

**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 appeals². 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.