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**Paper for the House Committee Meeting
on 7 October 2011**

**Legal Service Division Report on
Immigration (Amendment) Bill 2011**

I. SUMMARY

- 1. Objects of the Bill** To provide for a statutory framework for determining claims made by persons in Hong Kong for protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment against expulsion, return or extradition of the claimant to countries in which they would be in danger of being subjected to torture.
- 2. Comments**

 - (a) A new Part VIIC is to be added to the Immigration Ordinance (Cap. 115) to provide for a statutory mechanism for determining torture claims.
 - (b) A board known as the "Torture Claims Appeal Board" will be established to hear and determine appeals against decisions to reject a torture claim and to revoke a decision accepting a torture claim as substantiated.
 - (c) Decisions not to re-open a torture claim and not to allow the making of a subsequent torture claim are not reviewable or appealable under the Bill.
 - (d) A claimant who has a substantiated torture claim may be permitted to take employment in exceptional circumstances.
- 3. Public Consultation** No public consultation has been carried out.
- 4. Consultation with LegCo Panel** The Panel on Security was consulted on the legislative proposals at its meetings on 12 April and 5 July 2011. Members expressed various views and concerns on the proposals.
- 5. Conclusion** In the light of the views and concerns expressed at the Security Panel meetings, members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

Objects of the Bill

To amend the Immigration Ordinance (Cap. 115) (the Ordinance) to provide for a statutory mechanism for determining claims made by persons in Hong Kong for protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment against expulsion, return or extradition of the claimant to countries in which they would be in danger of being subjected to torture.

LegCo Brief Reference

2. SBCR 3/2761/09 issued by the Security Bureau on 7 July 2011.

Date of First Reading

3. 13 July 2011.

Background

4. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has been applied to Hong Kong since 1992¹. Article 3 provides that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture (the non-refoulement protection).

5. Torture claims made under Article 3 of CAT have been handled by the Immigration Department according to a set of administrative procedures. These administrative measures have been subject to challenge in courts. In *Secretary for Security v Sakthevel Prabakar*² (*Prakabar*), the Court of Final Appeal held that high standards of fairness must be demanded in the determination of CAT claims as such determination may put a person's life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture. In *FB v Director of*

¹ Since 1 July 1997, CAT has applied to the Hong Kong Special Administrative Region through the People's Republic of China: United Nations Treaty Collection Webpage (2011) *Chapter IV Human Rights, Item 9 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (endnote 6)

《http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#5》 [Accessed September 2011].

² (2004) 7 HKCFAR 187.

*Immigration and Secretary for Security*³, the Court of First Instance, in considering the fairness of the procedures for dealing with torture claimants, held that the Director of Immigration's blanket policy of denying legal representation to torture claimants was unlawful and failed to meet the required high standards of fairness.

6. Following the above court decisions, the Administration has reviewed and revised the administrative screening mechanism for torture claims. According to paragraph 3 of the LegCo Brief, the revised mechanism, which commenced in December 2009, includes the provision of publicly-funded legal assistance to torture claimants through the Duty Lawyer Service, training for decision makers and a new petition procedure involving adjudicators with legal background.

7. At the meeting of the Panel on Security on 6 July 2009, the Administration advised members that it planned to introduce legislation on the screening procedures so that the procedures would be based on clear statutory provisions.

Comments

8. The Bill seeks to amend the Ordinance to provide for a statutory framework for determining torture claims. The proposed statutory framework is set out in the new Part VIIC of the Ordinance (new sections 37U to 37ZW). The main provisions are summarized in the following paragraphs.

Definition of "torture"

9. Under the new section 37U of the Ordinance, "torture" is defined to mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or a third person information of a confession, punishing that person for an act which that person or a third person has committed or is suspected of having committed, intimidating or coercing that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, excluding pain or suffering arising only from, inherent in or incidental to lawful sanctions. It is noted that the proposed definition is the same as the definition of "torture" provided in Article 1 of CAT.

Scope and effect of torture claims

10. Under the Bill, a person may claim non-refoulement protection in Hong Kong only if he meets the two descriptions set out in the proposed section 37W(1).

³ [2009] 2 HKLRD 346.

These descriptions are: (a) the person is subject or liable to removal; and (b) apart from a torture risk State, he does not have a right of abode or right to land in, or right to return to, any other State in which he would be entitled to non-refoulement protection. The effect of this section is that a person who is remaining in Hong Kong lawfully is not allowed to make a torture claim. Under the new section 37W(2), the above descriptions do not apply to a person whose surrender is requested in surrender proceedings.

11. The effect of making a torture claim is provided in the new section 37Z. Under that section, once a person has made a torture claim, he may not be removed from Hong Kong to a torture risk State until his claim has finally been determined as unsubstantiated or until the claim is withdrawn. However, the making of a torture claim will not affect the validity of any removal order or deportation order made against the claimant.

Procedure relating to torture claims

12. For the purposes of making a torture claim under the Bill, a torture claimant, on written request by an immigration officer, is required under the new section 37Y to complete a torture claim form to provide information in support of the claim within 28 days after the written request is given to the claimant. The said period may be extended if an immigration officer is satisfied that by reason of special circumstances it would be unjust not to allow an extension. Failure to return a completed torture claim form will lead to the claim being treated as withdrawn under the new section 37ZG.

13. The new sections 37ZA to 37ZC provide for certain duties and powers in relation to the processing of a torture claim. Section 37ZA provides that the claimant is under a duty to provide to the Director of Immigration (the Director) all relevant information to substantiate the claimant's torture claim. Section 37ZB empowers immigration officers to require claimants to provide information or documentary evidence, or to attend interviews to provide information and answer questions, relating to their claims. Under the new section 37ZC, a claimant may be required to undergo medical examinations if there is any dispute on a claimant's physical or mental condition which is relevant to the consideration of a torture claim.

Consideration of torture claims

14. The new section 37ZD sets out the kinds of behaviour of a claimant that may be considered as damaging the claimant's credibility. These include behaviour designed to conceal information, mislead or obstruct or delay the handling or determination of his torture claim, a failure to take advantage of a reasonable opportunity to claim non-refoulement protection while in a place outside Hong Kong to which CAT applies, and delay in making a claim.

Withdrawal of torture claims

15. The new sections 37ZE, 37ZF and 37ZG of the Ordinance respectively provide for the withdrawal of a torture claim by notice and deemed withdrawal of a torture claim in specified circumstances. A torture claim which is treated as withdrawn on the claimant's departure from Hong Kong cannot be re-opened. In other cases, a claim withdrawn may be re-opened if sufficient evidence is provided by the claimant to satisfy an immigration officer that the claim should be re-opened.

Determination of torture claims

16. Unless a torture claim is withdrawn, an immigration officer is to decide whether to accept the claim as substantiated or reject the claim. Under the new section 37ZI, a torture claim is accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant were removed or surrendered to a torture risk State. A torture claim is to be rejected in the absence of such substantial grounds. A decision accepting a torture claim as substantiated may be revoked under the new section 37ZL.

17. Under the new section 37ZM, a person whose a torture claim was rejected may not subsequently make another torture claim, unless an immigration officer is satisfied that a significant change of circumstances gives the subsequent claim a realistic prospect of success.

Appeal against decisions made in relation to torture claims

18. The new sections 37ZO to 37ZS provide for matters relating to appeals against decisions made by immigration officers in respect of torture claims. Under the Bill, the decisions that may be appealed against are confined to decisions to reject a torture claim and to revoke a decision accepting a torture claim as substantiated. A person aggrieved by such decisions may appeal to the Torture Claims Appeal Board (the Appeal Board) established under the new section 37ZO. Matters relating to membership and procedures of the Appeal Board are provided in the new Schedule 1A to the Ordinance.

19. Other decisions made by immigration officers, including decisions not to re-open a torture claim that has been withdrawn and decisions not to allow the making of a subsequent torture claim, are not appealable under the Bill. Further, under the proposed section 53(8) of the Ordinance, a person aggrieved by these decisions may not lodge objections with the Chief Secretary for Administration. The Legal Service Division will be seeking clarification with the Administration about the justifications for not allowing an aggrieved person to appeal or oppose such

decisions and whether the above proposal could meet the requirement for high standards of fairness in the determination of torture claims as laid down in *Prakabar*.

Permission for claimants of substantiated claims to take employment

20. At present, persons subject or liable to removal are prohibited under the Immigration Ordinance from taking employment. This prohibition has recently been considered by the Court of First Instance which held that the Director should, where there are exceptional circumstances, exercise his discretion to allow a successful torture claimant to work⁴.

21. The Bill seeks to give effect to the above court decision to empower the Director to permit a claimant who has a substantiated claim to take employment or establish or join in a business in exceptional circumstances.

Right to legal representation and provision of legal assistance

22. It is noted that the Bill does not contain any provisions relating to claimants' right to legal representation and the provision of free legal assistance to torture claimants. According to paragraph 21 of the LegCo Brief, the Government will continue to fund legal assistance for claimants under the new statutory mechanism. The Legal Service Division will be seeking clarification with the Administration on the reason for not providing these matters in the Bill.

Offences

23. New offences are proposed under the Bill. Clause 9 amends section 42 of the Ordinance to provide that a person who makes a false statement or representation to an immigration officer in the screening process of a torture claim commits an offence. The proposed maximum penalty for this offence is a fine of \$150,000 and 14 years' imprisonment on conviction on indictment and a fine at level 6 (\$100,000) and two years' imprisonment on summary conviction. The proposed section 43A of the Ordinance provides that a person commits an offence if the person disturbs or otherwise interferes with the proceedings of the Appeal Board. The proposed maximum penalty for this offence is a fine at level 3 (\$10,000) and six months' imprisonment.

⁴ See *Ma v Director of Immigration* (HCAL 10/2010), *GA v Director of Immigration* (HCAL 73/2010), *PA v Director of Immigration* (HCAL 75/2010), *FI v Director of Immigration* (HCAL 81/2010) and *JA v Director of Immigration* (HCAL 83/2010) heard together before the Court of First Instance and judgment given on 6 January 2011.

Other provisions

24. Other provisions in the Bill relate to the power of the Secretary for Security to make regulations for the purposes of torture claim screening and transitional and consequential amendments.

Commencement

25. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

Public Consultation

26. No public consultation exercise has been carried out.

Consultation with LegCo Panel

27. The Panel on Security was consulted on the Administration's legislative proposals at its meetings on 12 April and 5 July 2011. Some members considered that the timeframe for a claimant to provide grounds for the torture claim and supporting documents should not be prescribed by subsidiary legislation. Some opposed the Administration's proposal that certain behaviours of claimants, including those designed to conceal information or mislead or delay the handling of the claim, might be considered as damaging their credibility. They considered that the concealing of information might sometimes be necessary for the purpose of protection of a third party.

Conclusion

28. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In the light of the views and concerns expressed at the meetings of the Security Panel, members may wish to form a Bills Committee to study the Bill in detail.

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