DALY, HO 帝理何律師行
& ASSOCIATES

LegCo Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims

Submission of Daly, Ho & Associates to the Subcommittee

We have reviewed the Security Bureau's paper of March 2018 and the background paper of the Legislative Council Secretariat of 5 March 2018. We invite the Subcommittee to consider our observations set out herein.

Increasing Expedition of Decision-making / Fairness at Appeal Stage

1. While we welcome the Government's efforts to increase the efficiency with respect to screening of non-refoulement claims, including by the addition of more immigration officers for the first stage of screening by the Director of Immigration ("ImmD") as well as additional Members of the Torture Claim Appeal Board/Non-refoulement Claim Petition Office ("the Board") to hear cases on appeal/petition, we are concerned with (a) lack of representation on appeal/petition; (b) failure of the Board to publicize redacted decisions.

2. With respect to lack of duty lawyer representation at the appeal/petition stage, we note that less than 10% of claimants are represented on appeal/petition.

3. Under the Duty Lawyer Service ("DLS") scheme the duty lawyer assigned to represent in the screening at the 1st stage before ImmD will make a decision as to whether to continue to represent at the appeal/petition stage. If the duty lawyer declines to continue representation [on the basis of merits], then the claimant is usually without legal representation on appeal. While claimants may seek a second opinion from another duty lawyer on the DLS panel, it seems that this option is not readily accessible or widely known to claimants and it is only in exceptional circumstances that claimants are able to obtain such opinion by lawyers willing to provide same on a pro bono basis.

CONTACTS
3rd Floor Yam Tze Commercial Building, 23 Thomson Road, Wanchai, Hong Kong.
香港灣仔譚臣道23號 壬子商業大廈3樓
t: +852 2781-2998
f: +852 2783-8072
www.dalyhoassociates.com
office@dalyhoassociates.com

There is a very real concern that claimants are being left to fend for themselves without the benefit of legal advice and representation at the final stage of the USM screening process.

4. We are also gravely concerned that the Pilot Scheme launched in September 2017 further disincentivizes legal representation at the appeal stage before the Board. The flat fee for representation at the appeal/petition stage is only HKD7,500 despite the amount of work required at this stage including preparation of grounds of appeal, skeleton submissions, review of the hearing bundle and attendance at an oral hearing (and in some cases, more than one hearing) before the Board. Hence the compensation set out in the Pilot Scheme financially disincentivizes work beyond the bare minimum and in particular, discourages representation at the appeal stage due to the low level of remuneration.

5. No decisions of the Board are published (on a redacted basis) or otherwise made available to the public or legal profession. The failure to publish decisions contributes to a lack of transparency in decision-making; undermines consistency in the application of legal principles and tests, and does nothing to encourage high quality, fair and well-reasoned decisions. Furthermore, as the Director of Immigration is the respondent in every appeal/petition – the Director has knowledge of and/or access to all prior decisions of the Board whereas the Appellant/Petitioner and/or his/her legal representative does not, thereby resulting in an inequality of arms. Despite our repeated requests for the Board to publish its decisions on a redacted basis, it seems to have not taken any steps to do so.

6. While ImmD and the Board may be increasing the rate at which determinations are reached on USM cases, the above circumstances raise serious concerns as to fairness at the appeal stage given the low rate of legal representation and the Board's failure to publish decisions.

Errors in Decision-making by the Board (Torture Claim Appeal Board/Non-refoulement Claim Petition Office)

7. Recent decisions by the Court of First Instance ("CFI") show serious flaws, breaches of procedural fairness and errors of law in decision-making by the Board. A few examples of recent judgments by the High Court illustrate some of the issues arising:-

    a. HCAL 367/2017 and HCAL 394/2017: 2 cases involving claimants from the minority Ahmadi religion in Pakistan - notably available country of origin information (COI) demonstrates widespread and serious persecution of this group on the basis of religion. The CFI granted leave to apply for judicial review on all grounds, which can be summarized as:

        i. Adjudicator failed to take proper approach in assessing persecution risk for Ahmadis

        ii. Adjudicator improperly cherry-picked from the COI

        iii. Adjudicator erred in his assertion that the test in assessing persecution risk is "virtually the same" as that of BOR 3

        iv. Adjudicator erred in its credibility findings

    b. HCAL 155/2017: a case involving a failure to adjourn an oral hearing before the Board despite the importance of the hearing to the claimant and medical evidence from his surgeon that the claimant was unfit to participate in the hearing. The Adjudicator refused to adjourn and then went on – after some 13 months – to reject the appeal claim. The CFI quashed the decision of the Adjudicator and held that "*...the tone and approach in the correspondence and hearing did not demonstrate the adjudicator was considering the applicant's well being and opportunity to make representations on his own behalf in light of the well-documented medical condition he was suffering from. If the tribunal maintained high standards of fairness and the application to adjourn had been considered fairly then the application to adjourn, reasons offered and the numerous medical reports should have been enough to allow the adjournment. ... That hearing*

should have been adjourned, it should not have proceeded that day in the absence of the applicant and been determined 13 months later."[1]

c. HCAL 78/2017: a case involving a claimant from the Central African Republic who claimed protection due to, among other things, his active involvement in the former Government and support for the ousted president which had fallen during a coup d'état and therefore would be at risk of harm by the ruling party and/or their related militias. The CFI granted leave to apply for judicial review on all grounds, which can be summarized as:

   i. the adjudicator applied the wrong legal test in assessing persecution risk;

   ii. the adjudicator failed to take proper approach in assessing persecution risk arising from political opinion and failed to take into account relevant evidence with respect to same

   iii. the adjudicator erred in requiring corroborating evidence

   iv. the adjudicator failed to take into account relevant COI

   v. the adjudicator failed to take into account relevant factors in assessing the possibility of internal relocation in the country

8. In our experience, these errors in law have been repeated in numerous decisions and there is a real risk that unchallenged in court, the Board will continue to make such errors and the claimant will be liable to removal.

Decline in grant of Legal Aid / Increasing Applications for Legal Aid

9. We are seeing a growing trend with Legal Aid in cases where non-refoulement claimants have applied to challenge their decisions by judicial review. Namely:-

[1] per DHCJ Woodcock at para. 28

a. Delay in processing claims such that the decision – usually refusing the application – is made on or after the 3 month limitation period for filing for JR

b. The consequence is often that applicants either miss the deadline and may not be allowed by the court to proceed with a late application or proceed on their own and are unrepresented in the proceedings and often do not know how to properly explain their case to the Court. This runs the serious risk that meritorious cases may be falling through the cracks. Although we do represent some very strong cases pro bono – this clearly cannot make up for timely grant of Legal Aid or ensure representation for every case.

c. We have seen multiple cases where Legal Aid was wrong in their assessment of the merits – indeed in one case, in which leave was subsequently granted by the High Court, Legal Aid was refused twice before he was finally granted Legal Aid.

d. In another case, the Applicant was refused just a few days before the Court granted leave on the papers (the Applicant's substantive JR was successful) – instead of reconsidering the Legal Aid application, the applicant had to re-apply afresh for Legal Aid and resulting in a delay of several weeks before he had Legal Aid

e. There have also been a number of cases where despite providing lawyer's / counsel's opinion to Legal Aid nevertheless refuse the application and in those cases, the applicant is left to appeal that decision – often without representation – or if s/he can find lawyers willing to represent pro bono. In the meantime the clock is still running for commencing judicial review proceedings – which may not be allowed after the 3 month limitation [although court can extend time]

f. We also note there seems to be no clear process for applying for fee waiver for filing fees (HK$1045) for indigent claimants

g. We observe that on some occasions Judges at the CFI proceed with the leave hearing despite a pending Legal Aid Appeal.

h. Recent statistics[2] is indicative of Legal Aid being burdened by an increasing number of legal aid applications for judicial review of non-refoulement claim decisions in around the same timeframe as a corresponding increase in Appeal Board decisions (with a success rate for established claims still under 1%):

Year	No. of legal aid applications involving JRs pertaining to non-refoulement claims	No. of legal aid certificates granted on JRs pertaining to non-refoulement claims	Legal Aid acceptance rate
2014	98	52	53.06%
2015	248	62	25%
2016	144	9	6.25%

i. The last official statistics showed that in 2017, 1046 legal aid applications for judicial review were submitted (including 841 by non refoulement claimant). Less than 30 (around 2%) were approved[3].

10. While the above statistics are indicative of a decreasing number of legal aid certificates granted on judicial review cases pertaining to non-refoulement claims, this does not necessarily have bearing on the merits of the intended judicial review applications. Despite the above- we have been successful in applying for leave in most cases that were originally refused Legal Aid, in our view, this shows that the decisions by Legal Aid are not necessarily truly reflective of the merits of the case and indeed, genuine claimants could be falling through the cracks.

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Daly, Ho & Associates

[2] (https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718cb4-1386-3-e.pdf)
LCQ17: Statistical information on judicial review cases, Annex C, available at
http://www.info.gov.hk/gia/general/201802/28/P2018022800345.htm

[3] LCQ17: Statistical information on judicial review cases, Annex C, available at
http://www.info.gov.hk/gia/general/201802/28/P2018022800345.htm