

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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By Post

8 October 2018

Panel on Security
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Miss Betty MA)

Dear Betty,

Panel on Security of the Legislative Council

Questions raised by the Hon Dennis Kwok regarding Agenda Item III: An update of the comprehensive review of the strategy of handling non-refoulement claims of the meeting on 10.7.2018

I write in response to the comments and questions raised by Daly, Ho & Associates in LC Paper No. CB(2)1800/17-18(01), titled “Note of Advice – Working Draft Re: Proposals by the Security Bureau to Amend the Immigration Ordinance” (“**the Note**”) presented by the Hon Dennis Kwok at the captioned meeting.

2. First of all, the Government is fully aware that procedures to screen non-refoulement claims should meet with the “high standards of fairness” required by the Court of Final Appeal. The current proposals to amend the Immigration Ordinance (Cap. 115) in order to improve the screening procedures were therefore prepared bearing in mind this important principle.

Factors contributing to delays in screening before

3. The assertion in paragraph 1 of the Note that “*the main hold-up has been in the slowness of decision-making rather than delays from claimants*” is unfounded and not supported by any evidence. As reported before, the significant drop in the number of claims pending screening by the Immigration Department (“**ImmD**”) from over 11 000 (at the peak in early 2016) to the current backlog of below 2 000 claims is mainly attributable to the following key developments since we commenced the comprehensive review of the strategy of handling non-refoulement claims (“**comprehensive review**”) in early 2016 –

- (a) significant **decrease in the number of new claims** by 80%, following various very effective measures preventing potential claimants from entering Hong Kong, including the joint operations with Mainland authorities to combat the smuggling of non-ethnic Chinese illegal immigrants into Hong Kong, enactment of the Immigration (Unauthorized Entrants) (Amendment) Order 2016, and other arrival prevention measures including the pre-arrival registration requirement on visitors from India; and
- (b) significant **increase in the capacity of publicly-funded legal assistance (“PFLA”)** by over 75% following implementation of the Pilot Scheme for Provision of PFLA for Non-refoulement Claimants (“**Pilot Scheme**”) in 2017, allowing ImmD to increase the number of claims to commence screening from 10 to 23 per day (i.e. an annual total of over 5 000 claims).

Period for returning a claim form

4. It is opined in the Note that timelines in other jurisdictions may not always be useful as reference given Hong Kong’s “unique circumstances”. Our response on these specific comments are as follows.

Availability of interpreters

5. There is no evidence to show that delays in screening in the past were caused by a lack of interpreters. In fact, the 22 in-house interpreters

(and translators) posts created on non-civil service contract terms in ImmD to provide language support in Hindi, Urdu, Bengali, Punjabi, Indonesian and Vietnamese are already sufficient to serve over 80% of all the claimants, given that the overwhelming majority of the claimants are from Vietnam, India, Pakistan, Indonesia or Bangladesh. All these in-house interpreters are on par with their counterparts serving in courts for the Judiciary in terms of qualification requirement. When necessary, ImmD will also hire, on a case-by-case basis, part-time non-government interpreters from the pool of over 280 interpreters registered with the Judiciary to ensure provision of adequate interpretation service, for example in cases involving claimants from Africa. In 2018, record shows that less than 1% of screening interviews had to be rescheduled or postponed due to unavailable interpreters.

6. We have repeatedly suggested to the Duty Lawyer Service (“DLS”) since December 2014 to follow suit to recruit in-house interpreters. After rounds of discussion, in November 2016, DLS accepted the suggestion and agreed to exploring the employment of in-house interpreters. In June 2017, DLS proposed to recruit 14 full-time in-house interpreters. Nevertheless, no interpreter was recruited eventually as the need for doing so has been overtaken given the decreasing number of new claims.

Detention

7. In the first bullet on page 2 of the Note, it is said that “*many USM claimants are detained in Hong Kong.*” This is plainly untrue. In fact, only less than 1% of all the claimants pending screening or appeal in Hong Kong are detained at present.

8. All detainees are properly treated pursuant to the Immigration (Treatment of Detainees) Order (Cap.115E). Under the current arrangements, all persons detained in the Castle Peak Bay Immigration Centre (“CIC”) may attend meetings with their legal adviser. Detainees may also make phone calls or write to their legal adviser as long as these are within reasonable time and without affecting the execution of detention.

Publication of decisions

9. Whether a non-refoulement claim is to be substantiated depends on the particular facts and merits of a claim. If, based on the grounds of the

claim and the facts in support of the claim submitted by the claimant and other relevant information available, there are substantial grounds for believing that the claimant would be in danger of being subjected to such risks as torture, cruel, inhuman or degrading treatment or punishment, etc., then ImmD or Torture Claims Appeal Board (“TCAB”) must accept the non-refoulement claim as substantiated. Otherwise, the claim will be rejected.

10. We disagree that facilitation should be given to claimants such that they may rely on findings arising from facts of other claims to substantiate their own claim. That said, in any event, as reported at the captioned meeting, the Government has been studying the proposal of some that decisions of TCAB should be published. We will update the Legislative Council (“LegCo”) Panel on Security on this in due course.

11. Separately, since the Unified Screening Mechanism (“USM”) has been implemented for more than four years, many lawyers who have been providing support to claimants under the PFLA scheme(s) should have accumulated good experience. We have full confidence that all PFLA lawyers are qualified to do the job, especially considering that they, regardless of whether under the scheme operated by DLS or the Pilot Scheme, have attended relevant dedicated training organised or approved by the Hong Kong Bar Association and/or the Law Society of Hong Kong.

Success rate

12. Under the USM, claimants are provided free legal assistance and interpretation services without limits during screening by ImmD, followed by unrestricted access to appeal before TCAB. These arrangements compare most favourably with those adopted in other common law jurisdictions. There is no credible logic that the longer the time one is allowed to complete a claim form and provide evidence, the higher the chance that a claim would be substantiated. On the contrary, as pointed out before, of all the 16 189 non-refoulement claims made to ImmD between March 2014 and August 2018, over 80% are nationals of countries in South or Southeast Asia. We note that this profile is distinctly different from those seeking protection in Europe. The situation of Hong Kong is better compared with other jurisdictions in the Far East (e.g. Japan and South Korea), where the nationality profile of claimants are similar and with a relatively lower substantiation rate as well.

Deadline for submission of claim form

13. As set out in paragraph 7 of the LegCo Panel Paper (LC Paper No. CB(2)1751/17-18(01)), to alleviate delay and having made reference to overseas practices (e.g. Canada requires the claimant to submit all relevant information and documents at most within 15 days), we consider that the statutory timeframe for submission of claim form should be tightened (e.g. to 14 days) (the current administrative arrangement of allowing 21 additional days for all cases should also be cancelled), with a view to further enhancing the screening efficiency. In any event, as set out in paragraph 8 of the same paper, as in existing practice, claimants may, before the submission deadline, submit a written application to the immigration officer for extending the time to return the claim form. Their application will be considered if they have exercised all due diligence to comply with the original deadline as far as practicable, and that the delay was caused by “exceptional” and “uncontrollable” circumstances. This ensures that claimants will continue to have every reasonable opportunity to state the grounds of the claim and supporting facts, whilst reducing room of procedural abuse.

Submission of evidence

14. As found by the courts in Hong Kong, it is the duty of a claimant to substantiate a non-refoulement claim, and to this end, the claimant must provide to ImmD and (on an appeal) to TCAB all information relevant to the claim and make prompt and full disclosure of all material facts in support of the claim, including any supporting document. At present, it is not prescribed in the Immigration Ordinance how ImmD should handle the situation where a claimant requests to provide documents and evidence after the submission of a claim form or after the expiry of any other period of time specified by an immigration officer. There have been cases where claimants, after returning their claim forms, repeatedly requested deferral of screening interviews on the ground of submitting additional documents and evidence, but did not do so eventually. To address such situations, we are considering adding provisions to require claimants to submit all relevant supporting documents with the claim form.

15. On page 2 of the Note (point 1 under “*Other proposals*”), it is said that “*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*”. We made no such assumption. To ensure that claimants will continue to have every reasonable opportunity to submit available and relevant documents in support of their claim, as already set out in the LegCo Panel Paper, the following procedural safeguards will be in place –

- (a) if a claimant is unable to submit all relevant supporting documents with the claim form, he/she may provide a list stating the outstanding documents that will be submitted later, in which case he/she may submit the listed documents before the first screening interview; and
- (b) if a claimant has exercised all due diligence to comply with the specified deadline, but still could not timely submit the documents due to “exceptional” and “uncontrollable” circumstances, an immigration officer may accept any document not submitted before the specified deadline or listed as an outstanding document as described above.

16. The purpose of the proposed amendments being considered is not to exclude any evidence relying on a procedural point, as claimed in the Note, but instead to ensure that screening would not be delayed by claimants who deliberately withhold evidence. The proposed amendments being considered would give claimants every reasonable opportunity to submit available and relevant documents in support of their claim, whilst reducing room of procedural abuse.

Screening interview and medical examination

17. Since implementation of USM, there were cases for which screening interviews could not be completed as scheduled and had to be re-scheduled, sometimes repeatedly for the same claimant, resulting in serious delays. The most common reasons for delay include claiming to be sick (but often without the relevant medical proof), pending allegedly important documents (but failed to furnish the documents eventually), or

claiming to be mentally unfit to attend the interview (but delaying the medical examination for various reasons).

18. Also, the arrangement of screening interviews could not begin until a claim form was received by ImmD (i.e. some 7 weeks after screening commenced). As arrangement of screening interviews also takes time, before any enhancement measures was put in place, screening interviews were usually held only 13 weeks after a claim form was received by ImmD (i.e. some 20 weeks after screening commenced).

19. Through administrative means, ImmD tightened the requirements for extension of time for submitting claim forms and deferral of interviews to address deliberate delays. The rate of successfully completed screening interviews increased from 61% in 2014 to 79% in 2016, 91% in 2017 and the present 94%. Arrangement of screening interviews was also advanced, significantly shortening the time between submission of claim form and conducting of screening interview. At present, screening interviews are usually conducted within 2 weeks after a claim form is received. In addition, through internal streamlining and optimising manpower deployment, decisions are now issued by immigration officers faster than before. With all these efforts in place, the screening process by ImmD is reduced from an average of 25 weeks before to about 10 weeks now.

20. Given these positive outcomes, we consider it necessary to duly incorporate those effective existing measures into the law in order to prescribe statutory procedures and provide legal basis for USM. This is not “over-prescription of legislation”. With the relevant requirements clearly set out in the statues, any obstruction or delay to the procedures can be tackled more effectively and unnecessary disputes can be avoided.

21. Separately, there were claimants who, alleged to be physically or mentally unfit, applied for extension of time at various stages of the screening procedure, but were absent from the medical examination as arranged by ImmD, or refused to submit the relevant medical reports (especially if they consider the reports not supportive to their claim), or only submitted part of the medical report to ImmD. As a result, ImmD could not decide whether the extension application is justified or not, and the screening process was delayed. Putting in place effective statutory requirements is equally important to achieve effectiveness whilst ensuring “high standards of fairness”.

Considering late appeals

22. Claimants are invariably given explanation on ImmD's decision by his/her lawyer under PFLA. Similar to our proposal on submission of claim form, we consider that the statutory timeframe for lodging an appeal should be tightened (e.g. from the current 14 days to 7 days) as well to ensure overall efficiency in the screening process. TCAB may allow the filing of late appeals if claimants have exercised all due diligence to comply with the original deadline as far as practicable, and that the delay was caused by "exceptional" and "uncontrollable" circumstances.

23. It is currently stipulated in the law that when TCAB considers a late appeal, apart from the claimant's statement of reasons for the late filing, it can take into account "any other relevant matters of fact" within its knowledge. This broad provision allows (or obliges) TCAB, when handling a late appeal, to take into account any matters which do not relate to the reasons for the late filing. We consider that when considering a late appeal, TCAB should only take into account the reasons for and relevant evidence on the late filing, so that late appeals can be handled in a fair and objective manner.

Removal

24. As set out in paragraph 39 of the LegCo Panel Paper, we are considering adding provisions to prescribe that after a claim has been rejected by an immigration officer, the HKSAR Government may liaise with relevant authorities for removal arrangements, but only on the pre-requisite of not disclosing whether the person concerned has filed a claim. Neither the information indicating that the claimant has made a non-refoulement claim nor any information pertaining to his/her claim will be provided to any government of a risk country (unless with the claimant's express consent).

25. We disagree with the description in the Note that the proposal aims to achieve "administrative convenience". Persons not having legal status to remain in Hong Kong, including illegal immigrants, overstayers or persons who have been refused permission to land (including non-refoulement claimants with unsubstantiated claims), are subject to removal from Hong Kong. The proposal aims to safeguard the overall interest of Hong Kong by removing rejected claimants from Hong Kong as soon as possible.

Management of detention facilities

26. Point 6 on page 3 of the Note queried why the CIC is managed by ImmD but not the Customs and Excise Department (“C&ED”).

27. The mission of C&ED includes protecting HKSAR against smuggling, protecting and collecting revenue on dutiable goods, detecting and deterring narcotics trafficking and abuse of narcotic drugs, protecting intellectual property rights, protecting consumer interests, protecting and facilitating legitimate trade and industry and upholding Hong Kong’s trade integrity, and fulfilling international obligations. We fail to understand why the Note would consider that C&ED is in a position to manage CIC.

28. Since April 2010, immigration offenders pending removal from Hong Kong are generally detained at CIC. In recent years, there were a number of indiscipline incidents. For example, in August 2016, there was a large-scale indiscipline incident involving physical confrontation of around 100 detainees; some of the violent detainees were subdued only after the use of pepper spray by immigration staff.

29. Anti-riot equipment is regulated by the Firearms and Ammunition Ordinance (“FAO”) (Cap. 238). Section 3(b) of the FAO empowers officers or members of certain government departments to possess or deal with arms or ammunition on behalf of the Government, but ImmD is not amongst the departments listed in that section. To ensure that ImmD staff working at CIC may perform their duties effectively and to ensure their safety as well as that of detainees, CIC staff must be well equipped. At present, the Commissioner of Police grants exemptions under FAO to applications by ImmD staff deployed to work at CIC on personal and case-by-case basis for possessing firearms and ammunition. This is highly undesirable, as it constrained ImmD’s flexibility in the deployment of staff, which in turn affects the ability of ImmD in handling emergencies. For the same reason, ImmD has not been able to conduct its own training for CIC staff but has been seeking the assistance of the Correctional Services Department (“CSD”) to provide tailor-made training on using anti-riot equipment and relevant refresher courses. This arrangement is undesirable for both ImmD and CSD.

30. We therefore propose amending the FAO (Cap. 238) (and the Weapons Ordinance (Cap. 217) for similar reasons) to authorise ImmD officers to possess firearms and ammunition (e.g. pepper spray), thus

strengthening internal training and deployment flexibility, and further enhancing ImmD's capability in emergency response.

Consultation

31. The Government has maintained communication with various stakeholders (the two legal professional bodies, relevant non-governmental organisations (“NGOs”), etc.) on the comprehensive review, including the screening procedures for claims and other related matters. The LegCo Panel on Security has been briefed on five occasions since February 2016. The LegCo Subcommittee to Follow Up Issues Relating to the USM for Non-refoulement Claims has been looking into relevant matters since its establishment in March 2018. When reviewing the Immigration Ordinance, relevant legal provisions and practices overseas have been taken into account. As mentioned above, we are of the view that the framework of the existing screening process can in general be retained. The proposals for amending the Immigration Ordinance mainly focus on plugging existing loopholes and do not involve major policy changes. Amendment proposals mentioned in the preceding paragraphs and LegCo Panel Paper meet the “high standards of fairness” as required by the Court and enable prompt completion of cases by eliminating deliberate stalling. This will benefit all stakeholders, including claimants, as well as the general public.

32. Our legislative review exercise is still ongoing and we will further brief LegCo regarding other suggestions as soon as possible. Meanwhile, the Government has written to the two legal professional bodies on the amendment proposals of the Immigration Ordinance, and will exchange views with relevant NGOs on the implementation of the comprehensive review and the latest situations.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Billy Woo', written in a cursive style.

(Billy Woo)
for Secretary for Security