

**President's ruling on a Committee stage amendment
to the Immigration (Amendment) Bill 2011
proposed by Dr Hon Margaret NG**

Dr Hon Margaret NG has given notice to move a Committee stage amendment ("CSA") to the Immigration (Amendment) Bill 2011 ("the Bill"), if the motion for the Second Reading debate of the Bill is agreed to at the meeting of the Legislative Council ("LegCo") of 13 June 2012. Before considering the admissibility of the CSA under the Rules of Procedure, I invited the Administration to comment on the CSA and Dr NG to respond to the Administration's comments.

Object of the Bill

2. The main object of the Bill is to amend the Immigration Ordinance (Cap. 115) ("IO") to provide for a statutory scheme for determining claims ("torture claims") made by persons in Hong Kong for protection ("the non-refoulement protection") under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") against expulsion, return or extradition of the claimant to countries in which they would be in danger of being subjected to torture. The Bill also deals with other matters in respect of persons making torture claims and provides for conditions that may be imposed in granting a recognizance.

Dr Hon Margaret NG's CSA

3. Counsel to the Legislature advises that at present, torture claims made under CAT are handled by the Immigration Department ("ImmD") under an administrative screening mechanism which has been put in place since December 2009 following a series of court judgments in which it was decided that high standards of fairness are required in the determination of CAT claims¹. The statutory process provided in the Bill will replace the existing administrative screening mechanism for determining torture claims on the commencement of the Bill after its enactment.

¹ *Secretary for Security v Sakthivel Prabakar* (2004) 7 HKCFAR 187; *FB v Director of Immigration and Secretary for Security* [2009] 2 HKLRD 346.

4. Counsel explains that the procedure relating to torture claims is set out in the proposed sections 37W to 37ZN of IO. Under the proposed section 37X(1) of IO, a person who claims non-refoulement protection in Hong Kong on the ground of a torture risk must signify to an immigration officer in writing the person's intention to seek non-refoulement protection. The proposed section 37Y(1) requires a torture claimant, on written request by an immigration officer, to complete a torture claim form stating the grounds of the claim and the facts supporting the claim, and including such other information as required by the form. Under the proposed section 37Y(2)(a), the claimant must return the completed torture claim form within 28 days after the written request is given, together with all documents supporting the claim that are readily available to the claimant when the form is returned, unless a further period is allowed by an immigration officer. Failure to return a completed torture claim form will lead to the claim being treated as withdrawn under the proposed section 37ZG. Under the Bill, a claimant whose torture claim (not being a torture claim that has been withdrawn) has not been finally determined will not be removed from Hong Kong to a torture risk State.

5. Dr NG's CSA seeks to extend the timeframe for returning a completed torture claim form in the proposed section 37Y(2)(a) from 28 to 90 days.

The Administration's comments

6. The Administration submits that the CSA will have substantial financial implications on public expenditure in that while awaiting their claims to be processed and decided on, the Government is committed to providing prescribed humanitarian assistance items, including food, accommodation, clothing, transportation and other basic necessities, to prevent the claimants from going destitute. The cost is \$109 per person per day.

7. The Administration points out that according to the experience under the existing administrative screening mechanism, at least 80% of all torture claimants have been receiving such assistance and the claimants spent on average 40 days to complete and return the torture claim forms. The Administration estimates that the financial implications arising from the extended timeframe of 90 days proposed by Dr NG will be in the range of \$31.4 million², if 80% of the claimants apply for

² The calculation is as follows: 4 640 claimants (i.e. 5 800 X 80%) X 62 days (i.e. 90-28) X \$109.

assistance and the benchmark of 28 days is used, or \$25.3 million³, if 80% of the claimants apply for assistance and the benchmark of 40 days is used.

8. The Administration considers that the timeframe of 28 days now provided for in the Bill is reasonable and practical, and this compares favourably with similar arrangements overseas. The Administration submits that where the claimants are in genuine need for more time to complete their claim forms, the track record of ImmD shows that all requests with reasons for extension of time were granted, and that ImmD has made it clear that such approval will continue to be granted under the mechanism stipulated in the proposed section 37Y(3) of IO. It is the Government's policy that further extension should be granted to individual claimants who feel it necessary, rather than indiscriminately among all claimants irrespective of their need.

Dr Hon Margaret NG's response

9. Dr NG does not accept that her CSA has the effect of imposing a charge on the revenue. Dr NG considers that there is no dispute that sufficient time must be allowed for the torture claim form, on which the claimant's case is to be determined, to be properly made. The sole dispute is whether the 28 days stipulated in the proposed new section 37Y is sufficient as the Administration claims. Dr NG points out that many of the depositions to the Bills Committee, in particular, the Duty Lawyer Service and the Joint Working Group of the Hong Kong Bar Association and the Law Society of Hong Kong, have made strong representation that it is impossible to prepare an adequate claim form within 28 days, and the latter considers that a period of 90 days is required.

10. Dr NG submits that given that the object of the bill is to provide a fair procedure, her CSA does not impose a new and distinct function not provided in the Bill. Dr NG also submits that the Administration has explained to the Bills Committee that extensions of submission of the torture claim forms may be granted, and such extensions may well go beyond 90 days if necessary, thus the cost of subsistence provided to claimants will also vary. She considers that the Administration is bound to provide for subsistence for the period of stay which procedural fairness requires.

³ The calculation is as follows: 4 640 claimants (i.e. 5 800 X 80%) X 50 days (i.e. 90-40) X \$109.

My opinion

11. Under Rule 57(6) of the Rules of Procedure, an amendment, the object or effect of which may, in the opinion of the President, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by the Chief Executive; or a designated public officer; or a Member, if the Chief Executive consents in writing to the proposal.

12. A clear principle has been established in past rulings that a CSA will have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure only if it poses a new and distinct function on the Administration, i.e. a statutory function which is not provided in the existing law, and the President is satisfied that the performance of the new and distinct function will require the spending of an amount of public money that is not nominal or negligible.

13. Counsel to the Legislature advises that the protection provided to torture claimants under the Bill is protection against removal to a torture risk State. Under the proposed section 37ZK of IO, a torture claimant may be detained under the authority of the Director of Immigration pending final determination of the claimant's torture claim. Section 36, as amended by the Bill, confers a discretionary power on an immigration officer to release a torture claimant on recognizance pending determination of his claim. Counsel points out that the Bill does not impose an obligation on the Government to provide financial assistance to torture claimants while they are released on recognizance. The Bill also does not require the Government to provide financial assistance to torture claimants before their claims are finally determined. It is also noted that the assistance-in-kind services, as described by the Administration, are provided to torture claimants on humanitarian grounds and these services are available not only to torture claimants but also to refugees and asylum seekers⁴.

14. It is clear from Counsel's advice above that Dr NG's CSA, which seeks to extend the timeframe for returning a torture claim form under the proposed section 37Y(2)(a) from 28 to 90 days, does not impose a new and distinct function not provided in the Bill. I am therefore of the opinion that Dr NG's CSA does not have a charging effect within the meaning of Rule 57(6) of the Rules of Procedure.

⁴ Paragraph 8 of the paper entitled "Situation of Refugees, Asylum Seekers and Torture Claimants in Hong Kong" (LC Paper No. CB(2)2747/05-06(01)) issued by the Security Bureau, the Health, Welfare and Food Bureau, and the Education and Manpower Bureau.

15. In their submissions, both the Administration and Dr NG have put forward arguments in support of their respective proposed timeframe of 28 and 90 days. These are points of merit which I should not consider in making a ruling on the admissibility of a CSA to a bill under the Rules of Procedure.

My ruling

16. I rule that the CSA proposed by Dr Hon Margaret NG is admissible and may be moved at the Council meeting of 13 June 2012.

(Jasper TSANG Yok-sing)
President
Legislative Council

11 June 2012