

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.:

來函檔號 Your Ref.:

28 February 2014

Mr Raymond Leung
Honorary Secretary
Hong Kong Bar Association
LG2 Floor, High Court
38 Queensway
Hong Kong

Dear Mr Leung,

We write in response to your Association's submission dated 14 February 2014.

2. The Administration announced on 7 February 2014 that a unified screening mechanism ("USM"), based on the existing statutory procedures for screening torture claims under Part VIIC of the Immigration Ordinance, Cap. 115 ("the Ordinance"), will commence operation on 3 March 2014 to determine claims for non-refoulement protection ("non-refoulement claims") against expulsion, return or extradition from Hong Kong to another country on applicable grounds including risks of (i) torture under Part VIIC of the Ordinance ("torture risk"); (ii) torture or cruel, inhuman or degrading treatment or punishment under Article 3 of Section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383 ("BOR 3 risk"); and (iii) persecution ("persecution risk") with reference to the non-refoulement principle under Article 33 of the 1951 Convention relating to the Status of Refugees ("the Refugee Convention"). The Legislative Council ("LegCo") Panel on Security has been briefed in July 2013 to this end.

The screening procedures

3. Both the existing statutory screening procedures (including the handling of appeals) and the previous enhanced administrative mechanism were formulated in accordance with the high standards of fairness required by the law and were finalized following extensive consultation with stakeholders (including the legal

profession) and with reference to overseas practice and jurisprudence. That the USM will follow the statutory procedures under Part VIIC of the Ordinance and the practice directions for appeals/petitions will follow the statutory procedures under Part VIIC of and Schedule 1A to the Ordinance will best ensure that high standards of fairness are met in the processing of non-refoulement claims on applicable grounds. This principle was made clear to the LegCo Panel on Security in July 2013 with details set out in the guidelines for the USM, which follow closely the ones for torture claims implemented since December 2012.

4. It is in the interest of all claimants and the public that the USM shall commence operation as soon as practicable in order to allow claimants facing real risks upon removal to another country to substantiate their claims in a timely manner and to fairly and efficiently screen out unmeritorious claims. Legislative amendments to underpin the USM's procedures may be considered after more operational experience of the USM is accumulated. As a matter of fact, the enhanced mechanism for torture claims was also implemented first as an administrative scheme. The underpinning legislation was enacted only after sufficient and useful operational experience was accumulated.

Transitional arrangements

Torture claims not yet determined by the ImmD

5. As foreshadowed in the press statement issued on 7 February 2014, the Immigration Department ("ImmD") has already issued a letter ("the Notification Letter") to each and every claimant who has an ongoing torture claim (i.e. not yet determined by the ImmD) to notify them of the transitional arrangements corresponding to the respective stages of screening of their claims. The transitional arrangements are highlighted at **Annex A** for easy reference. As requirements (e.g. deadlines for returning claim forms) vary depending on the stages of screening or individual circumstances, claimants are reminded to seek advice from their duty lawyer or legal representative(s) **as necessary**. This is a fair and reasonable approach by which claimants are both clearly informed of the next steps in the transitional arrangements regarding their claims as well as reminded of their right to seek independent legal advice if and when they see fit to do so.

6. The main purposes of a briefing session at the beginning of the screening process are to explain to a claimant the screening process, to attend to his special needs (if any), to establish means of contact with him and to refer him to the Duty

Lawyer Service (DLS) to seek publicly-funded legal assistance if necessary, etc. For a claimant whose torture claim is ongoing, the above matters should have already been covered during his previous briefing session held by the ImmD. That said, if a claimant considers it necessary and so requests, the ImmD will arrange a further briefing session (to avoid doubt, these claimants are still required to return the claim form(s) within prescribed deadline(s)).

7. For claimants for whom the processing of their torture claim has not yet begun upon commencement of the USM, they have been informed by the Notification Letter that the ImmD will process their claims under the USM in due course on all applicable grounds.

Torture claims rejected by the ImmD

8. For claimants whose torture claim has been rejected by the ImmD (including those with ongoing appeals or judicial review applications), the Administration notes that the DLS has contacted more than 3 100 such claimants who are still in Hong Kong, out of which around 2 500 have lodged a further non-refoulement claim on grounds other than torture risk with the ImmD. As set out in the Notification Letter, these claims will be screened under the same procedures as those for other non-refoulement claimants under the USM¹.

9. To avoid any unnecessary future arguments over perceived unfairness, non-refoulement claims made by a rejected torture claimant will be determined under the USM by a different immigration officer from the one who has rejected the claimant's torture claim. Information submitted previously by the claimant (since commencement of the previous enhanced administrative mechanism in December 2009) will be taken into account under the USM such that the claimant will not have to recount his experience, which may be traumatic for some claimants, again under the USM. He may however further supplement information for his non-refoulement claim on grounds other than torture risk if he so wishes.

Torture claims appeals

10. For rejected claimants with an ongoing appeal, the Torture Claims Appeal Board ("TCAB") has separately written to all of them on 7 February 2014

¹ The ImmD's previous decision made under section 37ZI of the Ordinance as regards the torture claim will not be affected.

on the transitional arrangements concerning their appeal (see Annex B). As mentioned in paragraph 3 above, the practice directions for appeal/petitions under the USM (available at <http://www.sb.gov.hk/eng/links/tcab>) follow the statutory procedures under Part VIIC of and Schedule 1A to the Ordinance to ensure that high standards of fairness are met.

Time to return the completed claim form(s)

11. Following detailed discussion with the DLS and in the interest of a smooth rolling out of the USM, a claimant will generally be issued with the non-refoulement claim form 21 days before a formal written request is served to require him to return the form within 28 days, giving him a total of 49 days to complete the form to provide grounds and information to substantiate his claim. The arrangement, as agreed with the DLS, is subject to review one year after the implementation of the USM. Moreover, as at 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.

Country reports

12. Country reports considered and relied on by the ImmD in determining non-refoulement claims are and will continue to be made known to a claimant as may be required by the high standards of fairness depending on the circumstances of his case.

Applicable grounds

13. If a claimant considers that non-refoulement protection should be provided on grounds other than torture, BOR 3 or persecution risks, he may set out these grounds in the claim form as appropriate². 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.

² See question 52 of the non-refoulement claim form or the supplementary claim form.

Refugee Convention not applicable

14. The USM is a mechanism for determining non-refoulement claims, i.e. whether removal or deportation of a person from Hong Kong to another country (the putative risk state) should be temporarily withheld. The commencement of the USM does not affect the Administration's position that the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong and our firm policy of not conducting asylum screening and determining the refugee status of or granting asylum to anyone.

15. Following the Court of Final Appeal judgment in the case of *C & Ors v the Director of Immigration* [2013] 4 HKC 563 in March 2013 and the Administration's announcement in July 2013 of the plan to introduce the USM, the United Nations High Commissioner for Refugees ("UNHCR") in Hong Kong decided to cease asylum screening after the commencement of the USM, but will continue its role in securing durable solutions for refugees recognized under its mandate by arranging for their resettlement in a third country. If a non-refoulement claim is substantiated on grounds of persecution risks under the USM³, the ImmD will pass the case to the UNHCR for consideration of refugee recognition and arrangement of resettlement. The UNHCR will inform the ImmD its decision with reasons. As at present, the ImmD will review substantiated claims from time to time to consider whether revocation is appropriate taking into account latest developments, including the UNHCR's rationale in deciding not to recognize a claimant with substantiated persecution risks as a refugee, where applicable. That said, non-refoulement protection will be afforded to a claimant for so long as his non-refoulement claim under the USM remains substantiated.

16. We trust that the above should help clarify issues raised on the operation of the USM.

17. Since the existing statutory procedures under Part VIIC of and Schedule 1A to the Ordinance came into operation in December 2012, all stakeholders, including the legal profession, duty lawyers, immigration officers, the TCAB, etc. have accumulated valuable experience to ensure that all claims are processed in accordance with high standards of fairness. In recognition of the fact that the

³ The legality of the current policy on consideration of providing non-refoulement protection (i.e. against removal from Hong Kong to another country) where only persons subject or liable to removal from Hong Kong to another country may make a non-refoulement claim has been affirmed by the Court of Appeal in *BK & CH v the Director of Immigration* [2011] 3 HKLRD 101.

expanded ambit of the USM requires relevant training and sharing of knowledge of relevant jurisprudence in overseas jurisdictions, the Administration has organised a few rounds of training for immigration officers and TCAB members. We are pleased to note that your Association has organised similar training in August 2013 as well as a top-up seminar on 8 February 2014. We also note that the Law Academy has organised a four-day training from 21 to 25 February 2014 for their members. We trust that all stakeholders share the common goal of seeing to the smooth implementation of the USM to ensure that the screening of non-refoulement claims is conducted in a fair and just manner.

Yours sincerely,



(Billy Woo)
for Secretary for Security

c.c. Clerk to Panel on Security of the Legislative Council
Administrator, the Duty Lawyer Service
Secretary General, the Law Society of Hong Kong

Annex A**Transitional Arrangements Applicable to Claimants with a Pending Claim
with the Immigration Department (ImmD)**

In the interest of a smooth rolling out of the USM, the Administration has agreed with the DLS that under the USM, a claimant will generally be issued with the non-refoulement claim form 21 days before a formal written request is served to require him to return the form within 28 days, giving him a total of 49 days to complete the form to provide grounds and information to substantiate his claim. The arrangement, as agreed with the DLS, is subject to review one year after the implementation of the USM commencing 3 March 2014. Transitional arrangements for claimants with an ongoing torture claim (i.e. not yet determined by the ImmD) will be implemented along the same principle –

- (a) For claimants who have already returned a torture claim form to the ImmD, they have all been provided a supplementary claim form in the week of 10 February 2014. After commencement of the USM on 3 March 2014, the ImmD will serve a written request on them for return of the supplementary claim form. They will be given an additional 21 days counting from such written request to complete and return the supplementary claim form, on top of the 28 days or more already given to them to complete the torture claim form which they have already returned to the ImmD (i.e. 49 days or more in total).
 - (b) For claimants who have been served but not yet returned the torture claim form to the ImmD as at 10 February 2014, they have also been provided with a supplementary claim form in the week of 10 February 2014. They will be given an additional 21 days to complete and return the supplementary claim form (counting from the commencement of the USM on 3 March 2014 or the original deadline to return the torture claim form, whichever later) on top of the 28 days already given to them to complete the torture claim form (i.e. 49 days or more in total).
 - (c) For those who are served with a torture claim form after 10 February but before 3 March 2014, they would be provided with the supplementary claim form together with a torture claim form. They will be given an additional 21 days to complete the supplementary claim form (counting from the original deadline to return the torture claim form) on top of the 28 days already given to them to complete the torture claim form (i.e. 49 days in total).
2. For cases under (b) and (c) above, if a claimant sees the need to submit both claim forms together, he may apply to the ImmD to extend the deadline for the torture claim form.
 3. For claimants who have not yet been served with a torture claim form upon the commencement of the USM, they will be served with a non-refoulement claim form in due course.

酷刑聲請上訴委員會

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TORTURE CLAIMS APPEAL BOARD

ROOMS 3007-10, 30/F
IMMIGRATION TOWER
7 GLOUCESTER ROAD
WANCHAI, HONG KONG
Tel: 2294 2981 Fax: 2110 4728

7 February 2014

[Addressee]

Implementation of Unified Screening Mechanism

I write to inform you that a unified screening mechanism ("USM") to assess non-refoulement claims on grounds of risk of torture as defined under Part VIIC of the Immigration Ordinance, Cap.115 ("Ordinance"), risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of Section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383 ("BOR 3 risk"), and/or a risk of persecution with reference to the principle under Article 33 of the 1951 Convention relating to the Status of Refugees ("persecution risk") will commence operation on 3 March 2014 ("Commencement Day").

Under the USM, all members of the Torture Claims Appeal Board ("Board"), in addition to their statutory powers to determine torture claim appeals under the Ordinance, will also be delegated with the authority of the Chief Executive under Article 48(13) of the Basic Law as Adjudicators to handle petitions on non-refoulement claims in relation to BOR 3 and/or persecution risks. Accordingly, a Board Member/Adjudicator is empowered to handle and determine an appeal/petition lodged by a non-refoulement claimant based on the Ordinance, BOR 3 and/or persecution risks in one-go.

On the Commencement Day, if your torture claim appeal remains outstanding (i.e. a substantive decision on your appeal has not yet been made by the Board), the Board will continue to handle your torture claim appeal made under the Ordinance. This includes a decision of the Board whether or not to accept the late filing of your appeal if your appeal was filed out of time.

If you have separately made a non-refoulement claim based on BOR 3 and/or persecution risks to the Immigration Department ("ImmD") and would wish to defer the processing of your ongoing torture claim appeal pending the results of your claim in relation to BOR 3 and/or persecution

risks from the ImmD, you may apply to the Board for an adjournment of your torture claim appeal. If the application for adjournment is allowed by the Board, and if your claim in relation to BOR 3 and/or persecution risks is subsequently rejected by the ImmD and you lodge a petition against such a decision, a Board Member/Adjudicator will handle your appeal/petition in one-go.

If however you do not apply for an adjournment, the Board will continue to process your torture claim appeal without waiting for the outcome of your aforesaid claim in relation to BOR 3 and/or persecution risks with the ImmD. The Board will then decide the order of processing your appeal in the normal course. If the Board eventually confirms the ImmD's refusal decision on your torture claim, your torture claim will be treated as finally determined under the Ordinance. That said, you may still file a petition against the ImmD's refusal decision regarding your claim in relation to BOR 3 and/or persecution risks at a later time, which will then be handled and determined by a Board member (other than the member who determined your torture claim appeal) in his/her sole capacity as an Adjudicator.

If, on the Commencement Day, you have not made a non-refoulement claim in relation to BOR 3 and/or persecution risks to the ImmD but have done so subsequently before your torture claim appeal has been determined by the Board, you may still apply for an adjournment of your torture claim appeal.

If you wish to apply for an adjournment of your torture claim appeal, you are required to complete the attached application form and return it to the Board Secretariat. The Board may seek the ImmD's comments if it thinks fit. Adjournment of your appeal will be considered based on individual circumstances of your case including but not limiting to the then progress of your appeal. In any event, the Board may, under the Ordinance, decide the order in which the appeals are to be handled.

Please note that the above serves only to give a brief outline about the transitional arrangements for general reference. You are reminded, where necessary, to seek advice from your legal representative(s), if any. You may write to us, contact us by phone or visit our office in person if you have enquiries regarding the procedures applicable to your case or have any

special needs and/or further enquiry in relation to the processing of your appeal which you wish to bring to our attention.

Secretariat
Torture Claims Appeal Board

Note: This is a computer generated document and no signature is required.

To: Torture Claims Appeal Board
Fax: 2110 4728
Postal Address: Rooms 3007-10, 30/F, Immigration Tower
7 Gloucester Road, Wanchai, Hong Kong

Application for Adjournment of Torture Claim Appeal

(Note: this application should only be submitted on or after the USM Commencement Day)

I would like to apply for adjournment of my ongoing torture claim appeal under the Immigration Ordinance (Cap.115) based on the following reason(s) -

I have made a non-refoulement claim in relation to BOR 3 and/or persecution risks to the Immigration Department which has not been determined by an immigration officer to date. I would wish to defer processing of my ongoing torture claim appeal pending the results of my aforesaid claim with the Immigration Department in order that my non-refoulement claim based on all three applicable grounds can be handled and determined by a Board Member/Adjudicator in one-go; and /or

Others: (please use separate sheets if required) _____

Signature : _____

Name of Appellant : _____

Appellant's telephone number (if different from previously provided) : _____

TCAB Ref. No. : _____

Name of legal representatives /legal firm (if any) : _____

Telephone no. and address of legal representatives/legal firm (if any) : _____