Note of Advice – Working Draft
Re: Proposals by the Security Bureau to Amend the Immigration Ordinance

First, SB provided statistics which showed the speeding up of the assessment of claims is welcomed. Only less than 3000 cases pending Immigration's assessment and TCAV demonstrated a 5-6 fold increase in the number of cases concluded. In this regard, we note that this is clear indication that the steps taken by the authorities in the last two years have been effective and query why further steps, which impinge upon high-standards of fairness, should be necessary or justified in this light. It is noted that the main action taken by the authorities which led to the speeding up of decision making is the hiring of a large number of personnel handling claims, both in Immigration and particularly in TCAB. This shows that the main hold-up has been in the slowness of decision-making rather than delays from claimants.

In any discussion concerning the handling of non-refoulement claims, the starting point or baseline has to fall on the finding by the Hong Kong Court of Final Appeal in the case of Prabakar (§§44-45): -

"The determination of the potential deportee's torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination."

"...the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met. If the courts decide that they have not been met, the determination will be held to have been made unlawfully."

It is upon this starting point that the proposals should be examined. The need to ensure effective immigration controls will have to be balanced against the fundamental rights of persons who are seeking protection from torture, persecution or threats to their life and limb.

Proposal to tighten timeframes – broad observations

There is no disagreement between all interested parties that USM claims should be dealt with expeditiously. Specifically, meritorious claimants will always want their claims to be confirmed as soon as possible so that they can be reassured that they will received protection and/or seek durable solutions/resettlement. However, all efforts to speed up the assessment process must take care of the rights and abilities of claimants to adequately seek legal assistance, obtain evidence, and summarize their claims into writing.

While it is useful to refer to timelines in other jurisdictions, they may not always be useful given Hong Kong's unique circumstances. See below:

Limitations in the Hong Kong Jurisdiction

- Compared to other jurisdictions, our pool of interpreters are very small. Interpreters are engaged chiefly by the Police, the Courts, Customs & Excise Department, Hospital Authority, Social Welfare Department and all sections of the Immigration Department. Given that communications with most USM claimants have to go through interpreters, it is important to note that arrangements of appointments with claimants take time and communications take twice the time it would take should no interpreters be required. In particular, for some languages there may only be one or two interpreters in Hong Kong.

- Unlike other jurisdictions, many USM claimants are detained in Hong Kong. Putting aside the appropriateness or legality of that, it should be noted that this results in more difficulties for claimants to communicate with their lawyers and makes it more time consuming for them to obtain evidence to support their claims.
- Neither Immigration nor TCAB publishes their decisions, making it more time-consuming for claimants or their legal representatives to put forward claims given the need for them to be comprehensive in covering all legal basis and country of origin information to the decision makers in all cases. In some jurisdictions where decisions are published, time can be saved in the preparation of cases because claimants can rely on the findings of previous cases instead of reinventing the wheel every time.
- Compared with other jurisdictions, the success rate in the USM process is exceptionally low, while the number of judicial reviews of USM claims are exceptionally high. (e.g. even Yemini cases are rejected when UNHCR recommends that NO Yeminis should be returned to their countries given the risk to their lives). It is our view that this indicates potential bias/ procedural unfairness/ inadequate training of decision makers. Against this background, it places a higher burden on claimants and legal representatives to provide more comprehensive and detailed submissions to decision makers, such as the relevant legal tests in the assessment of claims.

All of the above points to clear reasons why it would be highly dangerous and unfair to require claimants to finalize claim forms within an unreasonably short time. The current 28 days was provided contrary to the Law Society and the Bar Association's recommendation of 90 days. This is tempered by the present agreement to extend the time to 49 days. Should this be further tightened there is a strong chance that it would render the procedure unlawful and contrary to "high standards of fairness".

In any event, it should be repeated that this length of time is negligible when compared to the length of time Immigration officers take to reach a decision on a matter or the length of time claimants have to wait for a hearing after the submission of their appeals (often over 1 year in our experience), let alone the time claimants have to wait after hearings for the handing down of decisions.

Other proposals

The above already provides the background as to how other proposals should be measured. But for good measure we highlight a few observations.

1. Submission of evidence

   SB's proposals assume that a claimant would have a clear knowledge of the existence of what evidence may become available to support his/her claim. In reality this is not the case. Claimants often have to go through a digging exercise to find or obtain evidence that may support their claim – often the existence of such evidence would not initially be within the claimant's knowledge. If such evidence is obviously relevant or important to the determination of a claim, Immigration should not be able to rely on a procedural point to exclude considering such material. Doing so would be contrary to basic fairness, let alone high standards.

2. Arrangements of interviews

   Currently, Immigration already requires claimants who do not attend an interview to submit medical certificates or show proof why they failed to attend. Failure to do so mean that Immigration could reach a decision without arranging a further interview. It appears that these measures are effective and cannot see the need for over-

prescription in legislation which may result in absurd situations risking further necessary litigation. To justify such proposals, SB should show detailed evidence to elaborate on why they are necessary.

3. Medical examination

Again, if a claimant fails to attend an examination, Immigration is entitled to make a decision based on existing information should it consider that it is fair to do so. Any claimant who disagrees with such a decision can seek an appeal. Legislators should hesitate to intervene on this sensitive issue given that it involves mental illness and difficulties may vary on a case-by-case basis. Over-prescription of legislation on this topic should be avoided, again as it may result in absurd situations risking further necessary litigation.

4. Time for appeal

Again, given the limitations in the Hong Kong jurisdiction mentioned above, this is highly unreasonable. In particular, one should take into account that it normally takes several days for a decision to reach a claimant.

On the late appeal issue, we strongly query the legal basis for deleting the provision that TCAB could consider matters of fact. It is well established in civil and administrative law that anxious scrutiny is required when the matter involved fundamental human rights. For example, if a case involves a Jew in Nazi Germany who clearly fears torture, it would be clearly unreasonable for an appeal to be dismissed without TCAB having the opportunity to understand the context of the application.

On shortening the time of preparation for an appeal, again it is not justified and contrary to high standards of fairness.

5. Removal procedures

It is outright absurd for SB to make a proposal to arrange repatriation while an appeal is ongoing. The obvious reason for this is that repatriation arrangements usually involves contacting a claimant's embassy/consulate for verification of identity etc. Such a contact would expose the claimant to risks to their security and violates international law which requires our authorities to protect all potential and actual refugees/successful USM claimants. Such protections cannot be watered-down for the sake of administrative convenient, and such an action would certainly be liable to judicial reviews.

6. Firearms in Immigration Detention

First, we query why CIC is managed by Immigration and not Customs & Excise Department. Immigration is in a conflicted position as it seeks to remove/deport detained persons while on the other hand securing their rights as detained persons. It is not coincidence that tensions in CIC have risen given Immigration took over care of CIC, replacing C&E. This arrangement should be reviewed. Further, this proposal is alarming and puts into question why officers working in immigration detention should require firearms and officers working in C&E facilities do not. This is a highly dangerous proposal and much more inquiry should be made about the matter.

<u>Other queries:</u>

SB refers to a comprehensive review – who did that? Shouldn't it be independent? It appears they did not consult the relevant stakeholders such as Law Society or Bar Association.
Para 2 of SB Paper – query the rationale behind separating behind distinguishing non-ethnic Chinese illegal immigration and *non-refoulement* claims from those who are ethnic-Chinese.

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