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香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

本函檔號 Our Ref.:

30 May 2014

來函檔號 Your Ref.:

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Dear Messrs Shieh SC and Lam,

Thank you for your letter dated 2 May 2014 which we received on 14 May 2014.

2. The Administration implemented a unified screening mechanism (USM) on 3 March 2014 to assess non-refoulement claims lodged by persons with no right to enter and remain in Hong Kong against expulsion, return or surrender to another country on applicable grounds including risks of torture, cruel, inhuman and degrading treatment or punishment (CIDTP) and persecution. The procedures of the USM, as set out in the guidelines issued by the Immigration Department (ImmD) titled "Determination of Non-refoulement Claims" (the Guideline), follow that of the statutory screening mechanism for torture claims under Part VIIC of the Immigration Ordinance (Cap.115) (the Ordinance) which was enacted taking into account what high standards of fairness require in the screening process. The statutory procedures, on which the USM is modelled, are formulated and passed into legislation after extensive consultation with the relevant stakeholders including the legal profession and close scrutiny by the Legislative Council.

Definition of persecution under the USM

3. The USM does not seek to implement the 1951 Convention relating to the Status of Refugees (the Refugee Convention) (including its definition of refugees). The commencement of the USM does not affect the Government's position that the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong and our firm policy of not determining the refugee status of or granting asylum to anyone. Rather, the USM seeks to provide procedures that meet the high standards of fairness to assess a person's claimed risk of persecution, such "persecution risk" being taken, as a matter of practice / policy, as a relevant humanitarian consideration when the Director of Immigration decides whether to execute a person's removal at a given point of time. "Persecution risk" under the USM is defined taking into account the definition accepted by the Court of Final Appeal (CFA) in *C & Ors v The Director of Immigration* [2013] 4 HKC 563 (*ref.* paragraphs 3 and 63 of the judgment) and with reference to the non-refoulement principles enshrined in Article 33 of the Refugee Convention. The definition of "refugee" under Article 1 of the Refugee Convention is not directly incorporated given that the purpose of the USM is plainly not refugee status determination; that said, it has provided a useful reference in setting out the scope of what amounts to "persecution risks" for which the Director of Immigration, following his ongoing policy, would exercise his discretion to withhold removal of a person who is otherwise liable to be so removed.

4. The CFA accepted in the same judgment that the ImmD might well think it right to insist on refoulement (amid persecution risk) (*ref.* paragraph 42 of the judgment). Paragraph 59 of the Guideline is hence formulated to set out the scope of applicable exceptions under the ImmD's practice / policy regarding refoulement in persecution risk cases, with reference to relevant clauses in the Refugee Convention and having regard to local and overseas jurisprudence.

5. The paramount consideration of the Administration is to screen non-refoulement claims in accordance with the high standards of fairness required by the law. Whether a claimant will be subsequently recognized as a refugee by the UNHCR is not a relevant consideration in determining a non-refoulement claim under the USM. Refugee status determination remains a decision to be made by the UNHCR in accordance with its internal guidelines after a case substantiated on the ground of a persecution risk is referred to it.

The Screening Process

Making a non-refoulement claim

6. A person who seeks to make a non-refoulement claim under the USM is required to provide a written signification that gives a general indication of the reasons for making such a claim. This assists an immigration officer to ascertain whether that person is indeed seeking to make a claim on one (or more) of the applicable grounds for seeking non-refoulement protection to be decided under the USM (as opposed to, say, a person resisting removal on the basis that he has the right of abode in Hong Kong, or that he wishes to remain in Hong Kong for employment or other reasons not related to seeking non-refoulement protection). At this stage, it is not apposite that the Administration be required to provide publicly funded legal assistance: such a person is yet to be identified as a non-refoulement claimant at this stage and the USM is yet to be engaged in respect of him. So far, there is no evidence that the requirement of a written signification has become a threshold barring the making of claims: in the two months since the commencement of the USM on 3 March 2014 to end April 2014, 1 332 persons have made a non-refoulement claim with the ImmD. In any event, there is nothing to bar a person whose claim has been considered not made from putting in another written signification for non-refoulement protection; "safeguard" is hence unnecessary.

7. For the avoidance of doubt, please note that procedures on subsequent claims apply only to a person who seeks to make another non-refoulement claim after his first claim (being a claim that has been made) is rejected.

"Chain refoulement"

8. Under the USM, a person may claim non-refoulement protection in Hong Kong only if – (i) he is subject or liable to removal; and (ii) apart from a 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 the person would be entitled to non-refoulement protection. Accordingly, if a person fears that he would be expelled by a "non-risk state" (say Country A to which he is subject or liable to be removed from Hong Kong) to a "risk state" (say Country B), he may make a claim for non-refoulement protection in Hong Kong against his removal to Country A, with his possible subsequent removal by Country A to Country B as one of the alleged risks arising from his removal to Country A to be assessed under the USM. The ImmD will take into account all relevant considerations in determining the

claim, including the likelihood of subsequent removal to Country B by Country A in the light of, *inter alia*, country conditions of Country A.

Deadline to submit claim form

9. As set out in our letter of 28 February 2014, following detailed discussion with the Duty Lawyer Service (DLS) and in the interest of a smooth rolling out of the USM, the Administration has agreed to the DLS' request that a claimant will generally be issued with the non-refoulement claim form at least 21 days before a formal written request is to be served to require him to return the form within 28 days of such service, thus giving him a total of (at least) 49 days to complete the form to provide the grounds and information to establish his claim under the USM. The arrangement is subject to review one year after the implementation of the USM. Moreover, as at the present, if a claimant considers that, by reason of any special circumstances, he requires more time to complete his claim form, he may apply to the ImmD for an extension prior to the expiry of the relevant time limit.

Other applicable grounds

10. If a claimant considers that non-refoulement protection should be provided on grounds other than torture, CIDTP or persecution risks, he may set out these grounds during the screening process as appropriate (e.g. at Question 52 of the non-refoulement claim form). All applicable grounds will be considered in one go under the USM in determining whether the claimant warrants non-refoulement protection, having regard to the circumstances of the case and applicable jurisprudence and case law. It is in the claimant's best interest for him to set out, during the screening process, all risks that he fears (including all facts and evidence) for the ImmD's assessment of whether non-refoulement protection shall be afforded, rather than seeking to tailor his claim to the specific applicable grounds under the USM.

Medical examination

11. The ImmD may arrange medical examinations, to be conducted by registered medical practitioners from the Department of Health and the Hospital Authority who have received specialized training including that relating to the Istanbul Protocol, for claimants who claim to have a physical or mental condition that is in dispute and is relevant to the consideration of the claim. A claimant may therefore obtain medical evidence under the USM in support of his claim and there is hence no

need for a claimant to separately obtain medical evidence unless he wishes to do so by his own means from other sources, such as private medical practitioners.

Country reports

12. Under the USM, a list of all country information referred to by the ImmD will be appended to the Notice of Decision, which is served on the claimant via the DLS as appropriate. Therefore, the DLS has full knowledge of all country reports relied on by the ImmD in deciding a non-refoulement claim. The case officer will also draw the claimant's attention, at the screening interview or otherwise, to any material discrepancy and/or points calling for explanation or elaboration by the claimant arising from relevant country information considered, thus giving the claimant reasonable opportunities to comment on and/or submit further country information to the case officer before the claim is determined.

Internal Flight Alternative

13. In considering internal flight alternatives, the ImmD will make reference to relevant local and overseas jurisprudence, including the Court of Appeal's most recent decision in *TK v Jenkins & Anor* [2013] 1 HKC 526.

Reference to UNHCR's determination in making decision

14. The CFA has ruled it legitimate for the ImmD to consider information from / determination by the UNHCR so far as the ImmD makes its removal decisions fairly and independently, see §97 of *C & Ors*. In any event, a claimant's express consent will be sought before the ImmD approaches the UNHCR to obtain information relating to his asylum application, including its determination of the application. That the ImmD makes reference to a UNHCR decision as appropriate where it is available does not mean that the ImmD is solely relying on the UNHCR's determination in exercising its statutory power of removal.

Publication of decisions

15. The Administration must observe strict confidentiality requirements in handling non-refoulement claims. Publication of decisions of the Torture Claims Appeal Board (TCAB) (i.e. those made by the TCAB under Part VIIC of the Ordinance or by Adjudicators under the USM) infringes the privacy of the claimants, and, furthermore, may

potentially put the claimants or their families in the Risk State concerned in grave danger. Even if the decisions are anonymized, there is still a risk that the identity of the claimants can be inferred or ascertained based on the facts revealed in the decisions. We therefore have reservation in publishing such decisions. In any event, apart from facts and evidence provided by the claimants, decisions on appeal/petition under the USM are made taking into account all considerations, including relevant jurisprudence and country reports, which are all public information available to claimants and their duty lawyers or legal representatives (if any).

Review of the Guideline

16. The Guideline will be subject to review from time to time, in the light of operational experience of implementing the USM as well as local and overseas jurisprudence.

Ongoing training

17. We certainly agree that ongoing training should be arranged for decision makers and legal representatives to keep them abreast of the latest development in the field as well as local and overseas jurisprudence. In fact, suitable training sessions were arranged for decision makers in the ImmD and the TCAB before commencement of the USM. We also note that both the Bar Association and the Law Society arranged quality training sessions for duty lawyers in February 2014. The Administration continues to stand ready to provide necessary assistance to this end.

18. We trust that the above should help further clarify issues in relation to the USM. Please do not hesitate to contact the undersigned at 2810 2506 should there be further enquiries on the above.

Yours Sincerely,



(Billy Woo)
for Secretary for Security

c.c. Clerk to Panel on Security of the Legislative Council