THE LAW SOCIETY OF HONG KONG 香港律師會

IMMIGRATION (AMENDMENT) BILL 2011
Proposed Schedule 4

Joint Submissions of the Law Society and Bar Association

1. The Joint Working Group on CAT (JWG) has noted the Bills Committee's discussion on the proposed Schedule 4, and has the following submissions.

Schedule 4 – Transitional Provisions

2. The Administration has operated an administrative scheme for so long (and been criticized for not introducing comprehensive legislation to deal with screening and ancillary matters) and by the transitional provisions it may now be seeking to shield from review and legitimize decisions made under that administrative scheme.

Section 2(4) of the Schedule

3. This provision in essence deems a decision rejecting a claim under the administrative scheme as a decision made under the new legislation, where such decision had been rejected on petition under the present "enhanced" screening. The transitional provisions are unacceptable insofar as the Bill may provide greater protection and higher standards of fairness than does the present screening system.

4. One example of the potentially greater protection is the possibility that "having regard to the circumstances of a particular appeal", the Chairperson of the Torture Claims Appeal Board may direct an appeal to be heard by 3 persons instead of 1: see section 6(2) of Schedule 1A. The present administrative scheme does not allow for a multi-Adjudicator hearing of a petition. There may be other differences between the procedure of the Board and the procedure currently in place for the petition process which may be properly described as fairer or at least potentially fairer than the present system.

Section 5 of the Schedule

5. The JWG considers that section 5 is also suspect since it clothes the petition process as if it were an appeal under Part VIIC. Thus one can have a petition continued to be heard after the commencement date by an Adjudicator who is not appointed as a member of the Appeal Board. The deemed operation of section 2(5) of Schedule 1A in section 5(1)(b)(ii) of Schedule 4 does not appear to achieve what it might have been intended to do. The better way may be to reconstitute all petitions as appeals to commence afresh. As a consequence, item 9 of the Table of Schedule 4 may require amendment.

Section 6 of the Schedule

6. This would not shield any decision from attack where it is procedurally flawed or irrational or reviewable for any other reasons. Nor would it assist if it is shown that the process adopted in the administrative scheme does not include an element which is featured in the Bill, such as the example cited in paragraph 4 above.

7. Further, although the presence of an additional safeguard under the legislative scheme would not thereby mean that a pre-enactment decision had been arrived at under an unfair process, such a provision may well indicate that the high standards of procedural fairness were not present in that decision. It is notable that much of the procedural steps have counterparts in those presently adopted by the Director of Immigration and on petition, deliberately so, but there are substantive differences. A line by line comparison is not possible in these short comments, but this is the level of scrutiny the transitional provisions call for.

The Appeal Process

8. The JWG is aware of cases where the Adjudicator has noted a claimant's failure to provide evidence at first tier and decided not to hold an oral hearing or make any further enquiries of the applicant and simply proceeded to dismiss the petition for want of evidence.

9. It is essential that the second tier is a truly fresh consideration of the claim, as it has been hitherto, and as it is in all other advanced common-law jurisdictions, including the Upper Tribunal (Immigration and Asylum Chamber) in England. The nature of the matter requires there be proper consideration of all the materials and the claim at the second tier. This is not an appeal in the sense that term and title is applied in the Courts.

10. The essential feature of the proposed legislation is the absence of a clearly spelt-out requirement for an oral hearing or interview at the second tier (Appeal Board) stage. An applicant may have had all kinds of problems at first-tier which were not appreciated or allowed for by his interlocutor (including but not limited to the time limits imposed by the statutory timetable for the first tier process for each and every case) and which may have led to an error in the decision.

11. Such a provision may fairly provide for certain limited exceptions such as where the applicant is repeatedly guilty of culpable failure (i.e. without a reasonable excuse) to present his claim to that second-tier tribunal.

12. A similar failure at first tier does not relieve the second-tier decision maker of the duty to inquire and the legislation should address and emphasize this duty.

The Law Society of Hong Kong and the Hong Kong Bar Association
21 May 2012
843408