香港特別行政區政府
保安局

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Hong Kong Special Administrative Region
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香港中區
立法會綜合大樓
立法會秘書處
議會事務部
首席議會秘書 2
湯李燕屏女士

湯女士：

2011 年入境(修訂)條例草案：
過渡性條文

香港律師會及香港大律師公會於 2012 年 5 月 21 日就過渡性條文提交的聯合意見書（下稱「意見書」），我們的回應如下。

2. 正如我們較早前向法案委員會解釋，過渡性條文獲通過後，倘若審裁員在經改進的行政機制下所作的決定有違程序公義，有關人士仍可向法院申請司法覆核。現行行政機制下作的所有決定，均須達至審核酷刑聲請所須的高度公平標準。我們留意到，兩個法律專業團體並沒有在意見書中就此理解提出異議（見意見書第 2 及 6 段）。

3. 行政機制及法定機制下的審核程序基本一致。單純因爲法定機制可在程序上提供更進一步的保障，並不代表現行機制對聲請人的保護不足或無效。以處理呈請的審裁員（或上訴委員會委員）的人數爲例（見意見書第 4 段），《禁止酷刑公約》並沒有就處理酷刑聲請或相關呈請的審裁員的人數作出規定。單純因爲某一呈請由一名審裁員（或上訴委員會一名委員）處理，並不代表有關程序「較不公平」。

4. 目前，所有處理呈請的審裁員均爲前法官或裁判官，他們均符合將來成立的上訴委員會委員的資歷要求。就意見書第 5 段，我們不認

爲有需要將呈請個案在法定機制下重新處理，我們亦不同意應假定現有審裁員在法定機制下不會被重新委任。

5. 最近的司法覆核案中，法院對經改進的審核機制不同環節是否合乎法律要求予以肯定。最近，法院於 2012 年 5 月 9 日拒絕一宗以未有就呈請進行聆訊爲理由，要求推翻審裁員駁回呈請的司法覆核申請(*Marcelo De Vera Centeno 訴入境處處長* HCAL 50/2012)的裁決（見附件）中，指出機制合乎法律要求[1]。

6. 意見書第 8 至 12 段提及有關上訴程序的事宜。就是否必須就上訴進行聆訊，法院於 *FB v 訴入境處處長* HCAL 51/2007 的裁決中已清楚指出，並非每一宗呈請均須進行聆訊，有關決定須由審裁員在考慮個別個案情況後作出。上文第 5 段提及的裁決中，法院重申，是否進行聆訊應由審裁員按行事守則中所定的標準作決定[2]。現行做法符合有關要求。

7. 再者，在行政機制下，視乎個案情況，審裁員可要求聲請人或入境處呈交新的證據。在法定機制下將繼續此安排。

8. 其實，海外國家亦有相類似的過渡性條文，確保有關審核機制的法律變更後，機制可繼續暢順運作。例如，英國於 2005 年修改 the Immigration and Asylum Appeals (Procedure) Rules 2003，訂立新的條文以取代既有規定時，亦規定於原有機制下所作的決定，在新的機制下繼續有效，猶如在新機制下所作出的決定一樣。

9. 我們建議的過渡性條文可確保《條例草案》通過並生效後，酷刑聲請人的權益受到法定審核機制所保障，所有聲請可按法定機制的程序公平、有效處理，並減少濫用程序。我們小心及詳細地考慮了法律專業在意見書內表達的意見，但如上文所解釋，我們認爲無需再就過渡性條文內容提出進一步修訂。

保安局局長

（周永恒 代行）

二零一二年五月二十二日

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[1] "in my judgment, the system is in accordance with the law." (裁決第 15 段)

[2] "... the matter (of whether to conduct an oral hearing) is in the hands of the adjudicator, and the adjudicator is to make a decision as to whether there should be an oral hearing by reference to the criteria set out in these paragraphs." (裁決第 14 段)

副本抄送：

香港律師會及香港大律師公會《禁止酷刑公約》聯合工作小組
（經辦人：黃淑玲女士）

法案委員會高級助理法律顧問　馮秀娟女士

附件

HCAL 50/2012

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 50 OF 2012

IN THE MATTER of an application by Mr Marcelo De Vera Centeno (the Applicant) for leave to apply for judicial review (Order 53, rule 3(2))

and

IN THE MATTER of the written determination made by the Director of Immigration on 31 October 2011 refusing the Applicant's claim under the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

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BETWEEN

MARCELO DE VERA CENTENO Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before: Hon Lam J in Court
Date of Hearing: 9 May 2012
Date of Judgment: 9 May 2012

JUDGMENT

1. In this matter, the applicant seeks leave for judicial review to challenge a decision of the adjudicator made on the petition of the applicant in respect of a decision of the Director of Immigration under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. On 30 November 2011, the adjudicator, having considered the matter on paper, dismissed the petition. In the written decision, the adjudicator set out her reasons for dismissing the petition. In essence, the adjudicator came to these conclusions. First, there is no official involvement or acquiescence to the matters which the applicant said to give rise to a risk of being subject to pain and suffering. As such, the matters relied upon by the applicant do not come within the definition of torture under the Convention. The second major finding of the adjudicator was that there was no real or foreseeable risk of personal violence on the applicant.

3. The adjudicator came to those findings on the assumption that what the applicant said to have happened was true. The adjudicator also took into account of the applicant's complaint that there were some police mishandling of the matter after his brother-in-law was killed. This is apparent from paragraph 37 and paragraph 38 of the decision.

4. In support of his application the applicant has filed with the court a document which purports to be his affidavit although it has not been signed by him. I was told today that this document was prepared by a solicitor on his behalf and it set out all he wishes to rely upon in support of his application for judicial review.

5. In the Form 86 itself, the applicant did not set out any grounds for seeking relief. Bearing in mind that the applicant acts in person, I am prepared to treat what he said in this draft affidavit as setting out his grounds.

6. In his affidavit he basically repeats his story. But in paragraphs 27 and 28 he raised a point about procedural fairness. He said that the procedure for processing his torture claim was flawed because he was not given the chance of an oral hearing. That is not quite correct insofar as one refers to the proceedings before the Immigration Department. He had been interviewed by officials from the Immigration Department. But it is correct that as far as the petition is concerned, the adjudicator did not direct any oral hearing.

7. At today's hearing before this court, again the applicant repeated his story about the events in the Philippines. He placed emphasis on the fact that the police kicked him before taking away the corpse and also that during the autopsy, the police told him not to get involved in the matter. He also told me that the killer was tried and was sentenced to gaol for 6 years. The killer has now been released, having served his sentence. The applicant said the killer has gone to his home to look for him after he was released. The applicant has also told me that he

was blamed by his wife's family for the death of the brother-in-law because he did not do anything to help him when he was attacked.

8. As I said in the course of the hearing, the purpose of judicial review is not for this court to reopen the matter and hear evidence and deal with the matter afresh. In the exercise of its supervisory jurisdiction, the court in a judicial review is to examine whether the adjudicator, in dismissing the petition, has made any error of law or handled the matter without compliance with the high standard of fairness as required by the law. The high standard of fairness has been explained by the Court of Final Appeal in the case of *Secretary for Security v Prabaker* [2004] 7 HKCFAR 187.

9. As far as the reasoning of the adjudicator is concerned, having considered the matter with regard to the submissions of the applicant, subjecting it to the high degree of scrutiny, I do not think she has made any error in coming to those two essential findings. She has given sufficient reasons for coming to those findings which are rational and sound.

10. The real question that I have to consider is the applicant's complaint of lack of oral hearing before the adjudicator. A similar complaint has been considered by Saunders J in the case *FB v Director of Immigration* [2009] 2 HKLRD 346. On the facts of that particular case, Saunders J concluded that the system was unfair. But it is important to note His Lordship said at paragraph 216 in that judgment that it does not follow from his conclusion that every petition requires an oral hearing or the petitioner being represented at the hearing:

> "It may be necessary for the Secretary in each case to have regard to the appropriate relevant considerations and to make an appropriate determination."

11. On the facts of that case, one of the important issues is credibility. That is why Saunders J said at paragraph 217:

> "To deny him an oral hearing in those circumstances was unfair."

12. After the decision of *FB v Director of Immigration* a new practice has been implemented. In the latest version of the Notes for Adjudicators for handling petitions, there is a section dealing with oral hearings. Paragraph 11.1 says:

> "The adjudicator assigned to handle a petition shall review the case based on available information and decide whether to conduct an oral hearing or whether the petition is to be handled by means of a paper review. An oral hearing may be dispensed with where the adjudicator is satisfied that the petition can be justly determined on the papers. In deciding whether an oral hearing is needed, the adjudicator will take into account the circumstances of the case, including but not limited to considerations that all relevant evidence has been presented, and the determination of the facts shall be based on clear and cogent reasons."

13. Paragraph 11.2 refers to some matters which normally suggest there should be oral hearing. The matters are as follows:

(a) there are credibility issues crucial to the decision of the petition which were not adequately addressed during the interviews or supported in the assessment by the Director;

(b) new evidence is raised in the petition stage that is relevant to the decision, including any change in condition in the claimant's country of origin, and clarification via

correspondence is inexpedient or insufficient, and that holding of an oral hearing is therefore required;

(c) an apparent breach of procedural requirement has occurred which could have limited the ability of the claimant to establish his claim, for example, inadequate interpretation, denial of the opportunity to present relevant evidence.

14. Therefore, as a matter of procedural design for dealing with petitions, there are provisions for oral hearing. But the matter is in the hands of the adjudicator, and the adjudicator is to make a decision as to whether there should be an oral hearing by reference to the criteria set out in these paragraphs.

15. In my judgment, the system is in accordance with the law. One has to remember that the decision of the Director as well as that of the adjudicator are administrative decisions. In the context of administrative decisions, under the common law there is no absolute right to oral hearing. The leading case is *Lloyd v McMahon* [1987] AC 625. At page 702, Lord Bridge said as follows:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the right of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguard as will ensure the attainment of fairness."

16. In the case of *R v Army Board of the Defence Council ex parte Anderson* [1992] QB 169 at 187, Lord Justice Taylor also discussed the relevant principles. He said as follows:

> "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to the task, it is for them to decide how they will proceed, and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing."

17. I myself have applied these principles in the case of *Liu Pik Han v Hong Kong Federation of Insurers Appeal Tribunal* HCAL50/2005 11 July 2005. At paragraph 1(iii) in that judgment, I said:

> "From the authorities it is clear that there is no absolute rule that a tribunal must give a party an oral hearing in order to satisfy the requirement of Article 10. Where the submissions of the parties do not raise any issue of fact or of law which were of such a nature as to require an oral hearing for their disposition, oral hearing could be dispensed with. However, as observed by Permanent Judge Ribeiro, when there are disputes of facts, especially when the resolution of such disputes may hinge on one's impression as to the credibility of a witness or a party, a fair hearing within the meaning of Article 10 involves an oral hearing being held."

18. Recently I have applied these principles in the case of *Au Hing Sik Charles v Commissioner of Police* HCAL74/2010, a decision on 20 December 2011.

19. These principles apply equally in the context of petition against decisions on the Convention against Torture. In my judgment, they are consistent with the high standard of fairness required under *Prabaker*.

20. Applying these principles to the present case, we have to examine what were in issue in the petition. Miss Choi has produced to this court a copy of the petition of the applicant and it was this petition that the adjudicator had to deal with. The adjudicator had to ask herself in the light of the issue raised in this petition whether, applying the criteria set out in the Notes, there should be an oral hearing.

21. The petition basically reiterated some matters of fact which had already been set out in the decision of the Director of Immigration. Again, the applicant laid emphasis on his being kicked at the chest by police officers. He suggested there was police involvement in the matter and he made the point that he feared that somebody might kill him if he were sent back to the Philippines.

22. As I have said, the adjudicator proceeded to deal with the matter on the assumption that the version of the applicant was truthful. As such, there is no issue of fact, nor is there any conflict of evidence. The crucial issues are whether, on the facts as presented by the applicant, the requirement under the Convention with regard to torture has been satisfied. It is a matter of judgment in evaluating the risk based on the applicant's story.

23. Applying the principle of law set out in the Convention and the cases, the petition did not raise any complicated issues which require elaboration in an oral hearing. Nor was there any introduction of new evidence. Neither was there any suggestion that there was any procedural unfairness which prevented the applicant from presenting his story and his case adequately before the Director of Immigration.

24. In these circumstances, I do not think it is reasonably arguable that the adjudicator's decision not to hold any oral hearing is wrong in law. Therefore, I cannot be satisfied that this is a proper case where the matters raised by the applicant are reasonably arguable or that his intended judicial review enjoyed a realistic prospect of success.

25. I therefore refuse leave.

(M H Lam)
Judge of the Court of First Instance
High Court

Applicant in person

Miss Bethany Choi, SGC of the Department of Justice, for the Respondent