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4 October 2018

Re: Unified Screening Mechanism for Non-refoulement Claims

Clerk to Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Sirs:

We frequently act as *pro bono* counsel on behalf of claimants whose non-refoulement claims are governed by the Unified Screening Mechanism ("**USM**"). In the last year, we have represented no less than seven claimants at various stages of the USM process, from pre-claim submission to appeal before the Torture Claims Appeal Board ("**TCAB**") and post-TCAB judicial review.

In this capacity, we have reviewed what we understand is the most recent version of the paper, Proposals to Amend the Immigration Ordinance (Cap. 115) (LC Paper No. CB(2)(1751/17-18(01)) (the "**Proposals**", dated 10 July 2018. We believe our experience as *pro bono* counsel to claimants, the rights of whom the Proposals would directly impact, can be of value to the Subcommittee as it considers the Proposals. We also urge the Subcommittee to solicit the views of the Duty Lawyer Service and other legal practitioners who have experience representing claimants in the USM process as part of the Subcommittee's review of the USM.

We welcome the opportunity to discuss the Proposals in person, and have registered to provide oral comments at the 18 October 2018 meeting. In the meantime, please find below our most significant comments concerning the Proposals:

- First, it is not clear why the Proposals have been made. As the statistics that accompanied the Proposals show, the Immigration Department appears, on the whole, to be making its way successfully through the historic backlog of pending claims. From 2015

to June 2018, the backlog of pending cases has been reduced, very significantly, from nearly 11,000 to 3,000 such cases.

- Second, the basis for the Proposals, and, in particular, the basis for believing that the Proposals would allow the Immigration Department to more expeditiously evaluate non-refoulement claims, is not clear. As discussed below, we believe that some of the Proposals could result in well-founded judicial review applications that could cause the adjudication of many, if not all, cases to be substantially delayed, potentially by years. The Immigration Department has already made good progress addressing the historic backlog of non-refoulement claims, and we see no reasoned basis for pursuing systemic changes that threaten to undo this progress.

- Third, several of the Proposals have not, in our view, sufficiently accounted for procedural fairness concerns. As you are aware, the determination of torture claims is, as a matter of law, subject to "high standards of fairness." (*Secretary for Security v Sakthevel Prabakar* [2004] HKCFA 43 at [44]). This high standard reflects the vulnerable position of non-refoulement claimants, who have been the victim of torture (or other forms of persecution), fled their home country, and arrived in Hong Kong where they may not be able to speak Chinese or English and, in any event, lack a familial or social support network.

Tightening the statutory timeframe for claim form submission is unfair

Among the amendments set forth in the Proposals is a tightening of the statutory timeframe for claim form submission from 28 to 14 days, and eliminating an existing administrative arrangement by which claimants are given an additional 21 days, beyond the statutory timeframe, in which to submit claim forms.

The stated purpose of these amendments is to "alleviate the delay problem." As noted, however, the backlog of pending cases has improved dramatically since 2015, during the period in which the 28-day statutory timeframe and 21-day administrative timeframe (for a total of 49 days) have been in place, and the Proposals do not otherwise assert a plausible causal relationship between the length of the claim form submission timeframe and the "delay problem." At the very least, there is no identifiable rationale for what, in effect, is a more than 70 percent decrease in the claim form submission period. Indeed, in our experience, affording claimants more time to prepare detailed, well-supported claim forms actually reduces delay, by minimizing the need for subsequent amendments or supplements to the claim form.

Moreover, the Immigration Department implemented the current 21-day administrative timeframe in response to the "strong request" of the Duty Lawyer Service, the group most familiar with the practical challenges of working around the 28-day timeframe which suggests that even if the Proposals were effective in reducing "the delay problem," any reduction, let alone a drastic change from 49 days to 14 days, would come at the expense of the high standards of fairness—procedurally and substantively—due claimants in the non-refoulement context.

In our experience, 14 days is not a sufficient period of time in which to prepare even a minimally adequate claim form—or even, in some cases, for counsel and adequate interpreters to be

identified and assigned. The preparation of a legally sufficient claim form is a critically important process that requires:

(1) a high-degree of familiarity and comfort between a claimant and his / her counsel, especially as many claimants have fled from circumstances in which they were targeted by bureaucratic actors, and thus are suspicious of administrative processes like the USM;

(2) the taking of detailed claimant testimony, so as to make out, in as much detail as possible, each element of a non-refoulement claim, and also to allege these elements in a manner sufficient to prevent the Immigration Department from drawing the negative inferences set out in Section 37ZD of the Immigration Ordinance;

(3) the identification, where available, of detailed country information that lends plausibility to a claimant's testimony, including, where relevant, the procuring of plausibility assessments by third-party experts; and

(4) the identification, review and production of any relevant direct evidence that corroborates the claimant's account of persecution, which evidence is often available only by way of application to authorities in the state from which the claimant has fled. The insufficiency of a 14-day claim form submission timeframe would only be exacerbated by the additional proposal to require claimants to submit all relevant supporting documents with the claim form and, if they are unable to do so immediately, to provide a list stating the outstanding documents that will be submitted later, setting out the nature of the documents, explaining how they can support the claim and pinpointing the parts of the documents which are relevant to their claim.

Where interpretation and translation of documents is required, as is often the case, the preparation of an adequate claim form is an even more lengthy process.

Moreover, the proposal to shorten the time for claim form submission is inconsistent withthe precarious position in which many, if not most, claimants find themselves upon arrival in Hong Kong. By their very nature, claimants under the USM have fled difficult circumstances in their countries of origin—including torture, persecution, civil unrest and other forms of state-led or state-sanctioned violence—and often with little advance planning. Frequently, in our experience, claimants arrive in Hong Kong without all of the documentary evidence necessary to make out a perfect claim under the USM, and with a case so ready-made as to be fully substantiated in just two weeks. The Proposals, in seeking to eliminate delay in the USM, would punish those who can least afford it—claimants who, through no fault of their own, face a steep informational disadvantage even under the current system.

The Proposals seek to justify the radically abridged claim form submission period in part by reference to the 15-day period afforded claimants in the Canadian system. This comparison is inapposite. First, Canada receives far more claims than Hong Kong—more than 26,000 in the first six months of 2018, compared to barely more than 600 during the same period in Hong Kong. Canada also granted nearly 30 percent of such claims, which suggests that notwithstanding a limited claim form submission period, claimants in Canada are given a fair opportunity to pursue their claims. Not so in Hong Kong, where only 0.8 percent of claims since March 2014 have been found substantiated by the Immigration Department. An already

restrictive system can endure only so much procedural trimming before it ceases entirely to advance the aims of justice and fairness.

Requiring claimants to participate in a screening interview conducted in a language other than their most proficient language is unfair

The Proposals state that the Security Bureau is considering a provision that would require claimants who are "reasonably supposed to understand and to be able to communicate in another language" to participate in the screening interviews required under Section 37ZB of the Immigration Ordinance in a language other than their most proficient language. This proposal, like the proposed shortening of the time for claim form submission, would unfairly prioritize vague and unsubstantiated promises of reduced delay over the vindication of a claimant's fundamental procedural rights.

The substantiation of claims made under the USM turns on a set of highly fact-bound determinations, including the credibility of a claimant and the consistency of his / her account. Accordingly, the costs of forcing a claimant to communicate in a language other than their most proficient language are high.

For instance, we have acted for at least one claimant who had a basic ability to understand, read and speak English. We were able to have conversations in English with him, which allowed us to understand the broad contours of his claim. His most proficient language was not English, however, and in English he was entirely unable to articulate the details of his claim, including his subjective fear of future persecution and other elements of his claim that required linguistic nuance and cultural subtlety. Had he not been permitted to conduct his screening interview in his most proficient language, the Immigration Department would not have heard, nor had the opportunity to address, facts central to his claim.

The proposal to require certain claimants to participate in a screening interview in a language other than their most proficient language would also place the Immigration Department in the position of determining when a claimant can understand another language or otherwise communicate sufficiently in it, without any proposed safeguards to ensure that a claimant's right to be heard and understood is not compromised. The proposal to infer a claimant's ability to communicate in a language that is not his or her most proficient language, by an obscure "reasonably supposed" standard runs the risk of disregarding the claimant's individual circumstances. It is not clear how claimants would challenge this decision but for on appeal, in which case an appellate finding in the claimant's favor would vitiate a significant component of the evidentiary record at first instance. Certainly, it is not clear how placing *more* discretion with the Immigration Department, rather than less, would minimize procedural delay.

In another case, husband and wife joint claimants provided first instance evidence in a language that was not their native language during a screening interview with the Immigration Department. The wife could understand and speak some of that other language, but never learned it at school. The husband had an even more limited understanding of the same language. At the screening interview, the wife was tasked with not only providing her own evidence in her non-native language, but with acting as interpreter for her husband. The wife's native language is a significantly different language than the language used at the screening interview, and to compound the difficulty, she was unfamiliar with the particular dialect used by the interpreter at

the screening interview. Due to these difficulties, the claimants had trouble understanding the questions posed by the immigration officer in the screening interview, and encountered difficulties in articulating the details of their experiences and facts crucial to their claim. The finer details of their testimonies were not elicited in full until the appeal stage when we were engaged and located an interpreter based abroad who could provide interpretation in the claimants' native tongue.

For languages for which the immigration department is unable to locate interpreters in Hong Kong, rather than mandating that claimants provide testimony in a language in which they are not fully proficient, we would suggest that the Immigration Department consider the use of tele-interpretation services.

Tightening the statutory timeframe for appeal is unfair

In the Proposals, the Security Bureau also proposed a foreshortening of the time in which to lodge an appeal under Section 37ZS of the Immigration Ordinance from 14 days to seven. If this policy were to be adopted it would be all but fatal to the vast majority of cases improperly decided by the Immigration Department at first instance, of which there are many. (Fully 34 percent of substantiated cases were substantiated on appeal, after they were erroneously rejected by the Immigration Department).

Under Section 37ZS of the Immigration Ordinance, the period in which to file a notice of appeal runs from the date of the Immigration Department's notice of decision. In many cases, this notice of decision is received only many days after it is dated and posted. We have, for instance, acted as counsel in at least one case where the notice of decision was not received until six days after it was posted—limiting the period in which to file a notice of appeal to only eight days. Had the period in which to file a notice of appeal been seven days, we would have had only a single day in which to file the notice of appeal—a period even shorter than the two-day period (that runs from the service of the decision) struck down as unlawful in the United Kingdom (The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (the "**Fast Track Procedure**")) In such cases, a seven-day period in which to file a notice of appeal is tantamount to eliminating the opportunity for appeal entirely.

Even assuming that a claim would be afforded all seven days to prepare a notice of appeal, which is highly unlikely, filing a notice of appeal is no mere ministerial task, contrary to what the Proposals suggest. Preparing a notice of appeal requires the claimant to read and understand the decision of the Immigration Department at first instance—decisions that can often run to nearly 100 pages, or longer. It also requires the claimant to elaborate specific grounds of appeal, which requires the identification of specific factual issues wrongly interpreted, misrepresented or overlooked, as well as any errors of law made by the Immigration Department. In many cases, especially where the claimant requires an interpreter, preparing a thorough, legally adequate notice of appeal simply would not be possible in a seven-day period, and would result in claimants foregoing on appeal certain issues material to the substantiation of their claims.

The Proposals are likely to trigger judicial review—and will only lead to further delay

The Proposals are unfair and irrational. They are, like the Fast Track Procedure implemented in the United Kingdom in 2003 and struck down as "structurally unfair" and thus unlawful in 2015

after at least seven different judicial review actions, likely to cause more delay and more expense, rather than less (see *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 (UK Court of Appeal) ("***Detention Action***"), confirmed by the UK Supreme Court's refusal to grant the UK government's permission to appeal (November 9, 2015)). After the Fast Track Procedure Rules was struck down in 2015, hundreds of cases in the United Kingdom required rehearing, with the government exposed to a raft of possible suits for compensation by claimants whose claims were denied under what was found to be a fundamentally unfair system.

"Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount". (*Detention Action*, per Lord Dyson at [22]). Accordingly, the Immigration Department may not "sacrifice fairness on the altar of speed and convenience, much less of expediency" (*The Refugee Legal Centre, R (on the application of) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 (UK Court of Appeal) at [8], confirmed in *Detention Action* at [22]). Yet, the current Proposals, like the Detained Fast Track Policy before them, do just that—imposing on those least able to bear them procedural burdens that would make it more difficult to substantiate, or even bring, legitimate claims.

We recognize that the USM is in need of refinement, but for the reasons set out herein, the Proposals would take a step backward to create a less fair system. We therefore ask that the Sub-Committee decline to adopt the Proposals and instead solicit alternative proposals that would help the Government achieve the "high standards of fairness" that is mandated by the Court of Final Appeal.

Yours faithfully,

Davis Polk & Wardwell