

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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1 Legislative Council Road, Central
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Dear Miss Chan,

Immigration (Amendment) Bill 2020

Thank you for your letter of 19 January 2021. In consultation with the Immigration Department (“ImmD”) and Department of Justice (“DoJ”), we set out below our reply to the issues or questions raised in your letter.

Removal procedure

2. Non-refoulement claimants are illegal immigrants, overstayers or persons who were refused permission to land upon arrival in Hong Kong, and they have no lawful status to remain in Hong Kong. As such, when their claims and appeals (if any) are rejected under the Unified Screening Mechanism (“USM”), they must be removed from Hong Kong as soon as possible, so as to maintain effective immigration control and to safeguard the public interest.

3. To enhance the removal efficiency in respect of unsuccessful claimants, we have proposed in the Immigration (Amendment) Bill 2020 ("Amendment Bill") that after a claim is rejected by an immigration officer, the Government can in parallel liaise with the related authorities for the purpose of making arrangements for removal (such as issuance of travel documents).

4. The Government will not disclose to such authorities whether the person concerned has lodged any non-refoulement claim in Hong Kong when making arrangements for the removal. Besides, ImmD will not execute the removal of a claimant with a pending appeal to the Torture Claims Appeal Board ("TCAB"). It should also be highlighted that under the prevailing removal policy, ImmD will suspend removal of an unsuccessful claimant if the person has filed an application for leave to judicial review. As and when the legal proceedings have been disposed of, ImmD will proceed to execute removal of the claimants concerned as soon as practicable.

Detention of claimants

5. In formulating the detention policy, the Government has made reference to the laws of Hong Kong and the relevant legal principles established by the Court, including the common law principles. When determining whether an individual, including a non-refoulement claimant, should be detained, ImmD would take into account all relevant factors and circumstances of the particular case, including whether the person concerned has, among others, committed a serious crime or is likely to pose a threat/security risk to the community, and whether there is any risk of the person absconding and/or (re)offending, etc. Furthermore, ImmD will conduct regular and timely review of detention in respect of individual detainees in accordance with the detention policy and established mechanism, in order to determine whether an individual should be further detained. Upon conclusion of a detention review, ImmD will notify the person concerned in writing the result of the review with justifications, and conduct an interview with the person concerned, with the assistance of an interpreter where necessary. These arrangements aim to ensure that the detainees are timely informed and fully aware of the detention decisions and the reasons for such decisions.

6. The duration of detention of a detainee depends on the individual circumstances of the case and any relevant changes, which cannot be easily generalised. There may be many variables that may affect the progress of the removal arrangement and result in the need for a longer detention period pending removal of the detainee, including the time required in securing re-entry facilities for the removees, the processing formalities of the local consulates, and whether the removees are willing to cooperate throughout the removal process, etc., many of which may be outside the control of ImmD.

7. As regards the *Hardial Singh* principles referred to in your letter, the general principle is that in the absence of constitutional challenge, the legislature can vary the *Hardial Singh* principles when providing for a detention power by way of Ordinance (*Tan Te Lam v Superintendent of Tai A Chau Detention Centre & Anor* [1997] AC 97 at 111D-E). That being said, the proposed amendments to sections 32(4A) and 37ZK of the Immigration Ordinance ("the Ordinance") (Cap.115) will not affect the *Hardial Singh* principles in determining the reasonableness of the detention. The "circumstances" set out in the proposed amendments to sections 32(4A) and 37ZK of the Ordinance are the relevant factors which may justify a detention and should be taken into account when considering whether a period of detention is reasonable and lawful, alongside with other factors in the specific circumstances of the individual case. ImmD, when determining the detention of a person under sections 32(4A) and/or 37ZK, will continue to make its decision in accordance with the law and relevant legal principles, having regard to the said factors and circumstances of the particular case.

8. We would like to emphasise that the determination of whether the detention period of a person is reasonable in all the circumstances is a fact-sensitive exercise. The proposed amendments to sections 32(4A) and 37ZK are aimed to enhance transparency and provide unequivocal legal backup to the immigration officers in considering and determining the detention period, while complying with the relevant legal principles. The proposed amendments are modelled on existing section 13D(1A) of the Ordinance, which was introduced in 1991 to deal with the detention arrangement for Vietnamese boat-people back then.

The Secretary for Security (“S for S”)’s proposed new powers

9. The proposed provision to empower S for S to make regulations in relation to the provision of passenger information by carriers is intended for fulfilling the international obligation of the HKSAR under the Convention on International Civil Aviation. In 2018, the International Civil Aviation Organization (“ICAO”) updated the Convention, including imposing a new mandatory requirement for its members to put in place the Advance Passenger Information (“API”) system. Under the API, airlines are required to provide passenger information to immigration authorities of the destination port before flight departure. So far, over 90 countries already have the API system in place.

10. To comply with the said mandatory requirement, we have proposed addition of the enabling provision to empower S for S to make regulations under the Ordinance, so as to set down the legal foundation for implementation of API in Hong Kong. The API system will not only allow faster passenger clearance at control points, but will also enhance the enforcement capability of ImmD and strengthen our measures to prevent potential claimants from entering Hong Kong as a corollary.

11. The Government is in parallel studying how the API system should be implemented in Hong Kong, and ImmD has already engaged a consultancy on the feasibility of the required system. The operational details of API, including the handling of records and data to be collected, will be further developed and the views of relevant stakeholders will be sought in due course. Subject to Legislative Council’s enactment of the Bill, the Government will prepare the relevant subsidiary legislation, which will be subject to negative vetting of the Council in due course.

12. According to section 2 of the Personal Data (Privacy) Ordinance (“PDPO”) (Cap. 486), personal data means any data –

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable.

13. While the operational details of API are to be further developed, it is envisaged that the data to be collected under the proposed system may include, among others, items of data that appear on the travel documents of the passengers and crew members arriving at Hong Kong, such as their names, dates of birth, gender, travel document numbers and travel document types, etc. While the data to be collected through the proposed API system will likely fall within the meaning of "personal data" under PDPO, it is no different from the personal information that ImmD will have access to when the relevant persons are presented to ImmD for immigration clearance upon their arrival in Hong Kong. ImmD will continue to handle the personal data collected with care and in full compliance with the requirements of PDPO.

14. It should be worth noting that the API system, being a requirement by ICAO, is intended to enhance aviation security and facilitate immigration authorities around the world to exercise more effective immigration control on visitors. In Hong Kong, the freedom to travel and the right to enter or leave Hong Kong of Hong Kong residents are guaranteed under Article 31 of the Basic Law and Article 8(2) of the Bill of Rights under the Hong Kong Bill of Rights Ordinance ("BORO")(Cap. 383). We will ensure that the operation of the API system will conform with the Basic Law and BORO.

Penalties for unlawful employment

15. At present, if any person who enters Hong Kong illegally, or is issued with a removal order or deportation order, takes paid or unpaid employment, or establishes or takes part in any business, the person is liable to be prosecuted under section 38AA of the Ordinance, and liable on conviction to a fine of \$50,000 and imprisonment for 3 years. However, if an overstaying visitor who has not yet been issued with a removal order or deportation order is arrested for unlawful employment, he/she is not caught by section 38AA. In such cases, ImmD can only charge the person for breaching a condition of stay by section 41 of the Ordinance, of which the maximum penalty is a fine of \$50,000 and imprisonment for 2 years.

16. To properly reflect the criminality and achieve the required deterrence, we consider it necessary to amend section 38AA such that persons taking up unlawful employment in Hong Kong while overstaying can also be prosecuted under this section, so as to bring them on par with the penalties for other illegal immigrants working illegally in Hong Kong.

17. As to the level of penalty under section 17I of the Ordinance for employing a person who is not lawfully employable, breach of that provision is currently liable on conviction to fine of \$350,000 and imprisonment for 3 years. The current penalty level was last revised in 1996 and the Government considers it appropriate to raise the penalty level for employing a prohibited employee to a fine of \$500,000 and imprisonment for 10 years to increase the deterrent effect and to send a clear message to the community that unlawful employment is a serious offence. We are conscious that the prescribed penalty level is a maximum level and in determining the sentence on conviction of the offence in a particular case, the Court may take into account all relevant factors of that case and impose a penalty level below the prescribed maximum. This is in line with the long-held practice.

Proposed new statutory standards applicable to claimants

18. In determining whether a claimant has exercised “all due diligence” and whether a situation amounts to “circumstances beyond a claimant’s control”, all relevant circumstances of the individual case would be duly considered. While it is not feasible to generalise what amounts to “circumstances beyond a claimant’s control”, generally speaking, if the claimant fails to proceed with the claim in accordance with the screening or appeal procedures, such as failing to submit information or documents in support of the claim or appeal, or to attend any interview, hearing or medical examination as required, due to illness or accident which is beyond his/her own control, the situation may be considered as “circumstances beyond control”.

19. In determining whether a claimant has exercised all due diligence so as to avoid the relevant failure or non-compliance from happening, a common-sense approach will be adopted. For instance, if a claimant has endeavoured to try alternative means of conveyance during a traffic incident on the way to attend screening interview or hearing, and taken the first available opportunity to inform ImmD or TCAB of the hiccups or incident, the claimant can provide evidence to the satisfaction of ImmD or TCAB about the occurrence of such circumstances or their relevance to the claimant’s failure to fulfill or comply with the screening procedures, and hence their due diligence exercised.

20. The introduction of the “all due diligence” requirement is consistent with the high standard of fairness required in the procedures for dealing with claims. It is firmly established in previous court cases that high standards of fairness do not entitle the claimant, having stated a claim, “to simply sit back and require the Director to disprove it” and the exercise of determining whether a claim made is valid must be one of “joint endeavor” (see *TK v Jenkins & Anor* [2013] 1 HKC 526 at para. 25). The introduction of the “all due diligence” requirement is plainly consistent with the above.

21. All in all, claimants are expected to take active steps in fulfilling and complying with the screening procedures in accordance with the law. Whether they have exercised all due diligence and whether a situation amounts to “circumstances beyond control” will need to be considered on a case-by-case basis. While it would not be practical to set out the objective standards or guidelines, ImmD/TCAB will, as with the current practice, take into consideration all relevant facts and circumstances, and consider whether the claimant has made diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation, and in this context, is in conformity with the screening procedures. In any case, while it will be up to claimant concerned to demonstrate that he/she has exercised all due diligence and that the circumstances are beyond his/her control, ImmD/TCAB will still need to seek clarification or elaboration from him/her as and when necessary.

Language used for communication

22. Under the prevailing practice, unless the claimant could communicate in Chinese or English, ImmD will arrange publicly-funded simultaneous interpretation services to conduct screening interview. The same applies to oral hearing conducted by TCAB.

23. In the past, there have been cases where claimants could reasonably understand and communicate in other languages (e.g. English or the official languages of their countries of origin), but still insisted that ImmD or TCAB should arrange for the service of an interpreter who could communicate in their rare tribal dialects for conducting the interview/hearing, thereby seriously obstructing the smooth handling of their claims/appeals. The proposed provision that ImmD/TCAB may direct a claimant to communicate in a language that ImmD/TCAB

reasonably considers the claimant is able to understand and communicate in is intended to prevent such delaying tactics. When considering whether a claimant can reasonably understand and communicate in a language, ImmD/TCAB will take into account the information and documents submitted by the claimant, his/her previous communications with ImmD/TCAB, court documents, other evidences demonstrating the claimant's proficiency in another language, etc.

24. Indeed, there are previous court cases where the claimants quoted the lack of interpretation service during the screening or appeal proceedings as one of the grounds for judicial review, but the claims were rejected by the Court. In one case, all the court documents, including the affirmation filed in support of the leave application, the notice of appeal, and the written submission in support of that appeal, were written in English. The Court was of the view that either the applicant was conversant in the English language or she had access to language assistance as she deemed necessary (see *Sharma Poonam* [2019] HKCA 804 at para. 17). We should point out that after the proposed amendment is in place, ImmD or TCAB will continue to arrange simultaneous interpretation services for the claimant and publicly-funded interpretation services will continue to be available for those in need. The provision will enable ImmD or TCAB to tackle the situation if and when a claimant seeks to deploy this as an excuse to delay the processing of the case. ImmD and TCAB will continue to comply with the high standards of fairness in handling the claims.

25. For further enquiries, please contact the undersigned at 2810 2099.

Yours sincerely,



(Ronald Ho)
for Secretary for Security

c.c. Clerk to Bills Committee
Department of Justice
Immigration Department