LC Paper No. CB(2)484/13-14(01)

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Comments on the HKSAR Government Announcements on the Introduction of the United Screening Mechanism "USM"

These are necessarily initial comments only in light of the fact that details, including guidelines and procedures of the proposed USM have yet to be released.

On 21 December 2012, the Court of Final Appeal ("CFA") ruled in its judgment in *Ubamaka Edward Wilson v. Secretary for Security* (FACV 15/2011) ("*Ubamaka*") that the rights under Article 3 of the Hong Kong Bill of Rights are non-derogable and absolute and not limited by section 11 of the Hong Kong Bill of Rights Oedinance ("HKBORO"). Therefore where such *non-refoulement* protection is claimed, the Director of Immigration is under a duty to determine whether a person subject to removal faces a genuine risk of being subjected to **torture or other cruel, inhuman or degrading treatment or punishment ("CIDTP")** prior to exercising the power of removal.

On 25 March 2013, the CFA ruled in its judgment in *C & Ors v. Director of Immigration* (FACV 18-20/2011) that the Director must independently determine whether a protection claimant's fear of **persecution** is well-founded prior to exercising the power of removal.

These recent legal developments were preceded by and built upon the CFA ruling in *Sakthevel Prabakar v. Secretary for Security* (2004) 7 HKCFAR 187 ("*Prabakar*") and the Court of First Instance ("CFI") decision in *FB & Ors v. Director of Immigration and Secretary for Security* (HCAL 51/2007) ("*FB*"). The CFA in *Prabakar* made clear that **high standards of fairness** applied to the assessment of claims for protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and that the Director could not rely on decisions made by the United Nations High Commissioner for Refugees ("UNHCR") as determinative of their claim but had to conduct an independent assessment of their torture claim.

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The CFI in *FB* further elaborated what the high standards of fairness required in the assessment of CAT claims in its consideration of the CAT screening system as it was then, and declared unfair and unlawful:-

a) the refusal to allow legal representatives during screening interviews with the immigration officers,
b) failure to provide publicly funded legal representation;
c) the irregularity of the decision-maker being a different person than the interviewing officer;
d) lack of training of decision-makers; and
e) failure to provide for an oral hearing and representation at an oral hearing.

The Court also clarified that **no "magic words" are required to trigger the duty to assess** risk of torture so long as sufficient information is provided to indicate a danger or risk that may fall within the meaning of the Convention against Torture.[1]

Importantly, the cases of *Prabakar*, *FB*, *Ubamaka* and *C & Ors* enabled the Courts to clarify the law in regard to the duties of the Director of Immigration for persons claiming non-refoulement protection prior to their removal. The Director's **obligations are not "new"** in that the Director has always been under a duty to assess in accordance with HKSARG's commitments under, *inter alia*, the CAT and the HKBORO and in the exercise of his statutory powers under the *Immigration Ordinance* ("IO") and in assessing matters going towards life and limb in compliance with the high standards of fairness. The Director's exercise of statutory powers of removal must also, and this has always been the case, be consistent with the Director's policy or practice of non-refoulement of persons to a country where they face a real risk of persecution. In short, the Courts of Hong Kong have not imposed duties upon the Director but rather clarified the scope of duties for which the Director is and has been responsible.

[1] For further analysis of the development of refugee and CAT law in Hong Kong see: Mark Daly's articles in Hong Kong Lawyer "Refugee and CAT law in Hong Kong: an update" (October 2012) ; and Hong Kong Lawyer "Refugee law in Hong Kong: building the legal infrastructure" (September 2009)

In light of the Director's pre-existing duty to independently determine non-refoulement protection claims, we see that (a) the Director has failed to assess potentially thousands of *non-refoulement* claims raised years ago citing danger to life and limb and/or grounds potentially connected to persecution and/or CIDTP and therefore inevitably (b) meritorious torture and/or CIDTP claimants and/or failed refugee claimants (UNHCR determinations) have been unlawfully refouled.

Announcement of the Unified Screening Mechanism "USM"

On 2 July 2013, the Secretary for Security announced that the Government would be assessing claims for non-refoulement protection inclusive of torture, CIDTP and/or persecution under the USM.[2] Key features of the announcement include the following:-

- The USM will operate as an administrative procedure tagged on to the existing CAT screening mechanism under the IO, including possibly 2nd stage appeals to the Torture Claim Appeal Board ("TCAB").

- The Government will not be introducing new or amended legislation to deal with its expanded *non-refoulement* protection obligations at this time in order, *inter alia*, to develop experience in assessing refugee / CIDTP claims.

- The Government recognizes that the decision-makers (immigration officers and TCAB members) as well as the joint profession will require *further* training on CIDTP and persecution issues.

- The timeframe for the implementation of the USM is set for the end of 2013.

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[2] Security Bureau, Panel on Security of the Legislative Council, Screening of Non-refoulement Claims, **LC Paper No. CB(2)1465/12-13(01)** June 2013; Council Business Division 2, Legislative Council Secretariat, Panel on Security Background brief prepared by the Legislative Council Secretariat for the meeting on 2 July 2013 Torture claim screening, **LC Paper No. CB(2)1465/12-13(02)** 27 June 2013

- The Government is engaging in consultations with stakeholders, such as the Duty Lawyer Service ("DLS") and the UNHCR, and is considering public consultations on issues arising on the USM.

- No procedures or guidelines for assessment under the USM are in place yet or published.

- Torture claimants with extant claims should raise their "claims for protection from CIDTP and/or persecution" in the course of the 1st stage immigration screening under the IO, for example during the course of screening interviews.

- Persons claiming *non-refoulement* protection and requesting assessment under the USM will be eligible for publicly funded legal representation in the course of USM screening.

- Refugee status determinations by the UNHCR recognizing persons who are refugees will stand and the HKSARG will not re-asses UNHCR recognized refugees. Persons whose claims for protection with the UNHCR were rejected may have their claims assessed under the USM however weight will be given to UNHCR determinations.

- Social Welfare arrangements currently in place for torture claimants will extend to persons seeking *non-refoulement* protection and assessment under USM.

- The USM is to be an administrative scheme tagged on to the statutory CAT assessment procedure.

The Joint Profession and experts in the field have raised the issue of creating a legislative framework for a unified assessment of *non-refoulement* claims for years. It is only now as a result of the recent CFA judgments in *Ubamaka* and *C & Ors* that the HKSAR is developing the USM.

Treatment of Extant/Ongoing CAT claims – Continued Screening pre-USM

Despite the announcement of the USM proposing that non-refoulement protection claims be dealt with in a single system based on the present statutory torture claim process, the HKSARG has failed to indicate how extant claims will be treated pending the implementation of USM.

To date, there has been no announcement by the HKSARG of a suspension of screening of torture claims under the torture claim statutory mechanism.[3] To our knowledge, the Torture Claim Assessment Section (TCAS) of the Immigration Department continues to screen for "torture" as defined under Art.1 of CAT and refuses to assess claims for protection from return to torture and CIDTP under Art.3 BOR and/or persecution or other humanitarian considerations prior to implementation of the USM. Similarly, the TCAB continues to determine appeals only in regard to the risk of torture under CAT.

It is not surprising that decision-makers are not yet assessing risk of torture and CIDPT under Art.3 BOR or risk of persecution in accordance with the principles set out in Art.33 of the Refugee Convention, as the HKSARG has acknowledged that decision-makers will require further training in order to assess those issues. However, it is troubling that the HKSARG is continuing to assess torture under CAT prior to implementation of the USM given that decisions made on torture claims by TCAS and/or TCAB may be considered relevant and/or material and relied upon by a decision-maker in the subsequent assessment of related claims under the USM to the prejudice of the Claimant.[4]

As the current screening procedures allow for representations to be made only for torture under CAT, Claimants' submissions, representations and evidence is structured to address this definition. Similarly, questions during screening interviews and/or oral hearings are based on the narrow definition of torture under CAT. Claimants have not been advised or given instructions as to how their claims might fall within the definition and scope of risk of CIDTP or persecution.

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[3] Although we are aware of TCAB hearings which have been adjourned.
[4] According to oral submissions made on behalf of the Government in open court on 17 July 2013

The high standards of fairness require, *inter alia*, that the Claimant knows the case to be met and has an opportunity to respond to same, and in claims for *non-refoulement* protection, that claimants have access to legal representation in the course of screening. These basic tenets of fairness are undercut by the Government's apparent transitional practice of pushing forward on torture claims where claimants have not had the benefit of legal advice or representation as to the merits of their other *non-refoulement* claims (CIDTP/persecution), how to advance same and/or how the assessment of their extant torture claim may be subsequently relied upon and potentially prejudicial to the assessment of their other claims under the USM. Further, pushing forward assessments of torture claim, whilst knowing that they have to assess the same claimants under USM, is in every way a waste of time and costs, including costs of lawyers, interpreters and the administrative costs of continuing the present insufficient system.

Ideally, it is hoped that the USM will avoid a multiplicity of proceedings and ensure greater fairness, consistency and finality in *non-refoulement* protection decisions. Decisions made on torture claims prior to USM assessment are liable to challenge in court by way of judicial review. To continue making decisions on torture claims that may be subject to challenge by judicial review and /or may lead to further challenges to decisions made under the USM, for example due to reliance by a decision-maker in the USM on impugned decisions under the present statutory scheme will frustrate the laudable objectives of a comprehensive unified system and may result in duplicative proceedings and an unnecessary waste of resources and public funds.

➔ Recommendation: In keeping with the high standards of fairness required in the assessment of *non-refoulement* protection claims and with the goal of having one assessment procedure for all claims, **current torture claims should be stayed/adjourned pending the implementation of the USM** and decisions made on torture claims under the previous administrative screening mechanism or under the current statutory regime be re-assessed under the USM.

Consideration of old torture claim decisions & UNHCR decisions under USM screening

We understand that the Administration does not intend to re-assess torture claims already determined under the statutory scheme but rather to allow further assessments of Art.3 BOR and persecution issues under the USM. The decision-makers may or may not rely on the decisions made on their torture claims. In short, the previously made decisions are final and, where the torture claim was rejected, may have a prejudicial impact on the assessment of their other *non-refoulement* claims under the USM. For the reasons stated in the preceding paragraphs, reliance on findings made on torture claim decisions in *non-refoulement* assessment under the USM may not be in keeping with the high standards of fairness required.

The Government has indicated that *non-refoulement* assessment under the USM will give "weight to determination conducted by the UNHCR, if any"[5]. This is despite the fact that many claimants will have had their claims assessed by the UNHCR without the benefit of legal advice or representation at all. Additionally, and as implied in the judgment in *Prabakar* and as the joint legal profession has previously noted – the refugee status determination process employed by the UNHCR would not meet the high standards of fairness required by the Courts in Hong Kong and would likely be declared unlawful if subject to the scrutiny of the courts in Hong Kong. In our view, little weight, if any can be given to materials gleaned from an unfair assessment practice by the UNHCR, including decisions, interview transcripts and records, especially where the claimant did not have the benefit of legal representation.

Lack of Comprehensive Legislative Framework

The Government will not be introducing new or amended legislation incorporating its expanded non-refoulement protection obligations at this time. Rather the government will assess Art. 3 BOR risks and persecution risks and/or other humanitarian considerations by way of an administrative procedure (USM) tagged on to the existing CAT statutory screening mechanism.

[5] LC Paper No. CB(2) 1465/12-13(01) at para.11.

The Government has not provided details of how the USM administrative procedure will "fit" with the statutory CAT procedure. We note that a universal claim form will be adopted and screening interviews under the USM will take place along the same lines as under the statutory procedure.

The Government's proposed adoption of the statutory framework as the overarching model for assessment under the USM raises a number of concerns. Pursuant to s.37ZD of the IO, immigration officers and the Appeal Board may make adverse credibility findings based on a failure to raise a claim for protection at the earliest opportunity. Should the Government take the position that requests for CIDTP and/or persecution assessments under the USM are "new claims" for protection this would invite decision-makers to draw an adverse inference as to the claimant's credibility. It seems clear that the Government must apply the ruling in *FB* in the USM context, i.e. that there are no magic words required to trigger the Director's duty to assess provided that sufficient information has been given as to the *non-refoulement* claim. Where persons have lodged claims for protection which the Government has categorized as 'torture claims' and/or sought recognition of their refugee status from the UNHCR, the Director has been made aware that there is a *non-refoulement* claim which falls within the scope of the USM. In short, the Director cannot fault a claimant's credibility for failing to raise a claim for protection earlier where such a claim was indeed raised and it was the fault of the Director that same was not assessed in a timely and fair manner.

➔ Recommendation: Given the potential for adverse credibility findings to be made under s.37ZD of the IO and in accordance with the high standards of fairness, the Director/TCAB should accept that *non-refoulement* protection claim was made at the date of making a claim for protection with UNHCR and/or the first date the Government was notified of a claim for *non-refoulement* protection.

Independence of Decision-Makers (Immigration Officers & TCAB)

For unsuccessful torture claimants (assessed under the existing statutory scheme or previous administrative scheme), the USM purports to allow assessment of only their Art. 3 and/or persecution claims. There will be no re-visiting of the decisions by immigration officers and/or TCAB on their torture claim in the USM process. In the circumstances, it is critical that the Government ensure that the outstanding claims under the USM are assessed by an independent decision-maker and not the same officer or TCAB Member who previously rejected their torture claim. Failure to do so will result in an apprehension of bias in the decision-making process under the USM and be liable to challenge.

Following the announcement of the USM, the courts appear wary to proceed with judicial review challenges to decisions made on torture claims. As a result, many such judicial reviews have been adjourned pending screening of the Applicant under the USM. The rationale appears to be that the Applicant/Claimant will have a broader range of protection under CIDTP and/or persecution grounds and as such, pursuing the judicial review will be rendered academic should his/her other, i.e. non-CAT claims, be accepted. The unfortunate downside to these adjournments is that faulty decisions by TCAB and/or the Director of Immigration remain unchallenged, and without the guidance of the court similarly flawed decision-making is likely to persist in USM. Notably, this area of human rights law remains in its infancy in Hong Kong and as such the guidance of the courts as to interpretation, errors in law and errors of fact are critical.

Consultation with Stakeholders – Joint Profession?

The Administration has indicated that it is engaging in consultations with various stakeholders, including the DLS and the UNHCR.

We are of the view that the **joint legal profession and other independent organizations should be consulted** at the earliest stages as to the proposals for implementing the administrative USM scheme. The joint profession for example, has experience in representation of torture claimants under the previous

administrative and present statutory scheme, in judicial reviews, and in representation of asylum seekers at UNHCR.

The joint profession is in an ideal position to offer expertise in regards to the establishment of the USM to ensure that not only the mechanism, but also the procedures and guidelines for the USM, is in accordance with the required high standards of fairness. The joint profession is also able to contribute towards training for the profession and the Administration, and providing input on mechanisms in place for the provision of legal representation.

Training of Decision-makers

The Administration has acknowledged that training will be required for decision-makers assessing claims for *non-refoulement* protection, including CIDTP and persecution issues under the USM. To date, the Administration has failed to publicly provide further information as to the training that it has already or will conduct. The importance of training the decision-makers cannot be emphasized enough. The legal threshold for persecution and protection from *refoulement* pursuant to Article 33 of the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") requires evaluation of whether a person's life or freedom "would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" and requires an inherently different approach from the test under the CAT. Guidance may be obtained from approaches adopted in other common law jurisdictions however even here there is a certain amount of variation in decision-making. The evaluation of CIDTP claims is an under-developed area in other jurisdictions and may provide only limited guidance. The provision of this information publicly is important as it is necessary for the Legislature to scrutinize the sources of the Administration's expertise – for example, are they arranging training from persons/bodies which would have a strong anti-asylum reputation?

We also note that judicial training may be required given that this is a newly emerging area of law and practice in Hong Kong and hence there is a dearth in Hong Kong case law in regard to refugee and CIDTP law. We note that training

and guidance may be possible from the International Association of Refugee Law Judges.

In the same vein, if legal services to torture claimants are to be provided vis-à-vis the existing Duty Lawyer Service ("DLS") model and lawyers assigned from the current DLS Panel, then additional training is required for DLS panel lawyers.

Publication of Decisions under the Statutory Scheme and USM

Presently, no decisions of TCAB are made available to the public and/or the legal profession by the HKSAR and/or TCAB office.

Notwithstanding the lack of publication of TCAB decisions, it is clear that the Director of Immigration as the Respondent in every appeal will have knowledge of and/or access to all prior decisions of TCAB. We find this incongruity to be unfair and presumptively prejudicial to claimants given that the Director has reference to and/or experiential knowledge of past determinations and factors considered by the Board, for example, as to risk factors considered in the context of a particular country of origin, whereas the Appellant and his/her legal representatives have no such point of reference.

In many jurisdictions, including the UK, Canada and Australia, refugee tribunal decisions are published, with necessary redactions to protect the identity of the claimant, via the appropriate website and/or in hard copy. The purpose of publication of decisions is multi-fold and includes: increasing transparency in decision-making; promoting consistency in the application of legal principles and tests applicable to non-refoulement claims determination and encouraging high quality, fair and well-reasoned decisions. Although not binding on a tribunal, persuasive and/or guideline decisions are also helpful in developing jurisprudence as well as assisting legal representatives and claimants in preparing for proceedings before the tribunal. The same principle applies to dissemination of decisions under the USM.

We understand that the Chairperson of TCAB is considering the matter of publication of decisions however we are not aware of any positive developments in

this regard. We urge TCAB and the Administration to develop a system of publication of decisions prior to the implementation of the USM.

Proactive Steps Need to be Taken to Rectify Flaws in Current System and Proposed USM

From our experience and information obtained in the course of our practice, there are a number of concerns arising from the existing arrangements of the torture claim screening systemFor example the following: -

1. Medical examination procedures/practices – **lack of transparency**

   The process in which Immigration refers claimants to the Department of Health/ Hospital Authority and the information which is provided to them in this process is not made known to claimants or the public. Claimants do not know what questions are put to medical experts in the examinations and have no way to determine whether the process is fair or not. Further, we do not know whether medical experts follow any policies or guidance when conducting examinations, not to mention whether they are fair. The only "comfort" given to claimants is an empty rhetoric that the process accords to high standards of fairness.

2. Medical examination procedures/practices – **lack of experts**

   To our understanding there is currently no female forensic pathologist engaged for the assessment of torture victims. This means that a female torture claimant who has been the victim of sexual torture by a male has no means of obtaining a physical examination unless by a person of the same gender as her perpetrator.

   Further, to our knowledge the Director has significantly delayed the arrangement of psychiatric examinations for claimants requesting assessments of their mental conditions (an important issue as torture victims often suffer from major depression or other conditions). The delay gives rise to a concern that there are either an insufficient number of psychiatrists and/or clinical psychologists with training and/or that arrangements were not fully in place for

referrals to be made. In November 2013, we have for the first time obtained information that a Torture Claim Psychiatric Assessment Service has been set up by the Hospital Authority. However, there is no information available showing when it was set up, what the Service provides, or what expertise it possesses. The lack of such information does not demonstrate fairness. The importance of psychological assessment of torture victims is emphasized in the Istanbul Protocol, including at paragraphs 104, 260 and 261.

➔ Recommendation: We urge legislators to demand disclosure and publication of the policies and arrangements in place for medical examinations, including information on the training of medical experts in the system. We also urge the Administration to provide an assurance that all medical experts have been trained to implement the Istanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an internationally endorsed manual for medical examinations for victims of torture and other CIDTP.

We note that as of early December 2013, the proposed procedures and guidelines under the USM have yet to be released. As part of the joint legal profession, we would welcome the opportunity to engage in consultations in regard to proposals for implementation of the USM along with other stakeholders. We look forward to the timely receipt of further information as to the operational details and procedural guidelines for the USM.

3 December 2013

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