

Immigration (Amendment) Bill 2011
Reply to Questions Raised by the
Legal Service Division of the Legislative Council

New section 37U – Interpretation

Q1 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 Convention. In view of the proposed definition, is it necessary to amend section 3 of the Crimes (Torture) Ordinance (Cap. 427) 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?

The provisions of section 3 of the Crimes (Torture) Ordinance (Cap. 427) gives effect to Article 4 of the Convention Against Torture (CAT) by creating a specific and separate offence of torture locally, whereas the Immigration (Amendment) Bill (the Bill) gives effect to our non-refoulement obligation concerning the removal or extradition of a person to another State under Article 3 of the CAT. They serve different purposes. The definition of “torture” in the Bill follows Article 1 of the CAT. There is no definition of “torture” in Cap. 427 and section 3 of that ordinance delineates the scope of “torture” covered by the offence. The offence covers all the key elements contained in Article 1 of the CAT and the difference in form is desirable to provide for the specific offence of torture under the domestic law of Hong Kong. As section 3 of Cap. 427 is consistent with Article 1 of the CAT, it need not be amended.

Q2 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?

The terms “removal order” and “deportation order” are defined in section 2 of the Immigration Ordinance (Cap. 115):

- “removal order” is defined as “an order under section 19(1)”; and
- “deportation order” is defined as “an order under section 20”.

Since these definitions apply to the whole Ordinance, including the new section 37U, additional cross-referencing to sections 19(1) and 20 in

relation to “removal order” and “deportation order” respectively is not necessary.

New section 37V – When torture claim is finally determined

Q3 It is noted that while there is a provision 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?

The effect of a torture claim being finally determined has been provided for in the Bill.

A person whose torture claim is substantiated upon final determination would fall within the definition of “claimant” (defined in the new section 37U as a person whose torture claim (not being a torture claim that has been withdrawn) – (a) is not yet finally determined; or (b) is a substantiated claim.)

Under the new section 37Z(1), “[a] claimant may not be removed from Hong Kong to a torture risk State.”

On the other hand, the new section 37Z(3)(b) makes it clear that a person whose torture claim is not substantiated on final determination may be removed from Hong Kong.

New section 37Y – Submission of torture claim form

Q4 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?

An immigration officer may grant an extension of time for a claimant to return a torture claim form if there exist circumstances under which it would be unjust not to allow such further period having regard to the merits of a particular case. In considering a request for extension of time, an immigration officer will take into account all the relevant circumstances of the case, e.g. whether it is beyond the control of the claimant, any serious illness which may prevent the claimant from returning the torture claim form in time, etc. Given that what amount to special circumstances may vary in different cases and each case will be

considered on its own merits, it is not practical or appropriate to set them out in the Bill.

New section 37Z – Effect of making a torture claim

Q5 For the sake of clarity, please consider stipulating expressly in the new section 37Z(1) that on the making of a torture claim, a claimant may not be removed from Hong Kong to a torture risk State.

In the new section 37U, “claimant” is defined as including, amongst others, a person whose torture claim (not being a withdrawn one) is not yet finally determined.

Pursuant to the new section 37X, once a torture claim is made, the person making the claim is a “claimant” and may not be removed from Hong Kong to a torture risk State under the new section 37Z(1) until he or she ceases to be a claimant (i.e. when his or her torture claim is withdrawn or finally determined as unsubstantiated).

Q6 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?

Our obligation under Article 3(1) of the CAT is not to expel, return or extradite a person to a torture risk State where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State. Such non-refoulement protection does not extend to the removal of the claimant to another country where there is no torture risk and thus a claimant may be so removed under the new section 37Z(3)(a).

New Section 37ZA – Duties of claimant

Q7 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?

With respect to a claim for protection under Article 3 of the CAT, the burden or responsibility is upon the claimant to establish that there are substantial grounds for believing that he would be in danger of being subjected to torture were he to be expelled, returned or extradited¹. To this end, the new section 37ZA sets out that it is the duty of a claimant to substantiate a torture claim by providing all information and evidence promptly and fully. An immigration officer (or the Appeal Board) may take into account a claimant's failure to do so as damaging the claimant's credibility under the new section 37ZD.

New Section 37ZB – Power to require information

Q8 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 37D?

All information provided by a claimant for the purpose of establishing his torture claim will be treated by the Immigration Department (ImmD) in confidence. No such information provided, whether in a torture claim form or during screening interviews, will be used against the claimant in subsequent criminal proceedings of any nature (except for claimant's attempt to pervert the course of justice, say by acts of misrepresentation, false statement, etc. in relation to making of the torture claim, which will be an offence under section 42 of Cap. 115 as amended). As such, the claimants will not be at risk of prosecution even if self-incriminating statement is made in the screening process. Indeed, under the existing enhanced screening mechanism, a torture claimant will be informed of this position by way of a notice served at the commencement of the screening process and that such practice will continue under the statutory scheme.

As mentioned in our reply to Q7, the burden is upon the claimant to establish that there are substantial grounds for believing that he would be

¹ CAT General Comment No.1 adopted by the Committee against Torture on 21 November 1997 (paras 5 to 7). See also the judgments of Court of Final Appeal in *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187 (para. 54) & the Court of First Instance in *TK v Jenkins, HCAL 126/2010*, (para. 35) that the burden of proof is on the claimant.

subject to the risk of torture upon return to the alleged torture risk State. In this regard, failure by the claimant to provide the required information may jeopardize his chance of establishing the claim since the immigration officer will not be able to take into account all relevant considerations for a proper assessment to be made; and where such failure is without reasonable excuse, it may also be a ground taken as damaging the claimant's credibility.

New Section 37ZD – Credibility of claimant

Q9 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?

An immigration officer (or the Appeal Board) will take into account all relevant considerations in deciding whether to accept a torture claim as substantiated under the new section 37ZI or the new section 21 of Schedule 1A (the Appeal Board). The new section 37ZD provides that certain behaviours of a claimant may be taken into account as damaging his credibility, but that does not necessarily imply that the claim will be rejected upon finding of these behaviours. Whether or not a claimant's credibility in a claim has been damaged would depend on an overall assessment of all the relevant circumstances of the case.

Q10 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)?

Some examples of reasonable excuse under the new section 37ZD(2)(b) and (d) to (f) include where the claimant was not in possession of the document or evidence at the earlier material time, or where the claimant was unaware of the existence of relevant information before the date fixed for the first interview, etc. As regards the issue of self-incriminating statement, please see our reply to Q8 above.

New Section 37ZE – Withdrawal of torture claim by claimant

Q11 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?

To ensure that the procedures will meet the required standards of fairness, the new section 37ZE(2)(b) provides that an immigration officer may re-open a claim if it would be unjust not to do so under special circumstances, e.g. there are significant changes in the conditions of the torture risk State which will increase the torture risk after the withdrawal. Given that what amount to special circumstances may vary in different cases and each case will be considered on its own merits, it is not practical or appropriate to set them out in the Bill.

New Section 37ZI – Decision on torture claim

Q12 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 (the CAT Committee) has expressed the view that certain considerations are relevant to the determination of a torture claim. [...] Will the Administration consider setting out these considerations in the Bill?

As in the enhanced screening mechanism, immigration officers will continue to take into consideration all relevant circumstances and information available in assessing a claim (including grounds and evidence provided by the claimant and other information, e.g. background and country condition of the alleged torture risk State). In assessing torture claims, immigration officers will, as appropriate, refer to the CAT jurisprudence and relevant case law from time to time. Since each case will be considered on its own merits, it is not practical or appropriate to set out all such considerations in the Bill.

New Section 37ZL – Revocation of decision to accept torture claim

Q13 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?

An immigration officer will accept a torture claim as substantiated if he is satisfied that there exists a real torture risk for the claimant if he is removed to the torture risk State. On the other hand, if there are changes in circumstances or improvements in the conditions of the State, the torture risk may cease to exist and the non-refoulement protection should no longer be applicable. Substantiated torture claims will hence be regularly reviewed (usually every 6 to 12 months), such that if and when the condition of the torture risk State or the personal circumstances of the claimant changes, and the relevant torture risk no longer be found to exist, an immigration officer may revoke the previous decision and the claimant may be removed. There is no applicable time limit after which such regular review may cease.

Q14 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?

The power conferred on an immigration officer in the new section 37ZL(1)(b) is **not** to overturn the Appeal Board's decision, but to regularly review the circumstances pertinent to a torture claim which has been accepted by the Appeal Board as substantiated. We consider it appropriate for ImmD, instead of the Appeal Board, to conduct the review given that it is based on factual findings on the case as well as the home state. If an immigration officer revokes a decision to accept the claim as substantiated, the new section 37ZL(4) provides that he must give the claimant a written notice of such revocation decision with reasons provided in detail. The claimant may, pursuant to the new section 37ZP, appeal against such revocation decision to the Appeal Board. In other words, even if a revocation decision concerns an earlier decision of the Appeal Board, the Board would have a final say if the claimant proceeds to lodge an appeal.

New Section 37ZM – Limitation on subsequent claim

Q15 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?

If the claim on completely new grounds and supporting facts is made after the final determination of the torture claim that the person has previously made, the new claim is a subsequent claim, to which the new section 37ZM applies.

Any illegal immigrant or overstayer will be granted non-refoulement protection once he has made a torture claim unless and until his claim is finally determined as unsubstantiated or withdrawn. It is necessary to impose limitation on the making of subsequent claims. Otherwise, any person who is subject or liable to removal may easily abuse the mechanism by making repeated claims indefinitely to avoid being removed.

Right to legal representation and provision of legal assistance

Q16 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?

Members of the Bills Committee have also raised questions regarding the same issue. Please refer to our separate response to questions raised by Members at the first Bills Committee meeting on 24 October 2011.

Appeal against decisions made in relation to torture claims

Q17 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.

Under the Court of Final Appeal (CFA) judgment in *Prabakar*, the approach to satisfying the requirement of high standards of fairness are namely (a) the claimant should be given every reasonable opportunity to establish his claim, (b) the claim must be properly assessed by the authority, and (c) sufficient reasons should be given where the claim is rejected (para. 5 of the judgment). In this regard, while there is no appeal or statutory objection mechanism in respect of a decision made under the new section 37ZE(4) & the new section 37ZG(5) (not to re-open a withdrawn claim) and under the new section 37ZM(5) (not to allow subsequent claim), the making of each decision nevertheless is in compliance with the *Prabakar* requirement, in particular that there is a statutory requirement that reasons must be given for the decision. This will enable an aggrieved person to consider whether judicial review should be sought against the decision made. As such, despite that the appeal or statutory objection mechanism does not apply to these decisions, the proposal is not inconsistent with the requirement of high standards of fairness.

Q18 Where an appeal is lodged by a torture claimant, is it intended that the execution of any expulsion or extradition against the claimant would be suspended pending the determination of the appeal? If so, should this be stipulated in the Bill?

In the new section 37V(2)(b), if an appeal has been lodged against an immigration officer's decision on a torture claim, the claim is finally determined only when the appeal has been disposed of. By definition, as long as a claim is not withdrawn or not yet finally determined or (if finally determined) is substantiated, the person making the claim will remain a claimant as defined in the new section 37U; and a claimant may not be removed from Hong Kong to a torture risk State pursuant to the new section 37Z(1). The consequential amendments (i.e. clause 17 of the Bill) to the Fugitives Offenders Ordinance (Cap. 503) gives similar effect to staying the execution of a surrender order against a torture claimant

while the assessment of the torture claim is being processed and pending the disposal of an appeal, as applicable.

Q19 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 CFI'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" 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?

Members of the Bills Committee have also raised questions regarding the issue of whether torture claimants are not to be treated as ordinarily resident in Hong Kong. Please refer to our separate response to questions raised by Members at the first Bills Committee meeting on 24 October 2011.

New Schedule 1A – Torture Claims Appeal Board

Q20 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?

The person in section 2(2)(c) of the new Schedule 1A would include a person having the appropriate training or qualifications in law (apart from that set out in sections 2(2)(a) and 2(2)(b) of the new Schedule 1A) who is considered by the Chief Executive as suitably qualified to be a member of the Appeal Board.

Q21 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.

Normally an appeal will be heard and determined by one member of the Appeal Board as selected by the Chairperson. The Chairperson may

direct that, having regard to exceptional circumstances of a particular appeal (e.g. its complexity), the appeal is to be heard and decided by three members.

Q22 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?

The Chairperson of the Torture Claims Appeal Board may make any arrangements that are practicable to ensure that members discharge their functions in an orderly and expeditious manner. Having regard to the circumstances of a particular appeal, the Chairperson will decide whether an appeal is to be heard by either one or three members of the Appeal Board. By way of background, section 52 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that where power is conferred to a body consisting of not less than 3 persons, such power may be exercised in the name of that body by a majority. As for the case of equality of votes, section 52(2) of Cap. 1 stipulates that the presiding member has a casting vote when a decision is taken by vote.

Q23 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?

The Court of First Instance ruled in *FB v D of Immigration* [2009] 1 HKC 133 that it is unlawful and in breach of our duty to assess torture claims in accordance with high standards of fairness for the Administration not to allow the petitioner of a torture claim case to be legally represented at an oral hearing. Hence, the right to legal representation has been stated in that judgment.

Q24 How are the costs and 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?

The cost of operating the Appeal Board will be borne by the Administration and the Appeal Board will have no power to make orders relating to payment of costs or expenses of the hearings, as in the case of other immigration-related tribunals established under the Immigration Ordinance (Cap. 115).

Schedule 4 – Transitional and savings provisions

Q25 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?

At present, all eight Adjudicators appointed to consider petitions from torture claimants under the enhanced administrative screening mechanism are retired judges or magistrates. They have the same qualifications as a member appointed under section 2(2) of the new Schedule 1A.

Whether amendments need to be made to the ROPR (Cap. 177 sub. Leg. A)

Q26 Under section 3(1) of the ROP 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 ROPR (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?

Unlike Vietnamese refugees who were permitted to remain in Hong Kong pending resettlement, torture claimants are generally either illegal immigrants or overstayers and their stay in Hong Kong is unlawful throughout the material time. Under regulation 5(1A) of Cap. 177 sub. leg. A, identity cards must not be prepared for persons who are illegal immigrants or who are in Hong Kong in breach of a limit of stay.

**Security Bureau
15 November 2011**