respect of which the decision was made; and

(ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim; ~~or~~

(b) if the decision being appealed against is a revocation decision of an immigration officer under section 37ZL(1)—

(i) a copy of the completed torture claim form relating to the torture claim in respect of which the decision was made;

(ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim;

(iii) a copy of the notice of the decision under section 37ZI(1)(a) accepting the torture claim as substantiated;

(iv) a copy of the notice of proposed revocation of the torture claim given under section 37ZL(3); and

(v) a copy of the claimant's objection notice (if any) referred to in section 37ZL(4)(b);

(c) if the decision being appealed against is a decision under section 37ZE(4) not to re-open a torture claim withdrawn by the person who made the claim—

(i) a copy of any completed torture claim form relating to the torture claim;

(ii) a copy of the written record of any interview of the person conducted by an immigration officer in considering the torture claim;

(iii) a copy of the person's notice withdrawing the claim; and

(iv) a copy of any evidence in writing provided by the person under section 37ZE(2); or

(d) if the decision being appealed against is a decision under section 37ZG(5) not to re-open a torture claim treated as withdrawn on a person's failure to return a completed torture claim form—

(i) a copy of the written notice under section 37ZG(2) informing the person that the claim is treated as withdrawn; and

(ii)a copy of any evidence in writing provided by the person under section 37ZG(3).

(2) The Director must, as soon as practicable after filing with the Appeal Board a notice of application for a revocation decision under section 37ZLA(3), provide to the Appeal Board and the claimant—

(a) a copy of the completed torture claim form relating to the torture claim in respect of which the application is made;

(b) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim;

(c) a copy of the written notice under section 37ZJ(1) informing the claimant of an immigration officer's decision rejecting the torture claim;

(d) a copy of the written decision given under section 21(2) of this Schedule reversing an immigration officer's decision rejecting the torture claim;

(e) a copy of the written notice under section 37ZLA(2) informing the claimant of an intended application for a revocation decision to be made by the Board under section 37ZLA(1); and

(f) a copy of the claimant's objection notice (if any) referred to in section 37ZLA(2)(b).

18. Evidence considered by Appeal Board in an appeal under section 37ZP

(1) In an appeal under section 37ZP, the Appeal Board has the power to review the merits of the case, and accordingly it may consider—

(a) the same evidence that was before an immigration officer; and

(b) if subsection (2) applies, evidence that was not before an immigration officer.

(2) The Appeal Board may consider evidence that was not before an immigration officer if—

(a) the evidence relates to matters that have occurred after the decision being appealed against was made; ~~or~~

(b) the evidence was not reasonably available before the decision being appealed against was made.; or

(c) the Board is satisfied that exceptional circumstances exist that justify the consideration of the evidence.

~~(3) For the purposes of subsections (1) and (2), the Appeal Board may—~~

~~(a) administer oaths and affirmations;~~

~~(b) receive and consider any material by way of oral evidence (on oath or otherwise) or written statements or documents (by affidavit or otherwise).~~

19. Notice of new evidence

(1) A party to an appeal who wishes to present any evidence under section 18(2) of this Schedule at a hearing must—

(a) file with the Appeal Board a written notice to that effect; and

(b) serve a copy of the notice on the other party.

(2) The notice must—

(a) indicate the nature of the evidence; and

(b) explain why the evidence was not before an immigration officer before the decision being appealed against was made.

19A. Evidence considered by Appeal Board in an application for revocation decision

In an application for a revocation decision under section 37ZLA, the Appeal Board—

(a) has the power to review the merits of the case; and

(b) may consider any evidence that the Board considers relevant.

19B. Evidence on oath etc.

For the purposes of sections 18 and 19A of this Schedule, the Appeal Board may—

(a) administer oaths and affirmations;

(b) receive and consider any material by way of oral evidence (on oath or otherwise) or written statements or documents (by affidavit or otherwise).

21. Appeal Board's decision

(1) On an appeal against a decision referred to in section 37ZP, the Appeal Board may confirm or reverse the decision.

(1A) On an application for a revocation decision under section 37ZLA, the Appeal Board may allow or refuse the application.

(2) The Appeal Board must give its decision with reasons in writing.

(3) The Appeal Board's decision is final.

13. **Schedule 4** ~~Transitional and Savings Provisions in respect of Immigration (Amendment) Ordinance 2011 (Torture Claims)~~

"**Schedule 4** [s. 37ZX]

Transitional and Savings Provisions in respect of Immigration (Amendment) Ordinance 2011 (Torture Claims)

Table of Transitional Provisions

10.	Non-refoulement claim has been determined by an adjudicator as an established claim and, by virtue of the determination, the person making the claim has not been removed from Hong Kong	Part A The established claim is taken to be a substantiated claim within the meaning of paragraph (b) of the definition of ***substantiated claim*** in section 37U(1) and, without limiting section 2(1) of this Schedule, section 37ZLA applies accordingly

".

14. Form No. 8

"FORM NO. 8

IMMIGRATION ORDINANCE

(Chapter 115)

Section 36(1A)

RECOGNIZANCE

(1) .....

of .....

*is detained under section 27, 32, 34 or 37ZK of the Immigration Ordinance:

*is liable to be detained under section 27, 32, 34 or 37ZK of the Immigration Ordinance and is not now so detained:

Now—

(1) .....,

*(2) ..... of .....; and

*(3) ..... of .....,

hereby acknowledges/acknowledge that he/she/they severally will pay to the Government the following sum/sums—

(1) ..... the sum of $.....

*(2) ..... the sum of $.....

*(3) ..... the sum of $.....

if (1) ..... fails to comply with the *following condition/*any of the following conditions—

(a) report to—

(i)* the duty officer .....

Police Station on every .....

between the hours of .....

and .....

(ii)* the duty officer .....

Immigration Department on every .....
between the hours of .....
and .....
commencing .....
until this recognizance ceases to have effect.

†[(b) etc.]

Signed by—

(1) .....
*(2) .....
*(3) .....

on the ..... day of ..... 20..... in the presence of .....

.....
Signature

* Delete where inappropriate.

(i) complete in case of police recognizance.

(ii) complete in case of Immigration Department recognizance.

† Set out any other condition(s) imposed under section 36(1A) of the Immigration Ordinance.".