



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2501 4281)

19 January 2021

Mr Cyrus CHEUNG
Principal Assistant Secretary for Security (Review)
Security Bureau
Review Division
8th Floor, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

Dear Mr CHEUNG,

Immigration (Amendment) Bill 2020

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the following issues.

Removal procedure

2. Clause 9(3) of the Bill seeks to amend section 37Z(2) of the Immigration Ordinance (Cap. 115) by adding a new paragraph (c) to the effect that the Government could, for the purpose of making arrangements for the removal of a claimant, liaise with any party (including a torture risk State) after (i) the torture claim is rejected under section 37ZI; (ii) a revocation decision under section 37ZL(1) is made in relation to the torture claim; or (iii) the torture claim is withdrawn.

3. Please clarify whether a claimant whose torture claim had already been rejected by the Immigration Department and the Torture Claims Appeal Board but who had applied for leave to apply for judicial review would be removed. If so, please clarify whether (and if so, how)

clause 9(3), insofar as it may interfere with the right of claimants, as persons in Hong Kong, to institute legal proceedings in the courts against the acts of the executive authorities and their personnel, could satisfy the four-step proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* [2016] 19 HKCFAR 372 as far as Articles 35 and 41 of the Basic Law are concerned.

Detention of claimants

4. Under clauses 5 and 16 of the Bill, it is proposed that sections 32(4A) and 37ZK of Cap. 115, which concern detention pending removal/deportation and detention pending final determination respectively, be amended to provide for new circumstances under which the length of detention of a claimant would be considered as reasonable and would not be unlawful. Such new circumstances would include whether the number of other persons pending removal from Hong Kong/final determination is such that it is reasonable to take the time it is taking, or has taken, to remove the claimant/to have the claim finally determined, and whether the manpower and financial resources allocated for the removal of persons from Hong Kong under Cap. 115/carrying out the work involved in making such final determinations are such that it is reasonable to take the time it is taking, or has taken, to remove the claimant/to have the claim finally determined. Factors that directly or indirectly prevent or delay the person's removal that are not within the control of the Director of Immigration ("Director") could also be taken into consideration.

5. In respect of the proposed amendments to sections 32(4A) and 37ZK of Cap. 115 respectively, please clarify whether, and if so, how the proposed amendments could conform to the principles laid down by the English court in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704 ("*Hardial Singh* principles"), which have been consistently adopted and applied by Hong Kong courts (see e.g. the Court of Final Appeal's decision in *Ghulam Rbani v Secretary for Justice* [2014] 3 HKC 78). Under the *Hardial Singh* principles, in particular, (i) a claimant may only be detained for a period that is reasonable in all the circumstances, and (ii) if before the expiry of the reasonable period for detention, it becomes apparent that the Director will not be able to effect deportation within that reasonable period, the Director should not seek to exercise the power of detention (the detention may become unlawful even if the reasonable period has not yet expired). Please clarify whether, and if so, how the above proposed amendments could satisfy the *Hardial Singh* principles (in particular the two principles cited above).

The Secretary for Security's proposed new powers

6. Under clause 3 of the Bill, the Secretary for Security ("Secretary") is proposed to be empowered to make regulations to, amongst other things, provide that airlines or their owners or agents would be required to supply the Director with information or data relating to passengers or crew members of a carrier, and empower the Director to direct that a passenger or member of the crew of a carrier may or may not be carried on board the carrier. Furthermore, such regulations could also provide for the transmission mechanism of information or data collected under the regulations to the Director, as well as the handling or disposal of information or data collected under the regulations. It is also proposed that such regulations could either be of general application or different provisions could be made for different cases or classes of cases.

7. Please clarify the following matters:

- (a) whether the information or data collected under the above regulations to be made would be "personal data" within the meaning of the Personal Data (Privacy) Ordinance (Cap. 486);
- (b) if such information or data would be "personal data", whether the information or data collected under the regulations would be considered as "personal data *held* by or on behalf of the Government for the purposes of safeguarding security, defence or international relations in respect of Hong Kong" (italics added) under section 57(1) of the Personal Data (Privacy) Ordinance (Cap. 486), and if so, elaborate on the circumstances under which a data subject's (i.e. a passenger or crew member of a carrier) access to his own personal data pursuant to data protection principle 6 and section 18(1)(b) of Cap. 486 would likely prejudice the stated purpose(s);
- (c) in connection with (a) above, please also clarify whether such information or data would be used for purpose(s) other than "safeguarding security, defence or international relations in respect of Hong Kong", and whether in such circumstances, the prescribed consent of the data subjects (i.e. a passenger or crew member of a carrier) would be sought in compliance with data protection principle 3;

- (d) whether, and if so, how the handling or disposal of information or data collected under the regulations would comply with data protection principle 4; and
- (e) whether the regulations providing for (i) the collection of information or data relating to a carrier, its passengers or members of its crew, or (ii) the supply of such information or data to the Director would be of general application, and whether it is envisaged that under certain circumstances such regulations would apply only to specific cases or classes of cases and if so, what would be those specific cases or classes of cases.

8. Please also clarify whether (and if so, how) the Secretary's proposed new power under clause 3 to empower the Director to direct that a passenger or member of the crew of a carrier may or may not be carried on board the carrier, insofar as it may interfere with Hong Kong residents' freedom to travel and to enter or leave Hong Kong, could satisfy the four-step proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* [2016] 19 HKCFAR 372 as far as Article 31 of the Basic Law and Article 8(2) of the Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap. 383) are concerned.

Penalties for unlawful employment

9. Under clause 23 of the Bill, it is proposed that section 38AA of Cap. 115 be amended to widen the scope of persons prohibited from taking employment and establishing business in Hong Kong to include persons "who, having been given permission to land in Hong Kong under section 11(1), remains in Hong Kong in breach of the limit of stay imposed under section 11(2) in relation to the permission; or who was refused permission to land in Hong Kong under section 11(1)".

10. Under clause 4 of the Bill, it is proposed that section 17I of Cap. 115 be amended to increase the penalties for employing an employee who is not lawfully employable under the amended section 38AA from a maximum fine of \$350,000 and three years' imprisonment to a maximum fine of \$500,000 and 10 years' imprisonment. It is also proposed that any director, manager, secretary or other similar officer of a body corporate would also commit the offence if it is proved that the offence was committed with the consent or connivance of or was attributable to any neglect on their part.

11. Please clarify the rationale for the proposed increase in the penalties as stated above, in particular, whether the proposed new penalties are proportionate to the severity of the offence, and whether reference has been made to the penalties of other offence(s) under Cap. 115 and/or any other ordinance(s).

Proposed new statutory standards applicable to claimants

12. Under the Bill, it is proposed that claimants would have to demonstrate that (i) they have or had exercised all due diligence, or (ii) because of circumstances beyond their control, will not be able to or failed to perform certain acts, before they would be allowed to, for example, extend the time for submitting a torture claim form (section 37Y(3)), rely on disputed physical or mental condition for the purpose of the interview with the immigration officer (section 37ZC), re-open a torture claim treated as withdrawn due to the claimant's failure to return a completed torture claim form (section 37ZG), file a notice of appeal out of time (section 37ZT), or fix another hearing date for an appeal because of the claimant's absence from the original hearing (section 15 of Schedule 1A) (see clauses 8, 12, 14, 19 and 25 of the Bill).

13. Please clarify, with examples, what would be considered as a claimant having exercised "all due diligence", and what would be considered as "circumstances beyond a claimant's control". In that regard, please clarify whether claimants would actually be informed in practical terms the standards ("due diligence" and "circumstances beyond the claimant's control") that they would be required to meet.

14. In that connection, please also clarify whether (and if so, how) the proposed new statutory standards as stated above could conform to the high standards of fairness required in the procedures for dealing with torture claimants, which include the requirement(s) that the Secretary ought not adopt an attitude of sitting back and putting the claimant to strict proof of his claim, and that the Secretary should draw attention to matters that obviously require clarification or elaboration so that they could be addressed by the claimant concerned (see *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187).

Language used for communications

15. Under clause 10 of the Bill, it is proposed that a new section 37ZAC be added to Cap. 115 to provide that an immigration officer may direct a claimant to communicate in a language that the

officer reasonably considers the claimant is able to understand and communicate in. Please clarify how the officer would determine the language to be used, and the factors that would be taken into consideration by the officer.

16. Please also clarify whether (and if so, how) the proposed new section 37ZAC could conform to the high standards of fairness required in the procedures for dealing with torture claimants, which include the requirement that the claimant should be given every reasonable opportunity to establish his claim (see *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187).

17. Please let us have your response in both English and Chinese as soon as practicable, preferably by 1 February 2021.

Yours sincerely,



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