Submission by Daly & Associates

Submission to the Panel on Security of the Legislative Council: An Update on the Comprehensive Review of the Strategy of Handling Non-Refoulement Claims – Proposals to Amend the Immigration Ordinance (Cap. 115)

18 October 2018

1. In July 2018, the Legislative Council Secretariat prepared an updated brief summarizing discussions by the Panel on Security on issues relating to the HKSAR administration's strategy of handling non-refoulement claims ("**Brief**").[1]

2. This Submission discusses the following:

   a. Questions and issues under the USM which remain unanswered and/or unaddressed;

   b. Problems and queries with respects to the Pilot Scheme on Provision of Publicly-funded Legal Assistance to Non-refoulement Claimants under the USM ("**Pilot Scheme**"); and

   c. Concerns with the Brief's proposed amendments to the Immigration Ordinance (Cap. 115) ("**IO**") and other proposals raised in the Brief.

A. Questions and issues under the USM which remain unanswered and/or unaddressed

(I) Failure to publish decisions by the Torture Claims Appeal Board ("**TCAB**") is inconsistent with the principles of transparency in decision-making, undermines consistency in the application of legal principles and tests, and fails to encourage high-quality, fair and well-reasoned decisions.

3. First, the publication of TCAB decisions is of significant public interest as it enables civil society to monitor, assess and recommend improvements to the implementation of the USM. In this regard, we note that previous TCAB decisions have been based upon significant errors.

4. For example, in one case, the adjudicator rejected an appeal after mistaking the country of origin of the claimant from 'Niger' to 'Nigeria'. In another case, the adjudicator failed to adjourn an oral hearing before TCAB 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. No decision was made until 13 months later, at which point the adjudicator rejected the claim. Upon judicial review, the Court of First Instance quashed the adjudicator's decision and held that "…*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.*"[2] This case also draws out the fact that concerns about the 'backlogged' system frequently arise out of delays in the decision-making by Immigration /

[1] LC Paper No. CB(2)1751/17-18(01).

[2] *M v Torture Claims Appeal Board / Non Refoulement Claims Petition Office* [2018] HKCFI 24 per DHCJ Woodcock at para. 28.

TCAB and are not a consequence of claimants 'abusing the USM process'. In our experience, claimants often wait over one year for Immigration to reach a decision or for a hearing after the submission of their appeals (this does not include the time they wait after hearings for the handing down of decisions). There is no disagreement between all interested parties that USM claims should be dealt with expeditiously.

5. Second, the publication of TCAB decisions would make available the reasoning behind the decisions as well as clarify how the law is applied by the decision-makers. In turn, this would assist claimants and/or their legal representatives in considering the merits on appeal as well as assist claimants and their lawyers to prepare submissions in view of the approach taken by TCAB in other cases. Furthermore, the publication of TCAB decisions is consistent with the recommendation by the CERD Committee in its Concluding Observations that *"the rights of asylum-seekers* [in Hong Kong] *to information, interpretation, legal assistance and judicial remedies be guaranteed"* (emphasis added)[3] and the statement by the CAT Committee in its Concluding Observations that it took into account reports that claimants in Hong Kong face "*impediments to the effective preparation of their cases*" as a result of not having access to TCAB decisions.[4] We submit that in order to protect the privacy of the parties, parts of the published decisions could be redacted and/or anonymized. It is also submitted that redacted and/or anonymized decisions which still pose a risk to the identity of the appellant could remain unpublished.

6. Finally, the publication of TCAB decisions would be consistent with fairness principles and ensure equality of arms. Presently, the Director of Immigration and its legal representatives and the Department of Justice ostensibly have access to all TCAB decisions given their access to the same on TCAB appeals. Conversely, claimants and their duty lawyers do not have access to TCAB decisions. In this respect, we reiterate the statement made by the Hong Kong Bar Association and the Law Society of Hong Kong in a joint letter dated 2 May 2014 ("**Joint Letter**") that "*In many jurisdictions such tribunal decisions are published to promote transparency, consistency and encouragement of high quality, fair and well-reasoned decisions*".[5]

7. Ultimately, the failure to publish decisions contributes to a lack of transparency, undermines consistency in application of the law, and fails to encourage well-reasoned decisions. Despite repeated requests by us for TCAB to publish its decisions on a redacted and/or anonymized basis, it appears that no steps have been taken to this end.

[3] UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention : concluding observations of the Committee on the Elimination of Racial Discrimination : China (including Hong Kong and Macau Special Administrative Regions)*, 15 September 2009, CERD/C/CHN/CO/10-13, para. 29.

[4] UN Committee Against Torture (CAT), *Concluding observations on the fifth periodic report of China with respect to Hong Kong, China*, 3 February 2016, CAT/C/CHN-HKG/CO/5, para. 6.

[5] Joint Letter by the Hong Kong Bar Association and the Law Society of Hong Kong dated 2 May 2014, LC Paper No. CB(2)1657/13-14(01) ("**Joint Letter**"), para. 21.

(II) Failure to provide cogent explanation for the low substantiation rates of non-refoulement claims.

8. The disclosure of TCAB decisions would also allow the administration's statistics on the substantiation of non-refoulement claims to be analyzed, so as to provide a fuller understanding of the results of the USM. The Immigration Department's statistics indicate that between the commencement of the enhanced administrative mechanism in late 2009 and June 2018, 135 torture/non-refoulement claims were substantiated out of 17,978 claims determined.[6] Further, it is noted in the Brief that since the implementation of the USM, 0.8% of non-refoulement claims and appeals have been substantiated.[7] The question thus arises whether this low substantiation rate is reflective of an unfairly high threshold for granting protection or effective screening. In its letter of 8 October 2018, the Security Bureau attempted to dismiss this phenomenon without providing specific justifications, by stating that the arrangements under the USM *"compare most favorably with those adopted in other common law jurisdictions"*.[8] We query which common law jurisdictions the administration is referencing in respect of this comparison and seek a specific compare-and-contrast assessment of the asylum-claim arrangements between such jurisdictions and Hong Kong.

(III) The Hong Kong courts often lack the benefit of counsel's arguments in determining meritorious judicial reviews of poor Immigration / TCAB decisions in respect of complex areas of law.

9. Recent statistics indicate a rise in the number of legal aid applications for judicial review of non-refoulement claim decisions in around the same timeframe as a corresponding rise in TCAB decisions[9] (which have a success rate of around <1%).[10] Further, only approximately 2.7% of legal aid applications for judicial review (including 841 applications by non-refoulement claimants) were approved in 2017.[11] Given the stringent approach by the Legal Aid Department and decreasing number of legal aid certificates granted on judicial review cases pertaining to non-refoulement claims, applicants are often unrepresented at the courts. Consequently, the courts often do not have the benefit of counsel's argument in hearing these judicial review cases, which frequently revolve complex areas of law that are in their infancy in Hong Kong (particularly in respect of persecution risk assessment). We have, on a pro bono basis, successfully assisted many claimants who have been refused legal aid both to seek leave for judicial review and appeal the refusal decision by legal aid. However, it is unfortunately

[6] Statistics on Non-refoulement Claim, Torture/Non-refoulement Claim Cases (as at End of June 2018), Immigration Department of the Government of the Hong Kong Special Administrative Region at: https://www.immd.gov.hk/eng/facts/enforcement.html.

[7] *See* n 1 at p. 16.

[8] Letter by the Security Bureau dated 8 October 2018, LC Paper No. CB(2)29/18-19(01), para. 12.

[9] Home Affairs Bureau's paper on "Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases" issued 12 July 2017, LC Paper No. CB(4)1386/16-17(03).

[10] In this respect, we reiterate paras. 9-10 of the Submission of Daly, Ho & Associates to the Subcommittee, LegCo Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims, 18 May 2018 (appended hereto as Appendix A).

[11] LCQ17: Statistical information on judicial review cases, Annex C (Statistics on the number of legal aid applications in respect of judicial review (JR) cases and the legal expenditure for legally-aid JR cases), p. 1.

inevitable that many other meritorious judicial review cases are at risk of falling through the cracks of and are effectively denied access to justice.

(IV) Lack of a durable solution for individuals with substantiated non-refoulement claims.

10. Substantiated non-refoulement claimants are neither integrated nor regularized into Hong Kong society and remain overstayers whose presence in Hong Kong is merely tolerated. There is also a lack of transparency in the administration's coordination with UNHCR in respect of resettlement procedures for these individuals. Such arrangements give rise to an unbearable situation for substantiated non-refoulement claimants, including families and children, for whom resettlement does not seem possible at the moment or in the foreseeable future. The continued uncertainty and lack of assurance of their statuses in Hong Kong impose significant stresses on these individuals, who by virtue of their immigration statuses, are often unable to undertake simple but significant normalizing activities such as applying for a university education or obtaining a driving license. We strongly urge the administration to adopt a durable solution for these individuals (i.e. grant them unconditional permission to remain in Hong Kong) so as to resolve their untenable limbo situations.

B. Problems with the Pilot Scheme

11. In our view, the Pilot Scheme is deficient in the following areas:

    (i) The procedure for assigning cases between the Pilot Scheme and the DLS Scheme is determined by drawing lots. While the Pilot Scheme has in place a policy for non-refoulement claimants to apply for a DLS lawyer to be assigned rather than a Pilot Scheme lawyer, the procedures for making such an application are not easily accessible, open and/or transparent. Further, there is no apparent procedure for the claimant to be heard on his assignment application or an appeal procedure should the request for assignment be refused. This is problematic as there are substantive differences between the two schemes, including (a) restrictions on the support services provided to lawyers and claimants under the Pilot Scheme and (b) flat fee for legal services provided under the Pilot Scheme.

    (ii) Despite the measures intended to ensure physical and functional segregation of duties, the Pilot Scheme may lead to an apparent (institutional) bias as it is administered by the Security Bureau. For example, the bias may arise where immigration officers are also in the Review Division of Immigration / TCAB, as they would be exercising administrative powers but also providing legal assistance to non-refoulement claimants.

    (iii) As set out in point (i) above, the Pilot Scheme compromises the claimant's right to elect their legal representatives and may fail to provide claimants with effective legal representation. Instead of being pro rated, a flat fee of HK$7,500 is fixed for representation on appeals under the Pilot Scheme. This flat fee arguably creates a financial disincentive against continued representation by Pilot Scheme lawyers given the amount of work required at the appeal stage including preparation of grounds of appeal, preparation of skeleton submissions, review of the hearing bundle and attendance at an oral hearing (and in some cases, more than one hearing) before TCAB. As such, the flat flee is grossly disproportionate to the work entailed. We note that

as of June 2017, less than 10% of TCAB appellants/petitioners are represented.[12] In this connection, we would query the following statistics under the Pilot Scheme as of the date of this Joint-Submission:

- Success rates
- Rates of representation on appeal
- Countries of origin of the claimants / appellants
- Comparative statistics between the Pilot Scheme and DLS scheme (i.e. on success rates and rates of representation on appeal)

12. Immigration / TCAB have augmented their processing capacities (i.e. by increasing the numbers of Immigration Officers determining claims at 1st instance and Adjudicators/Board Members at the appeal stage) which have resulted in an increase in the rate at which determinations are reached on USM cases. The increasing rate of determination also coincides with increasing applications for Legal Aid to challenge the decision(s) by judicial review.[13]

C. Concerns with the Brief's proposed amendments to the IO and other proposals raised in the Brief

(I) Shortening statutory timeframe for submission of NCF and increasing threshold for an extension of time to submit a non-refoulement claim form ("**NCF**") and/or provide supporting documents together with a claim form substantially increases the burden on claimants (Paragraphs 6 – 8 of the Brief).

13. Decreasing the statutory timeframe for submission of claim forms from 28 days to 14 days – along with removing the administrative arrangement which ostensibly allowed an additional 21 days for filing claim forms, is likely to unfairly increase the burden on claimants. In order to prepare claim forms and submissions thereto, detailed instructions (usually with interpreter assistance) are required by the handling lawyer. In addition, time is required to consider the submission of evidence (which may require additional time as it must be translated into English or Chinese) and advise the claimant in respect of said evidence. It is crucial to note that by way of the Joint Letter, the Hong Kong Bar Association and the Law Society of Hong Kong previously considered the current time frame of 28 days as being too short and criticized that there had been *"no consultation on this fundamental issue prior"* (emphasis added). The Joint Letter further suggested that ***"the HKSAR Government should re-consider extending the time frame"***.[14] In response, the Security Bureau replied that "*the Administration has agreed... giving* [the claimant] *a **total of (at least) 49 days** to complete the form to provide the grounds and information to establish his claim under the USM*".[15] Consequently, to further reduce the 28-day

[12] *See* fn 27 below.

[13] *See* para. 9 above.

[14] Joint Letter, para. 17. Previously, the Hong Kong Bar Association and the Law Society of Hong Kong recommended a timeframe of 90 days as being necessary.

[15] Letter from the Security Bureau to the Hong Kong Bar Association and the Law Society of Hong Kong dated 30 May 2014, LC Paper No. CB(2)1675/13-14(01), para. 9.

period would be inconsistent with the administration's previous position on the already restrictive statutory timeframe. As the current Duty Lawyer Service - CAT and Non-refoulement Claims Scheme Office ("**DLS**") and Pilot Scheme Office ("**PSO**") relies on a pool of private lawyers, it is appropriate for the Director to adopt a flexible approach which is mindful of the professional obligations of legal representatives as well as the practical realities of accommodating *inter alia* interpreter availability.

14. The proposed stipulations that requests for time extensions will only be considered if claimants can show "*they have exercised all due diligence to comply with the original deadline as far as practicable, <u>and</u> that is because of 'exceptional' <u>and</u> 'uncontrollable' circumstances*" (emphasis added) unnecessarily and unreasonably fetters the discretion of the decision-maker to extend time and runs a real risk of generating refusals of time extension contrary to the high standards of fairness which need to be applied throughout the screening process. The requirement that a claimant show "*all due diligence*" in meeting the original deadline puts the claimant and his/her legal representative in the untenable position of being expected to disclose potentially privileged information to the decision-maker. Moreover, the requirement that the extension be shown to be necessitated by "*exceptional*" and "*uncontrollable*" circumstances may result in denials of a time extension in instances where an extension is warranted. For example, consider a scenario where an extension is requested due to lack of availability of a female interpreter for a vulnerable claimant-victim of gender-based violence (albeit a male interpreter is available). Under the proposed stipulations, the decision-maker may be of the view that the inability to complete the claim forms was not due to "*exceptional*" and "*uncontrollable*" circumstances but merely due to the claimant's preference as to the gender of the interpreter and disregard the need to accommodate the claimant's vulnerabilities as a survivor of sexual violence in accordance with the high standards of fairness.

15. The current provisions for extension of time are already sufficiently stringent to deter abuses and allow the decision-maker sufficient discretion to consider the claimant's particular circumstances as well as the reasons justifying an extension in accordance with the high standards of fairness. To be clear, under the current provisions, the claimant must make an application in writing for extension of time before the expiry of the 28 day deadline for filing the claim form. Further, the immigration officer *may* grant an extension if she/he is "*satisfied that, by reason of special circumstances, it would be unjust not to allow a further period for the claimant to return the completed form*"[16] and the officer will then stipulate the extent of any such time extension. The consequences of failing to return the claim form within the stipulated time (or any extended deadline) are likewise severe – the claim may be deemed withdrawn[17] by the decision-maker, at which point the claimant will be liable to removal from Hong Kong.

16. The same issues arise in respect of the proposal provided in paragraph 11 of the Brief which would require claimants to submit all supporting documents (and pinpoint the relevant parts of such documents) together with their claim form *"immediately"* save for *"'exceptional' and 'uncontrollable' circumstances"*. This proposal also fails to consider that claimants must be

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[16] Section 37Y of Cap. 115.

[17] Section 37ZG of Cap. 115.

provided sufficient time to retrieve documents from overseas, arrange for translations, and seek legal advice.

(II) Removing the requirement for interviews and/or hearings to be conducted in the claimant's most proficient language is highly detrimental to claimants.

17. Paragraph 15 of the Brief proposes prescribing that where a claimant is *"reasonably supposed to understand and to be able to communicate in another language, the* [screening] *interview needs not to be conducted in the claimant's most proficient language"*. Paragraph 27 of the Brief reiterates this position in respect of oral hearings before TCAB. Insofar as the proposal refers to language(s) the claimant is "*reasonably supposed to understand and to be able to communicate*", i.e. an alternative language to the claimant's first language or mother tongue; it is unclear on what basis and how the decision-maker will determine this alternative language to be used as opposed to the first language of the claimant. The only glimpse into how a decision-maker may interpret/apply this provision is with reference to "*the official languages of their country of origin*". As a consideration, this is problematic as it would likely disproportionately affect claimants' from African countries (as there is very limited number of court registered interpreters in Hong Kong from these countries). For instance, whilst Hausa is spoken by over 40 million people globally[18] (and is spoken as a first language by approximately 20 million people), it is not necessarily the national language of a claimant's country of origin and indeed the claimant may not be fluent in the national language. In a similar vein, whilst French is a national language of Rwanda, the majority speaks Kinyarwanda (another national language of Rwanda) and may not be fluent in French. .To our knowledge, there are no qualified Kinyarwanda interpreters in Hong Kong and at most, one Hausa interpreter in Hong Kong.

18. It is a fundamental right and tenet of the principles of natural justice that claimants have the opportunity to know the case to be met and be able to respond to the same. It is plain that a claimant, who cannot understand the language spoken to him/her during a screening interview and/or oral hearing and cannot present his/her case and respond to a decision-maker due to a language barrier, will be denied his/her basic right to know the case and respond. As such, failing to provide an interpreter in accordance with a claimant's fluency and language capacity will breach the high standards of fairness required in the conduct of the screening process.

19. In the claim forms, claimants are required to indicate their first language and any other languages they can speak or write. Insofar as the claimant is sufficiently fluent in another language to proceed in a language that is not their first language, there is no grave issue. However, we see no need for an amendment to the IO as arrangements can be made by agreement between the claimant and the decision-maker in such circumstances.

20. Further, the proposals would be difficult to implement as the question arises how a decision-maker can assess a claimant's language capacity with accuracy (i.e. would it be necessary to retain a language expert?). We submit that the Immigration Department should instead be focusing on ensuring the quality of interpretation and the timely recruitment of interpreters.

[18] Encyclopedia Britannica at https://www.britannica.com/topic/Hausa-language.

(III) Refusing to accept the physical or mental condition(s) of claimants who do not attend a medical examination arranged by Immigration / TCAB or decline to submit their medical reports following such an examination is contrary to case law.

21. Paragraph 18 of the Brief proposes rejecting the physical or mental condition of claimants who *"fail*[ed] *to attend a medical examination arranged by ImmD on time…* [or] *refuse*[ed] *to submit to ImmD/TCAB the medical report after the medical examination*". While the Immigration Ordinance at section 37ZD(2)(g)(ii) already provides that a failure to disclose a medical report without a reasonable excuse may result in adverse credibility findings (which can include a rejection of the claimant's medical condition), this new proposal would allow a decision-maker to dispense with his/her duty to consider the medical condition(s) and any other evidence relevant to the said condition(s) in one fell swoop. Notwithstanding that the decision-maker can draw adverse conclusions arising from the failure to disclose a medical report, the decision-maker must nonetheless consider all the relevant evidence before him/her, including photographs of injuries; medical reports obtained from other jurisdictions (including the country of origin of the claimant) and medical records from within Hong Kong which may corroborate the claimant's condition(s) and/or how such condition(s) arose (i.e. as a result of torture or other ill-treatment). A failure by the decision-maker to consider all relevant evidence will be liable to challenge in court.

(IV) The administration should not interfere with and/or otherwise limit the exercise of discretion by TCAB in considering a late appeal.

22. Paragraph 22 of the Brief which proposes deleting the provision whereby *"TCAB can take into account 'any other relevant matters of fact' within its knowledge"* in considering a late appeal would amount to undue interference by Immigration and/or otherwise limit the exercise of discretion by TCAB to take into account the relevant and particular circumstances of the claim in question.

23. The unfairness inherent in this proposal should also be viewed in the light of paragraph 21 of the Brief which proposes tightening the statutory timeframe for lodging an appeal *"from the current 14 days to 7 days"*. Such a reduction of time does not allow claimants sufficient time to review the decision with an interpreter, seek legal advice, or lodge an appeal.

(V) The current provisions on the withdrawal of claims/appeals are already stringent and should not be further restricted for the sake of expediency.

24. Paragraph 31 of the Brief which considers "*adding provisions to prescribe that a claim (or an appeal) should be deemed withdrawn immediately upon receipt of the claimant's written notice by ImmD (or TCAB)"* are draconian and would further limit the already rigorous provisions set out in s. 37ZE of the IO. There are many valid reasons that a claimant may have withdrawn a claim or appeal at a given time (i.e. they were suffering from PTSD or other health conditions) and seek to re-open it subsequently. The proposed amendment would lead to risk of immediate detention and removal from Hong Kong and impede the ability of a claimant to re-open a claim, even in situations where there are genuine and valid reasons for initially withdrawing the claim and subsequently seeking a re-opening of the claim. Given that Immigration already strictly screens re-opening requests, the current provisions on withdrawal and the exception on re-opening should be maintained.

25. Further, the statistics provided by the administration indicate a decreasing number of non-refoulement claims being lodged in Hong Kong and hardly justify the imposition of further draconian measures to expedite screening and/or removal of claimants. If it is the administration's position that there is rampant abuse of the re-opening procedures, we request the administration provide detailed statistics on re-opening applications.

(VI) The proposal to limit subsequent claims is unfair, unclear and would likely result in erroneous application.

26. Paragraph 33 of the Brief proposes "*tightening the threshold for making a 'subsequent claim'*" by amending the current requirement for a *"significant change in circumstances"* to also: (1) "*relate to the claimant himself/herself or his/her risk country/territory*; and (2) only be supported by further documents and evidences that *"relate to matters that happened after the previous claim was finally determined or withdrawn*". This proposal lacks clarity and is particularly problematic in situations where a claimant may not have been able to obtain evidence to corroborate his/her claim upon arrival in Hong Kong and/or at the time of filing previous protection claim, but is subsequently able to obtain such documents which may be relevant both to the closed-case and his/her subsequent claim. This proposal would amount to the decision-maker refusing to receive evidence which may be integral to the claim solely on the basis of the document relating to matters that happened at the time of or prior to the previous claim. It is trite that a failure by the decision-maker to consider all relevant evidence would be liable to challenge in court.

27. Further, it should be noted that the current requirement under s. 37ZO of the IO already imposes stringent conditions by setting out *inter alia* that the significant change in circumstances must also sufficiently evidence *"a realistic prospect of success"*.[19]

(VII) Deemed automatic withdrawal of a claim in circumstances where a claimant has *"lost contact with"* Immigration presents a high risk of unlawful refoulement.

28. Paragraph 34 of the Brief proposes that *"if a claimant has absconded or lost contact before commencement of the screening procedures, his/her claim shall be deemed withdrawn automatically"* save for "*exceptional and uncontrollable circumstances, and* [where] *all due diligence has been exercised"*. This proposed amendment would unfairly expose claimants to extremely harsh consequences for a potentially minor and accidental mistake (e.g. failing to notify the Director of Immigration of a change of mailing address).

(VIII) Removing the obligation of Immigration / TCAB to assist claimants in substantiating their claims may result in serious unfairness to claimants.

29. Paragraph 36 of the Brief proposes removing the duties of Immigration / TCAB to assist claimants in substantiating their claims/appeals. This amendment is contrary to the duty of joint endeavor in the screening process.[20] Disturbingly, the proposal conflates the decision-maker's duty to fairly and properly assess a non-refoulement claim, including considering relevant

[19] Section 37ZO (2)(b) of Cap. 115

[20] *CH v Director of Immigration* [2011] 3 HKLRD 101; *ST v Betty Kwan* [2014] 4 HKLRD 277.

country of origin information ("**COI**") as well as the claimant's particular background and evidence, with becoming an advocate for the claimant. At neither stage does the decision-maker take on the role of advocate. However as decision-makers in this specialized area, both immigration officers and adjudicators assessing claims are required not to hold the claimant to the strict proof of his claim [21] and are expected to have an understanding of relevant jurisprudence and applicable COI as to the country conditions and human rights situation in the claimant's home country. Decision-makers must also consider whether elaboration or clarification is required from the claimant so that he/she fully understands the claim and the claimant's position so as to make a fair assessment of the case. It will be for the claimant and his/her lawyer to establish that the claim falls within the scope of a protected ground. While the burden of proof is always on the claimant, in accordance with the high standards of fairness, the assessment process is one of "*joint endeavour*" by both the claimant and the decision-maker to fully and fairly assess the claim.

30. Although non-refoulement claimants have the benefit of automatic eligibility for publicly funded legal representation via the DLS Scheme and Pilot Scheme at the first instance of screening before the Director of Immigration, at the second stage before TCAB, claimants are only entitled to continued legal representation if their lawyer is of the view that there are merits to appeal. While claimants may seek a second opinion from another duty lawyer on the DLS panel, it would appear that this option is neither readily accessible nor widely known to claimants. Further, it is only in exceptional circumstances that claimants are able to obtain such opinion (by lawyers willing to provide the service on a pro bono basis). Accordingly, statistics indicate a woefully low level of representation on appeal. In response to a freedom of information request made to the Security Bureau in respect of TCAB's operations, the Security of Security stated that as of June 2017 *"about 9% of the appellants/petitioners are legally represented"* at TCAB.[22] As a result, it is generally the case that claimants are unrepresented at the appeal stage and face hurdles due to language barriers and lack of knowledge on both the law and how to present their case on appeal. Under the practice directions for TCAB hearings, the Immigration Department prepares the hearing bundle which is to be delivered just 5 days before the oral hearing. This allows the claimant very little time to review the bundle and prepare for the hearing. In our experience, Immigration will often include only selected extracts of critical COI reports that support their decision refusing protection (often leaving out portions of the same report that are supportive of the claimant's case). Further, Immigration will also often rely on outdated COI reports referred to at the time of its decision and fail to provide updated COI reports – from the same sources (i.e. the U.S. State Department and/or UK Home Office) – for inclusion in the hearing bundle despite the frequent lapse of over six months to more than a year between the Immigration decision and the TCAB hearing.

31. Given the disadvantages faced by unrepresented litigants and the significance of the matter to be decided (i.e. matters of life and limb to the claimant), it is of critical importance that the decision-maker has all relevant information, including up-to-date and relevant COI, before him.

[21] *Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289; *FB v Director of Immigration and another* [2008] HKCFI 1069.

[22] Access to information request, "Torture Claims Appeal Board Operations – a Freedom of Information request to Security Bureau" 28 June 2017.

The Immigration Department, which is often represented by the Department of Justice at TCAB hearings, has a duty to ensure that it is presenting a fair case and not misrepresenting the country conditions and human rights situation in the claimant's home country. It would be shocking and contrary to the public duty owed for Immigration to be permitted to deliberately present inaccurate and skewed and/or outdated COI to the decision-maker when acting as officers of the court and appearing before a quasi-judicial tribunal.

32. The importance of the 'joint endeavour' approach to screening non-refoulement claims is of particular importance when claimants are unrepresented and/or are detained. The courts have recognized that there is an expectation for the claimant's case to be fully set out where claimants are legally represented.[23] Notwithstanding that, decision-makers "*are not permitted to simply sit back and put the torture claimant to strict proof of his claim"* and must ensure that he/she properly raises any issues of concern or which call for clarification / elaboration.[24] The decision-maker is required also to take into account all relevant information, including COI, which is probative of a matter in issue. [25] Even where claimants are legally represented, it is not always foreseeable as to what issues or areas of concern a decision-maker may have. Therefore, it must be ensured that claims are fairly considered and the claimant has full opportunity to respond to any matters of concern that underlie the 'joint endeavour' approach. When claimants are unrepresented and/or detained during the screening process, the barriers to claimants presenting their case fully increase. Detainees (even with legal representation) face greater hurdles in obtaining evidence from their home country.[26]

<u>(IX) There is no evidence to justify authorizing immigration officers to possess arms or ammunition.</u>

33. Whilst paragraph 38 of the Brief proposes *"amending the Firearms and Ammunition Ordinance (Cap. 238) and the Weapons Ordinance (Cap. 217), so as to authorize immigration officers to possess arms, ammunition, etc."*, no evidence has been presented to demonstrate the necessity of such a drastic maneuver. If the purpose of the amendment is to *"further enhance*[e] *ImmD's ability to handle emergencies"*, the starting point would be for the administration to provide convincing and relevant statistics as to, *inter alia*, the number and type of "emergencies" that would have ostensibly been better handled with officers possessing weapons. Claimants should not be treated as criminals, especially where they are detained simply on the basis that their claims are being processed and not because they have committed any crime (outside of 'overstaying' – which is a *de facto* pre-requisite to lodging a non-refoulement claim). Pursuant to S. 37ZK of the IO, "…*a claimant may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending final determination of the claimant's torture claim*". [27] The current provisions on administrative detention are highly problematic given that they provide for sweeping detention

[23] *TK v Michael C Jenkins, Esq* [2012] HKEC 1597.

[24] *ST v Betty Kwan* [2014] 4 HKLRD 277.

[25] *Shafqat Ali v Betty Kwan* [2013] HKEC 2007.

[26] *See* para. 33 below.

[27] Section 30ZK of Cap. 115.

powers solely on the basis that non-refoulement claims are under process. There are many instances where claimants have been detained for over one year while their claims are being processed. Administrative detention is further problematic given that it hampers the claimant's ability to gather evidence to substantiate his/her claim and causes delay in the screening process. For example, claimants detained in Castle Peak Bay Immigration Centre ("**CIC**") are unable to (or at the least, must overcome numerous obstacles to) produce documents, materials and information relevant to their claims and background (or legal aid applications). The CIC does not allow outside computers to be brought into CIC and lawyers making legal visits can only use computers provided by CIC (however, the computers so provided do not allow documents or data to be saved or transferred to any other storage device, or enable internet access, resulting in additional time required to prepare and finalize submissions). Detainees in CIC also are allowed only very limited access to for telephone calls which can be costly (i.e. international telephone calls) and are often insufficient for them to contact persons who may be able to seek the relevant information on their behalf. We are also concerned about the detrimental effects of prolonged detention on the mental health of claimants (especially those who are affected by traumatic experiences in their home country at the hands of the authorities there and then are subjected to prolonged detention by authorities in Hong Kong) which may further compromise the fairness of the screening process and cause delays. Viewed individually or in totality, it is clear that the administrative detention provisions in Hong Kong are exceedingly draconian.

34. In this connection, we have also noted a rise in tensions at CIC since the Immigration Department replaced the Customs & Excise Department in managing CIC. We advance that it is imperative for the present arrangements to be reviewed seeing as the Immigration Department holds conflicting duties in this respect – on one hand it seeks to remove / deport detained persons, and on the other hand, it is responsible for impartially administering non-refoulement claims.

<u>(X) The arrangement of repatriation in parallel with a pending appeal increases the risk of harm to claimants and/or their families.</u>

35. Paragraph 39 of the Brief proposes prescribing that *"even though* [an] *appeal is pending, once the claim has been rejected by an immigration officer, the HKSAR Government may… liaise with the relevant authorities for repatriation arrangements in parallel"* including *"arranging for the issuance of necessary travel documents*". The administration's stated purpose of expediency comes at a hugely disproportionate cost to the claimant and/or his/her family in the home country. First, in order to ensure a fair and safe screening, the screening process must be confidential. This proposal runs the serious risk of exposing claimants to their persecutors by identifying them as persons to be removed to the foreign government and therefore is contrary to international law (which requires the administration to protect all potential and actual refugees and/or successful USM claimants). Second, many claims involve serious allegations against the foreign country and its agents. Accordingly, this proposal would not only remove the right of claimants to a confidential screening process but also would potentially drastically increase the risk of harm to claimants. Given that repatriation arrangements usually involve contacting the embassy and/or consulate of the claimant's country of origin (i.e. for verification of identity), the administration may become complicit in future ill-treatment of claimants. For example, claimants may already be on a government blacklist due to their political opinions, have absconded and/or have outstanding warrants arising from false blasphemy charges, have

departed their country illegally because they are a member of a minority ethnic group that was been targeted by the State and hence exiting the country via unofficial channels was the only option available; all of these factors are part and parcel of their claims for protection and hence consist information relevant to the risk of harm faced by them upon return. The notification of a foreign government – who may very well have an adverse interest in a claimant - raises a high risk of triggering further actions by the foreign government, such as to conduct inquiries, placing the claimant at even higher risk of serious ill-treatment on return and potentially exposing the claimant's family in the home country to risk of harm as well. Put another way, such a proposal is akin to the administration providing advance notice to (what will be in many cases) the claimant's persecutors.

36. Ultimately, Daly & Associates strongly reject implementation of the proposals set out in the Brief on the basis that they would place non-refoulement claimants at grave risk of prejudice. In any discussion concerning the handling of non-refoulement claims, the starting point must fall on the findings by the Hong Kong Court of Final Appeal in *Secretary for Security v Sakthevel Prabakar* where it was held that "*The determination of the potential deportee's torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination*".[28] In the light of our experiences in the USM processes, we are of the view that the suggested amendments to tighten the IO would seriously jeopardize claimants' rights to procedural and substantive fairness in the handling of their non-refoulement claims, and as such, are contrary to the high standards of fairness demanded of the administration in its non-refoulement decision-making obligations.

[28] *See* n 21 above at para. 44.

Appendix A

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.

   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*."[29]

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:

[29] per DHCJ Woodcock at para. 28

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:-

   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[30] 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%

[30] (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

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[31].

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.

18 May 2018

Daly, Ho & Associates

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