



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :
本函檔號 OUR REF : LS/B/27/10-11
電話 TELEPHONE : 3919 3501

傳真 FACSIMILE : 2901 1297
電郵 E-MAIL :

By Fax (2868 1552)
20 October 2011

Mr CHOW Wing-hang,
Principal Assistant Secretary (Security)D
Security Bureau
6/F Main and East Wings
Central Government Offices
Hong Kong

Dear Mr Chow,

Immigration (Amendment) Bill 2011

I am scrutinizing the above Bill with a view to advising Members. Set out at the Annex are my observations on the legal and drafting aspects of the Bill. As to comments on the Chinese text, I would write to you separately, if necessary.

I would appreciate it if you would let me have the Administration's response in both languages by *8 November 2011*.

Yours sincerely,

(Ms Connie FUNG)
Senior Assistant Legal Adviser

Encl.

c.c. DoJ (Attn: Ms Fanny IP, SALD and Miss Mandy NG, GC)
LA

**Legal Service Division's observations on
Immigration (Amendment) Bill 2011**

New section 37U – Interpretation

1. It is noted that the proposed definition of "torture" contains all the elements included in the definition of "torture" provided in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). In view of the proposed definition, is it necessary to amend section 3 of the Crimes (Torture) Ordinance (Cap. 427)¹ to make the elements of torture provided in that section consistent with those provided in the above proposed definition and Article 1 of the Convention?

2. Please clarify whether "removal order" and "deportation order" referred to in the proposed definition of "removal" are orders made under sections 19 and 20 of the Immigration Ordinance (Cap. 115) respectively? If so, should references to these sections be included in the proposed definition for the sake of clarity?

New section 37V

3. It is noted that while there is a provision (i.e. new section 37Z) on the effect of making a torture claim, there is no similar provision on the effect of a torture claim being finally determined. Is it necessary to provide for this in the Bill (e.g. in the new section 37V)?

New section 37Y

4. In the new section 37Y(3)(b), what are the special circumstances based on which a claimant may be allowed an extension of time to return a torture claim form? Will the Administration consider setting out these special circumstances in the Bill?

¹ Section 3(1) of Cap. 427 provides that a public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. Section 3(2) provides that the offence of torture may be committed where severe pain or suffering is inflicted on another by other persons at the instigation or with the consent or acquiescence of a public official. Section 3(5) provides for the defence of lawful authority, justification or excuse for the offence of torture.

New section 37Z

5. For the sake of clarify, please consider stipulating expressly in the new section 37Z(1) (instead of referring to "effect of making a torture claim" in the section heading only) that on the making of a torture claim, a claimant may not be removed from Hong Kong to a torture risk State.

6. The new section 37Z(3)(a), as drafted, seems to suggest that after the making of a torture claim, a claimant may be removed to another country that is not a torture risk State before the claim is finally determined. If this is the Administration's policy intent and a claimant is indeed so removed, how is he able to comply with the requirements, procedure and condition (e.g. requirement to provide evidence, attend interview, undergo medical examination, etc.) prescribed in the new Part VIIC proposed in the Bill?

New section 37ZA

7. Are there any consequences if a claimant fails to perform the duties as stipulated in the new section 37ZA? Will such failure affect the processing of the torture claim? Is it necessary to include provisions in the Bill to cover this matter?

New section 37ZB

8. The new section 37ZB empowers an immigration officer to require a claimant to provide information and to attend interviews to answer questions. Can a claimant refuse to provide information or answer questions on the ground that the information or answers are protected by privilege, such as the privilege against self-incrimination? Will the refusal to provide such information or answers based on the ground of privilege be taken as failure to provide information, etc. and hence behaviour damaging the claimant's credibility under the new section 37ZD?

New section 37ZD

9. If there is evidence showing that the claimant's behaviour falls within the kinds of behaviour specified in the new section 37ZD, must the claimant's claim necessarily be rejected? Is it intended that a claimant's credibility is only one of the factors to be taken into account in considering a torture claim? How much weight is to be given to this factor in the determination of a torture claim?

10. In the new section 37ZD(2)(b) and (d) to (f), what could constitute "reasonable excuse" for failure to produce or provide information or documentary evidence? For example, if the information or documentary evidence required to be provided under the new section 37ZB(1)(a) is privileged as in the case where the information tends to incriminate the claimant, does this amount to "reasonable excuse" for the purposes of the new section 37ZD(2)(d)?

New section 37ZE

11. In the new section 37ZE(2)(b), what are the special circumstances based on which an immigration officer would decide to re-open a claim which has been withdrawn. Will the Administration consider setting them out in the Bill?

New section 37ZI

12. In the new section 37ZI(3), what are the factors that an immigration officer will consider in deciding whether 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? In its monitoring of the implementation of the Convention, the Committee against Torture has expressed the view that certain considerations are relevant to the determination of a torture claim². These include whether there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State to which the claimant is to be expelled, returned or extradited, whether there is medical or other independent evidence to support the claimant's claim of torture or maltreatment in the past, whether the claimant has engaged in political or other activity which would make him/her particularly vulnerable to torture, the claimant's credibility, etc. Will the Administration consider setting out these considerations in the Bill?

² CAT General Comment 1, para. 8, see Joseph S., Schultz J. and Castan M. 2004, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (Second Edition) pp. 234.

New section 37ZL

13. In the new section 37ZL(1) which empowers an immigration officer to revoke a decision accepting a torture claim as substantiated, should a time limit within which such power is to be exercised be provided in the Bill?

14. In the new section 37ZL(1)(b), is it appropriate to confer on an immigration officer the power to overturn the decision of the independent Appeal Board reversing the immigration officer's decision to reject a torture claim? If a decision has been appealed against and new evidence has emerged or there has been a change in circumstances after the Appeal Board has made its decision, should the matter be referred to the Appeal Board for a review instead of proposing that the Appeal Board's decision be revoked by the Administration?

New section 37ZM

15. If a claimant who has previously made a torture claim makes a fresh claim based on completely new grounds and supporting facts, will he be subject to the limitation on subsequent claims provided in the new section 37ZM, and if so, why?

Right to legal representation and provision of legal assistance

16. It is noted that the Bill does not contain any provisions relating to claimants' right to legal representation and the provision of free legal assistance to torture claimants in the screening process. According to paragraph 21 of the LegCo Brief, the Administration will continue to fund legal assistance for claimants under the statutory mechanism. Is there any reason for not including provisions on legal representation and legal assistance in the Bill?

Appeal against decisions made in relation to torture claims

17. Under the new section 37ZP, the decisions that may be appealed against are confined to decisions to reject a torture claim and to revoke a decision accepting a torture claim as substantiated. Other decisions including decisions not to re-open a torture claim that has been withdrawn and decisions not to allow the making of a subsequent claim are not appealable under the Bill. Further, under the proposed section 53(8) of Cap. 115, a person aggrieved by

these decisions may not lodge an objection with the Chief Secretary for Administration. According to paragraph 16 of the LegCo Brief, the above proposal is intended to prevent abuse. In view of the requirement for high standards of fairness in the determination of torture claims laid down by the Court of Final Appeal in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, please clarify whether the above proposal would meet the required standards of fairness.

18. Where an appeal is lodged by a torture claimant, is it intended that the execution of any expulsion or extradition orders against the claimant would be suspended pending the determination of the appeal? If so, should this be stipulated in the Bill?

New section 37ZW

19. The new section 37ZW provides that without limiting section 2(4) of Cap. 115, a torture claimant is not to be treated as ordinarily resident in Hong Kong during any period in which the person remains in Hong Kong only by virtue of his torture claim. Following the recent Court of First Instance's decision in *Vallejos Evangeline Banao v Commissioner of Registration* (HCAL 124/2010) on the constitutionality of section 2(4)(a)(vi) of Cap. 115 and on the meaning of "ordinary residence", has the Administration considered what implications, if any, this case would have on the validity of the new section 37ZW if it is enacted? Is it possible to argue that the Court's interpretation of "ordinary residence" in the context of Article 24(2)(4) of the Basic Law in the above case would apply to cases where a torture claimant has entered Hong Kong with valid travel documents, made a torture claim after the expiry of his visa with the claim being accepted as substantiated and the claimant has since been residing and working in Hong Kong pursuant to the permission to take employment given under the new section 37ZV?

New Schedule 1A – Torture Claims Appeal Board

20. In section 2(2)(c) of the new Schedule 1A, who will be considered as suitably qualified to be a member of the Appeal Board apart from a judge or magistrate or one with legal qualifications?

21. Under section 6 of the new Schedule 1A, an appeal is generally heard by one member and under some circumstances an appeal may be heard by three members. Please clarify the circumstances under which an appeal is to be heard by three members.

22. In cases where an appeal is heard by three members, is it necessary to include provisions providing for how questions before the Appeal Board is to be determined and the voting rights of the presiding officer in case there is an equality of votes?

23. At a hearing before the Appeal Board, please clarify whether the Director of Immigration and the torture claimant may be legally represented. If so, should the right to legal representation be provided in the Bill?

24. How are the costs or expenses of the hearings to be met? Does the Appeal Board have the power to make orders relating to payment of costs or expenses of the hearings? Is it necessary to make provisions to cover these matters?

Schedule 4 – Transitional and savings provisions

25. In section 5 of the new Schedule 4, please clarify whether the adjudicator hearing the petition under the administrative scheme has the same qualifications as a member appointed under section 2(2) of the new Schedule 1A? If not, what qualifications does the adjudicator have?

Whether amendments need to be made to the Registration of Persons Regulations (Cap. 177 sub. leg. A)

26. Under section 3(1) of the Registration of Persons Ordinance (Cap. 177), every person in Hong Kong is required to be registered under the Ordinance unless exempted or excluded from its provisions by regulations made under the Ordinance. Among the excluded persons as provided in regulation 25A(2) of the Registration of Persons Regulations (Cap. 177 sub. leg. A) are persons previously resident in Vietnam who are permitted to remain in Hong Kong as refugees pending their resettlement elsewhere. If it is intended that a torture claimant is not required to be registered under Cap. 177 whilst in Hong Kong, should regulation 25A be amended to include torture claimants as excluded persons?