The Administration's Response to the Joint Submission of the Law Society and the Bar Association to the LegCo Panel on Security on Legal Representation for CAT Claimants Dated 24.9.2009

Guidelines on the new scheme (Paras. 6 & 7)

1. Allegation that the Administration does not truly appreciate the difficulties faced by claimants, and the heavy burden on the legal practitioner to present the claimant's case.

   There is no basis for such an allegation by the legal professional bodies ("LPBs"). The fact that the Administration is willing to accept the *FB judgment* without lodging any appeal and to revise the torture claim screening mechanism to remedy those systemic flaws as declared by the court to be unlawful together with the negotiations with the Duty Lawyer Service ("DLS") in setting up a publicly-funded legal assistance scheme for torture claimants are clear indications that the Administration has every intention to conduct torture claim screening in accordance with the requirement of high standards of fairness. Indeed, the Administration's concession that there will be no cap on the number of sessions of legal service to be provided by DLS lawyers under the proposed legal assistance scheme has demonstrated the Administration's willingness to accommodate the need of torture claimants and their legal representatives where the particular facts of a case or the issues involved are complicated which would require further advice on the matter.

2. Time permitted for completion of the questionnaire is insufficient.

   The Administration has agreed to extend the time for returning the completed questionnaire from 14 days to **28 days**. We consider that it is a reasonable period that strikes a balance between the need to ensure a claimant is given a reasonable opportunity to establish his case and the requirement for early screening of a case with no undue delay. This is in line with the Canadian practice in that an asylum claimant in Canada will be given 28 days to return the specified form containing the required information in support of his claim for assessment by the relevant authority and is longer than the previous UK practice where a

claimant was given only 10 days to complete a standard form to lodge his asylum claim.

Indeed, the information required to be given in the questionnaire in a torture claim relate to personal information about the claimant himself and factual information about his past experience of having been tortured which a claimant should have personal knowledge thereof; and thus there should not be any difficulty for him to give the required information which is within his own knowledge. Neither is it necessary for a claimant or his legal representative to make data access request etc. for information from authority in Hong Kong before he is in a position to complete the questionnaire. In this respect, the submission that a misplaced word or incorrect statement would cause serious prejudice to a claimant's case as damaging his credibility is misconceived as a case officer is required to take into account all the relevant information of the case which includes objective information e.g. the relevant country of origin information etc. in deciding the credibility issue; and that mistakes made in the questionnaire may always be rectified/clarified at the subsequent interview or by way of supplementary information given in writing.

As regards the difficulties faced by a claimant in obtaining documentary proof, the fact that he has no such proof or is unable to obtain it would not necessarily cause prejudice to his claim given that the authority determining his claim is required to take into account the fact that a claimant who has fled from the country concerned would have few belongings and document with him; and that the authority could not adopt an attitude of sitting back and putting him to strict proof of his claim (CFA in *Prabakar (2004) at paras. 53 & 54*). Where necessary, a claimant may request for an extension for a reasonable period of time to submit any crucial documentary proof which is temporary unavailable.

In any case, given that there is an element of flexibility on the timing to return the completed questionnaire as a case officer may allow for a time extension on justifications (para. 16 of the draft Guidelines), the 28-day period as now allowed by the Administration for returning a questionnaire cannot be said to be grossly inadequate.

3. Prosecutions

Para. 48 of the draft Guidelines states that, "*The claimant must be informed that the information he/she provided will be treated in confidence…… In addition, nothing at all said by the claimant in either the questionnaire or at the interview will be used against the claimant in any subsequent criminal proceedings of any nature save an attempt to pervert the course of justice,* ***and/or making of false reports, etc. to member of Immigration Service****."* The LPB alleges that the prosecution of torture claimant for providing false information is contrary to *FB judgment*.

The CFI in *FB judgment* only dealt with the issue concerning a torture claimant giving incriminating answers in the questionnaire or at the interview in relation to immigration or other offences which he has committed when fleeing from his country e.g. being an overstayer, illegal immigrant etc. in Hong Kong (paras. 147-151 of the judgment). The said judgment does not appear to support a case to condone a torture claimant giving any false information to an immigration officer or the authority when lodging a claim where there is a duty on him to tell the truth and thus the court expressly mentions that the immunity is subject to the exception of "an attempt to pervert the course of justice" (para. 151).

Given the above, notwithstanding that there is no mention of any possible prosecution for making false report or information in the course of making a claim in *FB judgment*, it does not appear to have any objection to warn a claimant of any possible risks of such prosecution if he deliberately gives false information in the screening process where he is expected to tell the truth in the circumstances. Indeed, depending on the circumstances of a case, a claimant's deliberate act to give false report or information to a case officer handling his claim may be one of those facts upon which a prosecution for an attempt to pervert the course of justice may be initiated. Viewed in this light, it could not be said that the giving of any such warning to a claimant is contrary to *FB judgment*.

4. Medical examinations

Paras. 43 & 44 of the Draft Guidelines provide that a case officer may request a torture claimant to undergo medical examination if it appears to him that such may shed light on the credibility of the claim. The CFA in *Prabakar* held that the authority in the screening process should not adopt an attitude of sitting back and that it is appropriate for it to draw attention to matters which obviously require clarification or elaboration so that they could be addressed by the claimant (para. 54 of the judgment). Therefore, it seems that there is nothing wrong with the authority or a case officer in requesting a claimant to undergo a medical examination or submit medical evidence if such is relevant to the claim. On the question of drawing adverse inference (where the claimant refuses to consent to having such medical examination), any such inference may only be made after the claimant is given a chance to explain why consent is not forthcoming in the circumstances. Provided that such a safeguard is in place, it does not seem to have any objection to requesting a claimant to undergo medical examination for the purpose of verifying his claim.

LPBs' submission is effectively made on the basis that a torture claimant has a right to have private medical examination to be conducted at public expenses for the purpose of obtaining evidence in support of his claim. This is not in line with the *Prabakar judgment* as it is clear that the burden of proof is on a claimant to substantiate his claim albeit that the authority should not take an attitude of sitting back and put the claimant to strict proof thereof. While a torture claimant is not prevented from producing his own medical evidence in support of his case e.g. from private practitioners at his own expenses or those offering their service voluntarily, the Administration has no such obligation to pay for expenses incurred by him in having such private medical examination if the examination is not relevant to the decision on the claim, as we should secure that public resources be used reasonably.

Training and Commencement of screening (Paras. 8-11)

5. The Administration appreciates the arrangement of training for duty lawyers initiated by LPBs in ensuring the quality of legal services to torture claimants. It has offered to assist in liaison work with the Office of the United Nations High Commissioner for Refugees (UNHCR)/Office of the High Commissioner for Human Rights (OHCHR) for trainers or logistic arrangements relating to venue and will provide further assistance as appropriate.

6. We agree that lawyers acting for torture claimants should be competent to do the work through training or have the relevant experience for undertaking such work. That said, this does not necessarily mean that lawyers must attend the training course conducted by the Academy of Law before they may act for torture claimants. Whether a lawyer is competent to do the work depends on what training he has received or the relevant experience which he has had on the subject whether in Hong Kong or elsewhere. While it would be incumbent upon the Administration to further negotiate with the two professional bodies with a view to securing their blessing to permit a small number of lawyers with the relevant experience to take up the work before the commencement of the training by the Academy of Law in December, it is unfair for the LPBs to say that the Administration is not aware of any lawyers who are able to handle these cases competently without proper training if the training here refers to the training course to be conducted by the Academy of Law. It seems that there are some lawyers in Hong Kong who are competent to do torture claim related work without attending the forthcoming training course e.g. those who have been actively involved in the relevant torture claim litigation cases in Hong Kong etc. Indeed, it does not seem that LPBs may prevent any of their members from acting for a torture claimant (at his own expenses) or to act for him on pro bono basis, except that a member who has no such training or experience may be liable to be disciplined for misconduct if he/she acts negligently in the matter and/or not up to the required professional standard having regard to the strong views expressed by the LPBs that only members with the relevant training or experience are competent to do torture claim related work.

Role of the UNHCR (Paras. 12-16)

7. Given that the Refugee Convention does not apply to Hong Kong, and subject to the outcome of the appeal in "C" (CACV 132/2008) which will soon be heard by the Court of Appeal, the Administration has no obligation to conduct asylum screening in Hong Kong and that refugee matters will remain the responsibility of UNHCR - Hong Kong Office. It remains the Administration's firm policy not to conduct any asylum screening in Hong Kong or to extend the application of the Refugee Convention to Hong Kong.

8. Subject to those procedural safeguards and the requirement of fairness, and also with consent from the claimant, it seems that the "interface" with the UNHCR and use of their materials (in the asylum screening process) by a case officer in CAT screening is permissible in those circumstances as sanctioned by the CFA in *Prabakar (at paras. 56-60 of the judgment)* which is reflected in paras. 41 & 42 of the draft Guidelines. As such, it does not seem that the relevant guidelines are in breach of the requirement of high standards of fairness.

9. Secondment of officers from Immigration Department to work in the UNHCR - Hong Kong Office under the Memorandum of Understanding signed between the HKSARG and the UNHCR is solely for the purpose of staff training. As such, the fact that government officers are seconded to work in UNHCR - Hong Kong Office should not be taken as a factor which will undermine the Administration's position that the HKSARG will not conduct asylum screening as it has no such obligation to do so.

Fees (Paras. 17-22)

10. The LPBs' submission is focused on the contention that remuneration paid to lawyers doing torture claim related work should be sufficient to attract lawyers of the calibre and experience that is needed to competently handle the claims and that a comparison with overseas rates is unrealistic as Hong Kong practitioners have higher overheads costs.

11. Nevertheless, we consider that the adoption of the current duty lawyer rate (i.e. around $677 per hour) is appropriate based on the following reasons:-

    The legal assistance is available to virtually all torture claimants, whether or not their claims involve legal issues or facts disputed. The assistance to be provided in the screening process is not of the same nature as litigation work in High Court/District Court cases.

    Having due regard to the views of the LPBs as well as DLS, the Administration has stretched reasonable flexibility and accepted the suggestion from the profession that no cap should be imposed on the number of sessions for a case, which will duly take into account the individual circumstances. In this regard, the package proposed by the Administration compares favourably to the remuneration in other countries for lawyers assisting asylum seekers.

    The proposed fee rates have been endorsed by the DLS Council after full deliberations and its meeting with legal profession.

    The arrangements are made under a pilot scheme, which will last for 12 months. A review will be conducted to make necessary adjustments in the light of practical experience. The fees may be reviewed in that context, including the issue about sufficient attraction for lawyers with relevant qualifications to provide service as highlighted by the legal profession.

12. Basing on the existing duty lawyer rates and the proposed scope of assistance agreed by the LPBs, we estimate that the legal cost alone to assist a torture claimant in making their case up to the petition stage is in the region of $51,000 for a simple case (apart from other incidental expenses, e.g. interpreter's cost and translation). Bearing in mind the current influx of 300 new claims per month and we have over 5 600 cases pending determination as at end August 2009, the proposed adoption of duty lawyer rate would already pose a great financial burden to the public purse. If the rates for civil cases (ranging from $1,600 to $4,000 per hour depending on the years of practice) proposed by the LPBs are to be applied, the legal cost would shoot up

to $120,000-$300,000 per case, which we believe, will not be viable and sustainable in the long term.

13. Last but not least, for meritorious cases, claimants who have been refused at the petition stage will still be able to put forward their cases to the court through judicial review. Civil litigation fee rates ($1,600-$4,000 per hour) will be applicable upon granting of legal aid.

Security Bureau
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