

## Legislative Council Brief

### Immigration Ordinance (Chapter 115)

## IMMIGRATION (AMENDMENT) BILL 2020

### INTRODUCTION

At the meeting of the Executive Council on 1 December 2020, the Council ADVISED and the CHIEF EXECUTIVE ORDERED that the Immigration (Amendment) Bill 2020 (“the Bill”), at Annex A, should be introduced into the Legislative Council (“LegCo”) with a view to improving the screening procedures for non-refoulement claims and introducing enhanced measures in respect of law enforcement, removal and detention.

Annex A

### JUSTIFICATIONS

2. Following judgments by the Court of Final Appeal (“CFA”) in two relevant judicial review (“JR”) cases, the number of new non-refoulement claims made to the Immigration Department (“ImmD”) in 2014 and 2015 quadrupled<sup>1</sup>. By early 2016, over 11 000 claims were pending determination by ImmD under the Unified Screening Mechanism (“USM”) <sup>2</sup>. To tackle the problem, the

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<sup>1</sup> Non-refoulement claimants include illegal immigrants, overstayers or persons who were refused permission to land in Hong Kong, and they should be removed from Hong Kong as soon as possible. In 2014 and 2015, respectively 4 634 and 5 053 claims were made to ImmD. From 2010 to 2013, on average over 1 200 claims were made each year.

<sup>2</sup> Following the said CFA judgments in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, FACV 15/2011 and *C & Others v Director of Immigration and Others* (2013) 16 HKCFAR 280, FACV 18-20/2011, USM was implemented in March 2014 to screen non-refoulement claims on all applicable grounds, i.e. a claim by someone subject to being removed from Hong Kong to another country that if removed to that country, he will be subjected to -

(a) “torture” within the meaning of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (b) ill-treatment that would violate his absolute and non-derogable rights under the Hong Kong Bill of Rights (“HKBOR”) (e.g. the right not to be subjected to arbitrary deprivation

Government commenced a comprehensive review of the strategy of handling non-refoulement claims (“the comprehensive review”), implementing measures in the following areas –

- (a) reducing at source the number of non-ethnic Chinese illegal immigrants (“NECIIs”) and overstayers<sup>3</sup> who may lodge non-refoulement claims in Hong Kong;
- (b) expediting screening of claims and appeals under USM;
- (c) expediting repatriation of claimants whose claims have been rejected; and
- (d) stepping up law enforcement (against crimes such as unlawful employment) and improving detention arrangements.

A summary of the measures implemented and the progress achieved so far is at **Annex B**.

3. Despite some concrete progress made in the comprehensive review, there remain significant challenges ahead. As at 31 October 2020, there remained some 1 700 claimants whose appeal against ImmD’s decision was pending decision by the Torture Claims Appeal Board (“TCAB”). In addition, according to information provided by the Judiciary Administration (“JA”), as at 28 February 2020, around 5 500 applications for leave to apply for JR (around 50 filed in 2017 or earlier, 1 850 filed in 2018, and 3 600 in 2019) by unsuccessful claimants (whose claim and appeal have both been rejected by ImmD and TCAB respectively) were pending consideration by the Court of First Instance (“CFI”) of the High Court. These applications for leave to apply for JR are expected to further increase<sup>4</sup>, putting pressure on various levels of court and adversely

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of his life or torture or cruel, inhuman or degrading treatment or punishment guaranteed by Articles 2 and 3 of HKBOR respectively); or

(c) “persecution” with reference to the non-refoulement principle under Article 33 of the 1951 Convention Relating to the Status of Refugees, etc.

<sup>3</sup> Overstayers are persons who entered Hong Kong lawfully (e.g. as visitors) but have remained in Hong Kong in breach of the limit of stay imposed in relation to the permission under section 11(2) of the Ordinance.

<sup>4</sup> Based on information available to the Government, more than 5 500 applications for leave to apply for JR were pending consideration by the CFI of the High Court as at 28 February 2020. The impact on various level of court is expected to aggravate over time because any applicants whose application for leave to apply for JR has been refused by the CFI may appeal against the refusal to the CA of the High Court. If leave is refused by the CA, the applicants may appeal with leave to the CFA. Furthermore, there may be more applications for leave to apply for JR to come when those appeals pending TCAB’s decision are refused.

impacting the courts' handling of other cases and judicial work. According to JA, as at 28 February 2020, there were 116 cases pending consideration by the Court of Appeal ("CA") and 332 pending consideration by the CFA. It is estimated that as at 31 October 2020 there were over 8 000 claimants whose application for leave for JR/application for JR are pending handling by the court. Separately, some other 1 320 unsuccessful claimants were imprisoned, remanded, involved in ongoing prosecution or investigation process, or have absconded, while removal was being arranged for the remaining about 1 320 persons. Altogether, these some 13 000 unsuccessful claimants remaining in Hong Kong have been here from a few months to over ten years in some cases.

4. While the overall landscape of non-refoulement claims is more or less stable in the first three quarters of 2020, the screening of claims was affected by the outbreak of Coronavirus Disease 2019 ("COVID-19") pandemic. Due to the special work arrangements which limited the provision of publicly-funded legal assistance to claimants during the pandemic, the commencement of screening procedure was hindered. Apart from the few hundreds of claims accumulated under the COVID-19 pandemic pending commencement of screening, we see an increasing number of new claims received and an increasing number of NECIIs intercepted recently (from an average of some 50 cases per month in the first quarter of 2020 to some 110 cases in October 2020, and from the monthly average of 74 NECIIs in the first quarter of 2020 to 99 NECIIs in October 2020). The Government needs to take steps to improve the screening procedures to plug any possible loopholes.

5. Separately, in the past few financial years, the total public expenditure relating to the handling of non-refoulement claims (not counting the Judiciary and legal aid for JR applications)<sup>5</sup> was around \$1.1 billion per year. The latest statistics relating to non-refoulement claims are at **Annex C**.

6. The overall policy objective on handling non-refoulement claims is to ensure that claims and relevant appeals are handled as efficiently as possible whilst meeting the high standards of fairness required by law as set down by the Court, and to remove unsuccessful claimants from Hong Kong as soon as possible. Working towards this objective, we see a need to amend the Ordinance to enhance the statutory backing for screening by ImmD, prevent the re-emergence of various

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<sup>5</sup> Public expenditure items relating to the handling of non-refoulement claims include publicly-funded legal assistance provided to claimants during screening under USM (as required by law), humanitarian assistance for claimants, cost of operation of TCAB and staff cost of various relevant departments.

delaying tactics deployed by claimants, improve the procedures and functions of TCAB to enhance its efficiency and effectiveness in handling appeals, and make further improvements in respect of removal, detention and law enforcement for better overall management of the situation.

## **KEY AMENDMENT PROPOSALS**

### ***(A) Enhancing efficiency in screening by ImmD and preventing delaying tactics***

7. Since 2018, ImmD has been receiving about 1 000 to 1 200 new claims per year. Under USM, all claimants must first complete and return a claim form to state all grounds of their claim and all the supporting facts. At present, claimants are given a minimum of 49 days (28 days as provided under the Ordinance, plus 21 days granted through administrative means) to complete and return the claim form no matter their claim is simple or complicated<sup>6</sup>. Taking into account the views of different stakeholders, we propose maintaining the current 28-day statutory period under the Ordinance, but an application for further extension of the period through administrative means may still be granted if there is a genuine need.

8. After a claim form is received by ImmD, the claimant will attend a screening interview with an immigration officer to provide information and answer questions relating to the claim. There were cases of serious delays due to uncooperative claimants refusing to confirm interview arrangements with ImmD or failing to attend or complete scheduled interviews, sometimes repeatedly. There were also cases where claimants could reasonably understand and communicate in English or other languages (e.g. the official languages of their countries of origin), but still insisted that ImmD should arrange for the service of an interpreter who could communicate in other languages (including rare tribal dialects) for conducting the interview, seriously obstructing the smooth handling of their claims. In this regard, we propose setting out in the Ordinance that -

- (a) it is the claimant's duty to attend interview(s) so required by ImmD, and even if the claimant fails to attend an interview, an immigration officer may still decide on the claim; and

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<sup>6</sup> Under the Ordinance, claimants must complete and return a claim form within 28 days of ImmD's request to set out why they fear being removed to the torture risk state. However, in response to the strong request of Duty Lawyer Service before implementation of USM, the Government agreed to allow claimants 21 additional days by means of administrative measures.

- (b) ImmD may direct a claimant to communicate in a language that ImmD reasonably considers the claimant is able to understand and communicate in.

9. In cases where a physical or mental condition of claimants is in dispute and relevant to the consideration of claims, ImmD will make arrangements for such claimants to undergo medical examinations to ascertain the alleged condition<sup>7</sup>. There were cases where the screening process was seriously delayed where uncooperative claimants were repeatedly absent from scheduled medical examinations, made baseless challenges against the professional qualifications of medical practitioners, or refused to disclose the full medical report to ImmD or TCAB. In this regard, we propose setting out in the Ordinance that ImmD or TCAB may decide not to take into account a disputed physical or mental condition alleged by a claimant if the claimant fails to give consent to the arrangement of medical examination, undergo the examination or disclose the full medical report to ImmD or TCAB.

#### ***(B) Improving procedures and functions of TCAB***

10. Claimants who disagree with ImmD's decision may lodge an appeal in writing (i.e. Notice of Appeal ("NOA")) to TCAB within 14 days after they are informed of such decision. It is expected that TCAB will be able to complete hearing and decide on the some 1 700 pending appeals (as at 31 October 2020) by mid-2021 the earliest. As most claimants rejected by ImmD would lodge an appeal, the number of new appeals to be received by TCAB each year is expected to remain at 1 000 or more, subject to whether the aforementioned increase in new claims received by ImmD will persist in the coming months. To ensure effective and efficient operation of TCAB, we propose setting out in the Ordinance that -

- (a) TCAB will take no action in relation to NOAs that are not in the specified form or not duly completed or signed;
- (b) when considering whether to allow the late filing of an NOA, TCAB will only take into account reasons and supporting

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<sup>7</sup> At present, these medical examinations are mainly conducted by medical and health officers of the Department of Health or psychiatrists of the Hospital Authority.

evidence given by the claimant for failing to file the NOA within the 14-day period, but not other matters;

- (c) TCAB may consider new evidence that relates to matters occurring before ImmD's decision being appealed against was made, on the condition that the evidence could not have been submitted before the decision was made due to circumstances beyond the claimant's control and that the claimant had exercised all due diligence; and
- (d) an appeal against a decision is withdrawn once a notice to withdraw is received by TCAB, and the claimant may not file further NOAs for the same decision.

11. When deciding on an appeal, TCAB would conduct an oral hearing in most cases<sup>8</sup>. If an oral hearing is required, a notice of hearing setting out its date, time and place should be served on the claimant at least 28 days before the hearing. Based on past experience, we propose setting out in the Ordinance that -

- (a) TCAB may shorten the notice period for oral hearings to less than 28 days where appropriate, but not less than seven days in any event;
- (b) in the event that a claimant is absent from a scheduled oral hearing, shorten the time period for the claimant to provide an explanation of his absence from seven to three working days<sup>9</sup>; and
- (c) similar to paragraph 10(b) above, TCAB may direct a claimant or a witness to communicate in a language that TCAB reasonably considers the claimant or the witness is able to understand and communicate in.

12. At present, only the Chairperson of TCAB has the power to assign member(s) to hear and determine an appeal, decide the order in which appeals

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<sup>8</sup> Section 12 of Schedule 1A of the Ordinance prescribes that TCAB may decide against conducting a hearing for an appeal upon considering the merits of the case. The CA ruled in a relevant JR in June 2014 that the discretion in deciding whether to conduct an oral hearing should be exercised in accordance with the high standards of fairness and oral hearings should be held where it would assist the adjudicator in his decision-making or reflect the claimant's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. Since the ruling, the percentage of appeal cases in which oral hearings are conducted by TCAB has increased from about 5% previously to over 90% at present.

<sup>9</sup> If the claimant could provide a reasonable explanation supported by evidence, TCAB may consider re-arranging a hearing.

and matters are to be heard or determined, and to give directions on the practice and procedures in hearing and determining an appeal. Since 2016, the number of TCAB members has increased from 26 to the current 93 (including the Chairperson and six Deputy Chairpersons)<sup>10</sup> to cope with the sharply increased caseload<sup>11</sup>. To ensure the effective management of TCAB, we propose setting out in the Ordinance that –

- (a) TCAB Chairperson may delegate specified powers and functions under the Ordinance to any Deputy Chairperson(s); and
- (b) if a three-member board is to be appointed to consider an appeal, it needs no longer include the Chairperson or a Deputy Chairperson and after appointing the members of the board, the Chairperson may nominate one of them to preside over the hearing<sup>12</sup>.

***(C) Improvement in respect of removal of unsuccessful claimants***

13. When making arrangements to remove unsuccessful claimants, application for a travel document is required for most of the cases, and the process would take quite a long time in many cases (in some cases over six months). At present, ImmD could not proceed in this regard until the claimant's appeal and related JR (if any) are also rejected. To ensure earlier removal of unsuccessful claimants, we propose setting out in the Ordinance that once a claim has been rejected by an immigration officer, ImmD may commence liaison with relevant authorities (including other governments) for repatriation arrangements in parallel (such as applying for necessary travel documents). This enables ImmD to take early action even when there is an appeal pending handling by TCAB. ImmD will not normally disclose to such authorities whether the person concerned has filed a non-refoulement claim, and in any event will not execute removal of a claimant with a pending appeal to TCAB.

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<sup>10</sup> TCAB members includes (a) former judges or magistrates of the Hong Kong Courts; (b) overseas experts with relevant experience in handling asylum-related cases outside Hong Kong; and (c) experienced members of other immigration-related tribunals/boards or other advisory/statutory boards, etc.

<sup>11</sup> The number of pending appeals nearly tripled from end 2015 (over 2 200) to end 2018 (over 6 500). It now stands at some 1 700 and it is expected that TCAB could complete the handling of these cases by mid-2021 the earliest.

<sup>12</sup> At present, if a three-member board is appointed, the law requires that the board must comprise the Chairperson or one of the Deputy Chairpersons, who will preside over the hearing.

***(D) Improvements in relation to detention of claimants***

14. ImmD is authorised under sections 32 and 37ZK of the Ordinance to detain persons pending removal and during screening of their claim respectively. As at 31 October 2020, about 200 claimants (whose claims or appeals are under processing) and unsuccessful claimants (whose removal is under arrangement) are detained at ImmD's detention centres<sup>13</sup>. To enhance the legal backing of the detention policy, we propose setting out in the Ordinance that in considering whether a period of detention is reasonable and lawful, in addition to the specific circumstances of the individual case, the following factors which may justify a longer detention should also be taken into account -

- (a) whether there is a large number of claims or appeals pending screening by ImmD or TCAB at the same time;
- (b) whether any procedure (for removal and final determination of claim) is hindered directly or indirectly by the person being detained; and
- (c) whether there are situations beyond the control of ImmD (e.g. some countries need more time to issue travel documents).

15. Separately, for security control reasons, officers deployed at the Castle Peak Bay Immigration Centre ("CIC") or sent in as reinforcement at emergency situation are equipped with suitable anti-riot equipment (such as pepper spray and 37mm single shot launcher). For such purpose, relevant ImmD staff need to apply to the Commissioner of Police for exemption to possess firearms and ammunition on a personal and case-by-case basis under the Firearms and Ammunition Ordinance (Cap. 238), while they are not permitted to possess weapons under the Weapons Ordinance (Cap. 217). Besides, to enhance protection of the officers concerned, ImmD is considering providing them with steel batons, which are classified as a "weapon" under the Weapons Ordinance. To alleviate the administrative burden on both ImmD and the Police Force in processing the relevant applications, we propose amending these two ordinances to designate the Immigration Service as one of the classes of persons who may possess such articles on behalf of the Government. Besides, because of the present constraint in possessing such articles, ImmD has been relying on the Correctional Services Department to provide the necessary training to its staff. After effecting the proposed changes, ImmD will have more flexibility in staff deployment and capacity to conduct staff training on its own, thereby enhancing its capability in handling emergencies and taking enforcement actions at detention

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<sup>13</sup> Representing about 2% of the some 13 000 claimants/unsuccessful claimants remaining in Hong Kong.



centres.

## **(E) Preventive measures**

### *Combating unlawful employment*

16. At present, for persons who entered Hong Kong illegally or who are subject to a removal or deportation order, if they take any employment (whether paid or unpaid) or establish or join in any business, they may be prosecuted under section 38AA of the Ordinance, and are liable on conviction to a maximum fine of \$50,000 and up to three years' imprisonment. However, overstaying visitors arrested for unlawful employment before being issued with a removal order or a deportation order are not subject to the said offence, and they can only be prosecuted for breaching their conditions of stay<sup>14</sup>. We propose amending section 38AA so that such overstaying visitors who take any employment will also be liable to be prosecuted under that provision and subject to the same penalty levels as illegal immigrants taking any employment.

17. As regards employers of illegal workers, we propose increasing the penalties for employing someone prohibited from taking employment under the amended section 38AA to a maximum fine of \$500,000 and 10 years' imprisonment<sup>15</sup>. Moreover, we propose specifying that if any body corporate (or partner in a partnership) employs anyone who is not lawfully employable, and the offence is proved to be committed with the consent or connivance of any director, manager, secretary or other similar officers of that body corporate (or any other partner in the partnership or any other person concerned in the partnership's management), such persons also commit the offence of employing someone not lawfully employable.

### *Increasing penalties against carrier of potential claimants*

18. At present, section 40 of the Ordinance provides that if a passenger arriving in Hong Kong in an aircraft does not have a valid travel document, the owner of the aircraft and his agent shall be guilty of an offence and liable to a fine of \$10,000. We propose increasing the maximum fine to \$100,000 to reflect the gravity of the consequence of breaching such duty.

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<sup>14</sup> The maximum penalty for breaching a condition of stay is a fine of \$50,000 and two years' imprisonment.

<sup>15</sup> The current maximum penalty for the offence to be employer of a person who is not lawfully employable is a fine of \$350,000 and three years' imprisonment.

### *Implementing latest International Civil Aviation Organization requirement*

19. The International Civil Aviation Organization updated the Convention on International Civil Aviation in 2018, including a new requirement for its members to put in place the Advanced Passenger Information (“API”) system. Under API, airlines are required to provide passenger information to immigration authorities of the destination port before flight departure. Currently, quite a number of countries/regions have gradually implemented the API system. We propose empowering the Secretary for Security to make regulations under the Ordinance to implement API in Hong Kong<sup>16</sup>, which will allow faster passenger clearance at control points, enhance the enforcement capability of ImmD and strengthen our measures to prevent potential claimants from departing from overseas airports and heading to Hong Kong to make a claim immediately upon arrival.

### **(F) Other matters**

#### *Revocation of decision to substantiate a claim*

20. As at 31 October 2020, there were 211 substantiated claims (including 126 claims accepted as substantiated by TCAB on appeal). ImmD will continue to regularly review the circumstances of each of these claimants, and decide whether the previous decision to accept their claims as substantiated should be revoked on the ground(s) set out in section 37ZN of the Ordinance<sup>17</sup> (there has not been any such revocation so far). Having reviewed the relevant provision, we propose clarifying in the Ordinance that a substantiated claim may be revoked if the risk giving rise to the claim has for any reason ceased to exist, or if, upon review of all prevailing circumstances, ImmD is of the view that the claim should not be accepted as substantiated.

#### *Continued operation of the USM*

21. Following enactment of the Bill, we will update all relevant administrative guidelines and practice directions under USM, such that procedures and requirements to assess non-refoulement claims and appeals on

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<sup>16</sup> Including requiring airlines (or other means of transportation) or their owners or agents to provide passenger information to ImmD before the departure of flights (or other means of transportation) coming to Hong Kong; and authorising ImmD to request airlines, etc. (or their owners or agents) not to allow individual persons to board the plane (or means of transportation) to Hong Kong.

<sup>17</sup> The grounds include submission of false or misleading information or documentary evidence; non-disclosure of information; and cessation of existence of the risk due to changes in circumstances of the claimant or the torture risk state.

grounds other than torture would continue to mirror the latest statutory procedures for screening torture claims.

## **THE BILL**

22. The key provisions of the Bill are as follows -

- (a) Clause 3 adds a new section 6A to the Ordinance to empower the Secretary for Security to make regulations to provide for the supply to the Director of Immigration of information relating to the passengers and crew members of a carrier;
- (b) Clause 4 amends section 17I of the Ordinance to increase the penalty that may be imposed on employers of persons prohibited from taking any employment or establishing or joining in any business under section 38AA of the Ordinance. Clause 23 amends section 38AA to include overstayers in the prohibition;
- (c) Clauses 5 and 16 amend sections 32 and 37ZK of the Ordinance respectively to set out some of the factors to be taken into account in deciding whether a period of detention is reasonable and lawful;
- (d) Clause 9 amends section 37Z of the Ordinance to make it clear that the making of a torture claim does not preclude the Government from liaising with any party after the claim is rejected for the purpose of making arrangements to remove the claimant;
- (e) Clause 10 adds a new section 37ZAB to the Ordinance to require claimants to attend interviews and a new section 37ZAC to enable an immigration officer to specify the language to be used by a claimant for communications;
- (f) Clause 12 amends section 37ZC of the Ordinance to provide that an immigration officer or TCAB may decide not to take into account the disputed physical or mental condition of a claimant in certain circumstances;
- (g) Clause 17 amends section 37ZN of the Ordinance to revise one of the existing grounds, and to add a new ground, on which an immigration officer or TCAB may, under sections 37ZL(1) and

37ZM(1) respectively of the Ordinance, revoke a previous decision made by an immigration officer or TCAB;

- (h) Clause 24 amends section 40 of the Ordinance to increase the penalty that may be imposed on the owner of an aircraft in which a passenger who does not have a valid travel document arrives in Hong Kong. The fine originally at level 3 (\$10,000) is increased to level 6 (\$100,000);
- (i) Clause 25 amends Schedule 1A to the Ordinance (which deals with the members and procedures of TCAB) to -
  - (i) enable the Chairperson of TCAB to delegate certain powers and functions to a Deputy Chairperson (new section 5A of Schedule 1A);
  - (ii) enable the Chairperson of TCAB to nominate the presiding member when the Board hears an appeal consisting of three members (section 6 of Schedule 1A);
  - (iii) enable TCAB to specify the language to be used by a claimant or witness for communications in proceedings before the Board (section 11 of Schedule 1A);
  - (iv) enable TCAB to give less than 28 days' notice of a hearing to the parties if it considers appropriate to do so in a particular case (section 13 of Schedule 1A); and
  - (v) streamline TCAB's procedures in determining an appeal where the claimant is absent from the hearing (section 15 of Schedule 1A);
- (j) Clause 26 adds a new Schedule 5 to the Ordinance to provide for the transitional and saving arrangements for torture claims made under the Ordinance before the commencement of the Immigration (Amendment) Ordinance 2020; and
- (k) Clauses 27 and 28 amend the Weapons Ordinance and Firearms and Ammunition Ordinance respectively to provide that the prohibition on the possession of weapons, arms and ammunition

under those Ordinances does not apply to a member of the Immigration Service.

## **OTHER OPTIONS**

23. The enhanced screening procedures, as well as the improvements made in respect of removal, detention and enforcement, all require legislative backing.

## **LEGISLATIVE TIMETABLE**

24. The legislative timetable will be as follows -

Publication in the Gazette	4 December 2020
First Reading and commencement of Second Reading debate	16 December 2020
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

## **IMPLICATIONS OF THE BILL**

25. The Bill is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the existing provisions of the Ordinance, the Firearms and Ammunition Ordinance and the Weapons Ordinance. The Bill is beneficial to enhancing the efficiency of handling claims and appeals, while continuing to meet the high standards of fairness required by law and maintaining effective immigration control of Hong Kong, which is in line with the principle of sustainable development of fostering a stable and fair society. Upon implementation of the Bill, the Government will, if necessary, seek additional manpower and financial resources in accordance with the established mechanism. The Bill has no economic, productivity, family, gender or environmental implications.

## **PUBLIC CONSULTATION**

26. We briefed the LegCo Panel on Security on the legislative proposals in two batches on 10 July 2018 and 8 January 2019. The LegCo Subcommittee to

Follow up Issues Relating to the USM for Non-refoulement Claims established under the House Committee also discussed matters relating to USM (including the legislative proposals) at length between March 2018 and February 2019. Separately, the Government received comments from the Hong Kong Bar Association and Law Society of Hong Kong on the legislative proposals. We also exchanged views with relevant human rights groups from time to time.

## **PUBLICITY**

27. A press release will be issued on the day when the Bill is gazetted. A spokesperson will be available to answer media and public enquiries.

## **ENQUIRY**

28. For enquiries regarding this brief, please feel free to contact Mr Cyrus Cheung, Principal Assistant Secretary for Security (Review) (Tel: 2810 2676).

**Security Bureau**  
**2 December 2020**

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## A BILL

## To

Amend the Immigration Ordinance to revise the procedures and requirements relating to the making and the handling of torture claims and appeals; to clarify the effect of making torture claims; to empower the Chairperson of the Torture Claims Appeal Board to delegate certain functions to a Deputy Chairperson; to revise the grounds for a revocation decision; to amend certain provisions relating to the lawfulness of detention; to enlarge the group of persons prohibited from taking employment under section 38AA and increase the penalty for employing such persons; to provide for the liability of connected persons in body corporates and partnerships when an offence under section 17I is committed; to increase the penalty for cases where aircraft passengers arrive in Hong Kong without valid travel documents; to empower the Secretary for Security to make regulations relating to the supply of information about persons on board carriers; to amend the Weapons Ordinance and the Firearms and Ammunition Ordinance to enable members of the Immigration Service to possess arms and weapons otherwise prohibited by those Ordinances; and to provide for transitional and other related matters.

Enacted by the Legislative Council.



**Part 1****Preliminary****1. Short title and commencement**

- (1) This Ordinance may be cited as the Immigration (Amendment) Ordinance 2020.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Enactments amended**

- (1) The Immigration Ordinance (Cap. 115) is amended as set out in Part 2.
  - (2) The enactments specified in Part 3 are amended as set out in that Part.
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**Part 2****Amendments to Immigration Ordinance****3. Section 6A added**

Part II, after section 6—

**Add****“6A. Regulations relating to persons on board carriers**

- (1) The Secretary for Security may make regulations—
  - (a) to provide for the supply to the Director of information or data relating to a carrier, its passengers or members of its crew, as may be specified in the regulations; and
  - (b) to empower the Director to direct that a passenger or a member of the crew of a carrier may or may not be carried on board the carrier.
- (2) Without limiting subsection (1), regulations made under this section may—
  - (a) provide for the time at which, the means or systems through which, and the form and way in which, the information or data is to be supplied to the Director;
  - (b) provide for the handling or disposal of information or data collected under the regulations; and
  - (c) provide for the exercise or performance by the Director or any public officer of any powers or functions under the regulations.
- (3) Regulations made under this section may—
  - (a) require the carrying out of any act by a person (wherever the person may be) and regulate any act

- or matter that may be done or happen wholly or partly outside Hong Kong;
- (b) be of general application or make different provisions for different cases or classes of cases;
  - (c) empower the Director to exempt any person or carrier, or any class of persons or carriers, from any of the requirements under the regulations; and
  - (d) contain any incidental, consequential, evidential, transitional, saving or supplementary provisions that the Secretary for Security considers appropriate.
- (4) Regulations made under this section may provide that a contravention of a regulation (including a contravention in relation to any act, matter or omission that is done or happens wholly or partly outside Hong Kong) is an offence punishable by a fine not exceeding level 6.
- (5) In this section—
- carrier* (運輸工具) means an aircraft or any other means of transportation as may be specified in the regulations made under this section;
- member of the crew* (乘組人員), in relation to a carrier, means a person actually employed in the working or service of the carrier;
- passenger* (乘客) means a person carried, or to be carried, on board a carrier, other than a member of the crew.”

**4. Section 17I amended (offence to be employer of a person who is not lawfully employable)**

- (1) Section 17I(1)—

**Repeal**

everything after “is liable”

**Substitute**

“on conviction on indictment—

- (a) if the employee is not a prohibited employee—to a fine of \$350,000 and to imprisonment for 3 years; or
- (b) if the employee is a prohibited employee—to a fine of \$500,000 and to imprisonment for 10 years.”.

- (2) After section 17I(4)—

**Add**

“(5) If—

- (a) a body corporate commits an offence under this section; and
- (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate,

the director, manager, secretary or other similar officer also commits the offence.

- (6) If—

- (a) a partner in a partnership commits an offence under this section; and
- (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any other partner in the partnership or any other person concerned in the management of the partnership,

the other partner or the other person concerned in the management of the partnership also commits the offence.

- (7) In this section—

*prohibited employee* (受禁僱員) means a person who is prohibited from taking any employment or establishing or joining in any business under section 38AA.”.

**5. Section 32 amended (detention pending removal or deportation)**

Section 32(4A)—

**Repeal**

everything after “all the circumstances”

**Substitute**

“that justify its length, including, in the case of a person being detained pending removal from Hong Kong—

- (a) whether the number of other persons pending removal from Hong Kong is such that it is reasonable to take the time it is taking, or has taken, to remove the person;
- (b) whether the manpower and financial resources allocated for the removal of persons from Hong Kong under this Ordinance are such that it is reasonable to take the time it is taking, or has taken, to remove the person;
- (c) the extent to which it is possible to make arrangements to effect the person’s removal;
- (d) whether the person’s removal is directly or indirectly prevented or delayed by any action or lack of action of the person, including the person not obtaining, or not providing assistance to obtain, any authorization from the relevant authorities of a place outside Hong Kong that is required for the person’s entry to that place;
- (e) the time required for the issue of the authorization referred to in paragraph (d); and

- (f) factors that directly or indirectly prevent or delay the person’s removal that are not within the control of the Director.”.

**6. Section 36 amended (recognizance as alternative to detention)**

Section 36(1A)(c)—

**Repeal**

everything after “interviews”

**Substitute**

“as required by section 37ZAB.”.

**7. Section 37V amended (when torture claim is finally determined)**

- (1) Section 37V(2)(b), after “when”—

**Add**

“a notice to withdraw the appeal under section 37ZTA is received by the Appeal Board or”.

- (2) Section 37V(4)(b), after “when”—

**Add**

“a notice to withdraw the appeal under section 37ZTA is received by the Appeal Board or”.

**8. Section 37Y amended (submission of torture claim form)**

Section 37Y(3)—

**Repeal paragraph (b)**

**Substitute**

- “(b) on being satisfied that the claimant—
  - (i) has exercised, or had exercised, all due diligence to return a completed torture claim form within the period; but

- (ii) will not be able to, or failed to, return a completed form within the period because of circumstances beyond the claimant's control.”.

**9. Section 37Z amended (effect of making a torture claim)**

- (1) Section 37Z(2)(a)—

**Repeal**

“claimant; or”

**Substitute**

“claimant;”.

- (2) Section 37Z(2)(b)—

**Repeal the full stop**

**Substitute**

“; or”.

- (3) After section 37Z(2)(b)—

**Add**

- “(c) preclude the Government from liaising 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, for the purpose of making arrangements for the removal of the claimant.”.

**10. Sections 37ZAB and 37ZAC added**

After section 37ZA—

**Add**

**“37ZAB. Claimant to attend interviews**

- (1) A claimant must attend an interview at the date, time and place specified by an immigration officer in the written request referred to in section 37Y(1) to provide information and answer questions relating to the claimant's torture claim.
- (2) The date of the interview must be a date after the expiry of the period for returning the completed torture claim form under section 37Y(2)(a).
- (3) If—
  - (a) an immigration officer allows, under section 37Y(3), a further period for returning the completed torture claim form; and
  - (b) the date of the original interview specified in the written request is within the further period, the officer must change it to a date after the expiry of the further period.
- (4) A claimant must also attend any further interview required by an immigration officer at the date, time and place specified by the officer.

**37ZAC. Language used for communications**

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.”.

**11. Section 37ZB amended (power to require information etc.)**

- (1) Section 37ZB—

**Repeal subsection (1)**

**Substitute**

“(1) After a completed torture claim form is returned by a claimant, an immigration officer may require the claimant to provide the immigration officer with any information or evidence related to the claimant’s torture claim that the immigration officer specifies.”.

(2) Section 37ZB(2)—

**Repeal**

“documentary”.

(3) Section 37ZB(2)—

**Repeal**

“subsection (1)(a)”

**Substitute**

“subsection (1)”.

**12. Section 37ZC amended (medical examination)**

(1) After section 37ZC(1)—

**Add**

“(1A) For the purposes of subsection (1), the claimant must give any consent that is necessary to enable a medical examination to be arranged or conducted.”.

(2) Section 37ZC(2)—

**Repeal**

everything after “the claimant must”

**Substitute**

“undergo the examination at the date, time and place specified by the immigration officer and notified to the claimant in writing.”.

(3) Section 37ZC(3)—

**Repeal**

everything after “the Appeal Board”

**Substitute**

“the full medical report of any examination arranged for the claimant under this section within 3 working days after a request for the disclosure is made by the officer or the Board.”.

(4) After section 37ZC(3)—

**Add**

“(4) If a claimant—

(a) fails to comply with subsection (1A), (2) or (3); and

(b) fails to provide sufficient evidence in writing to satisfy an immigration officer or the Appeal Board that the claimant—

(i) had exercised all due diligence to comply with the subsection concerned; but

(ii) failed to comply with the subsection concerned because of circumstances beyond the claimant’s control,

the officer or the Board may decide not to take into account the disputed physical or mental condition of the claimant.”.

**13. Section 37ZD amended (credibility of claimant)**

(1) Section 37ZD(2)(d)—

**Repeal**

“documentary”.

(2) Section 37ZD(2)(d)—

**Repeal**

“section 37ZB(1)(a)”

**Substitute**

“section 37ZB(1)”.

- (3) Section 37ZD(2)(e)—

**Repeal subparagraph (i)**

**Substitute**

“(i) attend an interview as required by section 37ZAB; or”.

- (4) Section 37ZD(2)(e)(ii)—

**Repeal**

“the”

**Substitute**

“such an”.

- (5) Section 37ZD(2)(f)—

**Repeal**

everything after “the date”

**Substitute**

“of the first interview that the claimant is required by section 37ZAB to attend;”.

- (6) Section 37ZD(2)—

**Repeal paragraph (g)**

**Substitute**

“(g) a failure, without reasonable excuse, to—

- (i) give consent as required by section 37ZC(1A);
- (ii) undergo a medical examination as required by section 37ZC(2); or

- (iii) disclose to an immigration officer or (on an appeal) the Appeal Board the full medical report as required by section 37ZC(3);”.

**14. Section 37ZG amended (deemed withdrawal of torture claim on failure to return completed torture claim form)**

Section 37ZG(3)—

**Repeal**

everything after “satisfy an immigration officer that”

**Substitute**

“the person—

- (a) had exercised all due diligence to return a completed torture claim form as required under section 37Y(2); but
- (b) failed to return a completed form as required under the section because of circumstances beyond the person’s control.”.

**15. Section 37ZI amended (decision on torture claim)**

- (1) Section 37ZI—

**Repeal subsection (2)**

**Substitute**

- “(2) A decision may be made by an immigration officer under subsection (1) even if a claimant—
- (a) has failed to attend an interview as required by section 37ZAB;
  - (b) has failed to comply with section 37ZC(1A), (2) or (3); or
  - (c) has otherwise failed to proceed with the claim in accordance with this Part.”.

- (2) Section 37ZI(4), English text—

**Repeal**

“the substantial grounds for belief”

**Substitute**

“substantial grounds for the belief”.

**16. Section 37ZK amended (detention pending final determination)**

- (1) Section 37ZK—

**Renumber the section as section 37ZK(1).**

- (2) After section 37ZK(1)—

**Add**

“(2) The detention of a claimant under this section is not unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances that justify its length, including—

- (a) whether the number of other torture claims pending final determination is such that it is reasonable to take the time it is taking, or has taken, to have the claimant’s torture claim finally determined;
- (b) whether the manpower and financial resources allocated for 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 have the claimant’s torture claim finally determined;
- (c) whether the making of—
  - (i) a decision by an immigration officer under section 37ZI;
  - (ii) a revocation decision; or

- (iii) a decision by the Appeal Board in relation to an appeal made under section 37ZR,

is directly or indirectly prevented or delayed by any action or lack of action of the claimant; and

- (d) factors that are not within the control of the Director.”.

**17. Section 37ZN amended (grounds for revocation decision)**

- (1) Section 37ZN(a)—

**Repeal**

“documentary”.

- (2) Section 37ZN(c)—

**Repeal**

everything after “ceased to exist”

**Substitute a semicolon.**

- (3) After section 37ZN(c)—

**Add**

“(d) having regard to the prevailing circumstances, the claim should not be accepted as substantiated.”.

**18. Section 37ZS amended (notice of appeal)**

- (1) Section 37ZS(2)(a)—

**Repeal**

“and”.

- (2) After section 37ZS(2)(a)—

**Add**

“(ab) duly completed and signed; and”.

- (3) After section 37ZS(2)—

**Add**

- “(3) No action may be taken in relation to a notice of appeal that does not comply with subsection (2)(a) or (ab).
- (4) On receiving a notice of appeal referred to in subsection (3), the Appeal Board must, by written notice, inform the person filing the notice of the non-compliance and that no further action will be taken in relation to the notice.”.

**19. Section 37ZT amended (late filing of notice of appeal)**

- (1) Section 37ZT(1)(b)—

**Repeal**

“any documentary evidence”

**Substitute**

“all available evidence”.

- (2) Section 37ZT(2)—

**Repeal**

everything after “take account of”

**Substitute**

“the statement of reasons stated in the application for late filing of the notice of appeal and the evidence relied on in support of the reasons.”.

- (3) Section 37ZT—

**Repeal subsections (3) and (4)****Substitute**

- “(3) The Appeal Board may allow the late filing of the notice of appeal if the person filing the notice provides sufficient evidence in writing to satisfy the Board that the person—
- (a) had exercised all due diligence to file the notice within the period specified in section 37ZS(1); but

- (b) failed to file the notice within the period because of circumstances beyond the person’s control.
- (4) For the purposes of subsection (3), the fact that a person attempted to file one or more notices of appeal that do not comply with section 37ZS(2)(a) or (ab), whether within the period specified in section 37ZS(1) or otherwise, must not be taken as evidence that the person had exercised all due diligence to file a notice of appeal within the period.
- (5) If the Appeal Board allows the late filing of the notice of appeal, it must, by written notice to the person filing the notice, inform the person of the Board’s decision.
- (6) If the Appeal Board does not allow the late filing of the notice of appeal, it must, by written notice to the person filing the notice—
- (a) inform the person that the Board refuses the notice as it is filed out of time; and
- (b) give reasons for the refusal.”.

**20. Section 37ZTA added**

After section 37ZT—

**Add****“37ZTA. Withdrawal of appeal**

- (1) A person who has filed a notice of appeal under section 37ZS (or section 37ZT if late filing is allowed) may, at any time before the Appeal Board determines the appeal, withdraw the appeal by filing a written notice with the Board.
- (2) An appeal against a decision is withdrawn once a notice to withdraw the appeal is received by the Appeal Board



and no further notice of appeal may be filed in relation to the decision.”.

**21. Section 37ZV amended (notices)**

- (1) Section 37ZV(1)(b)(ii)—

**Repeal**

“business; or”

**Substitute**

“business;”.

- (2) After section 37ZV(1)(b)—

**Add**

“(ba) if the person is held in custody, detained or imprisoned, by leaving it for the person, or by sending it by post addressed to the person, at the place where the person is held in custody, detained or imprisoned; or”.

- (3) Section 37ZV(2)—

**Repeal paragraph (b)**

**Substitute**

“(b) if it is left at a place or an address, on the second working day after it was so left.”.

**22. Section 37ZZ amended (savings and transitional arrangements)**

- (1) Section 37ZZ—

**Renumber the section as section 37ZZ(1).**

- (2) After section 37ZZ(1)—

**Add**

“(2) Schedule 5 provides for the savings and transitional arrangements that apply on, or relate to, the

commencement of the Immigration (Amendment) Ordinance 2020 ( of 2020).”.

**23. Section 38AA amended (prohibition of taking employment and establishing business, etc.)**

- (1) Section 38AA(1)(a)—

**Repeal**

“or”.

- (2) Section 38AA(1)(b)—

**Repeal the comma**

**Substitute a semicolon.**

- (3) After section 38AA(1)(b)—

**Add**

“(c) 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

(d) who was refused permission to land in Hong Kong under section 11(1).”.

**24. Section 40 amended (aircraft passengers arriving without valid travel document)**

Section 40—

**Repeal**

“3”

**Substitute**

“6”.

**25. Schedule 1A amended (Torture Claims Appeal Board)**

- (1) Schedule 1A, section 1(1), definition of
- member*
- 

**Repeal the full stop****Substitute a semicolon.**

- (2) Schedule 1A, section 1(1)—

**Add in alphabetical order*****“claimant*** (聲請人)—

- (a) in relation to an appeal made under section 37ZR, means the person who has lodged the appeal; and
- (b) in relation to an application for a revocation decision under section 37ZM, means the person who has been served with a notice of application under subsection (4) of the section;

***notice of hearing*** (聆訊通知) means a notice of the date, time and place of a hearing served under section 13 of this Schedule.”.

- (3) Schedule 1A, after section 5—

**Add****“5A. Delegation by Chairperson**

- (1) The Chairperson may delegate to a Deputy Chairperson any of the Chairperson’s powers and functions under the following provisions—
  - (a) section 6 of this Schedule;
  - (b) section 7 of this Schedule;
  - (c) section 16 of this Schedule (but only in so far as it relates to giving directions in a particular case).
- (2) A delegation may be subject to any terms and conditions that the Chairperson considers appropriate.

- (3) The Chairperson may revoke a delegation.”.

- (4) Schedule 1A, section 6—

**Repeal subsection (3)****Substitute****“(3)** In exercising the power under subsection (2), the Chairperson must nominate one of the 3 members to be the presiding member.”.

- (5) Schedule 1A, section 9(1)—

**Repeal****“person who has lodged the appeal”****Substitute****“claimant”.**

- (6) Schedule 1A, section 9(1)(c)—

**Repeal****“person who made the claim”****Substitute****“claimant”.**

- (7) Schedule 1A, section 9(1)(c)(ii)—

**Repeal****“person”****Substitute****“claimant”.**

- (8) Schedule 1A, section 9(1)(c)(iii)—

**Repeal****“person’s”****Substitute**

- “claimant’s”.
- (9) Schedule 1A, section 9(1)(c)(iv)—  
**Repeal**  
“person”  
**Substitute**  
“claimant”.
- (10) Schedule 1A, section 9(1)(d)—  
**Repeal**  
“a person’s”  
**Substitute**  
“the claimant’s”.
- (11) Schedule 1A, section 9(1)(d)(i)—  
**Repeal**  
“person”  
**Substitute**  
“claimant”.
- (12) Schedule 1A, section 9(1)(d)(ii)—  
**Repeal**  
“person”  
**Substitute**  
“claimant”.
- (13) Schedule 1A, section 11(2)—  
**Repeal paragraphs (a) and (b)**  
**Substitute**

- “(a) the Appeal Board may direct a claimant to address the Board in a language that the Board reasonably considers the claimant is able to understand and communicate in;
- (b) the Appeal Board may direct a witness in proceedings before the Board to testify in a language that the Board reasonably considers the witness is able to understand and communicate in; and”.
- (14) Schedule 1A—  
**Renumber section 13 as section 13(1).**
- (15) Schedule 1A, after section 13(1)—  
**Add**  
“(2) Despite subsection (1), the Appeal Board may give less than 28 days’ notice to the parties if it considers appropriate to do so in a particular case, but in any event the notice period must not be less than 7 days.
- (3) To avoid doubt, this section does not apply to—  
(a) a hearing that is rescheduled under section 15(5) of this Schedule; or  
(b) a further hearing of an appeal.”.
- (16) Schedule 1A, after section 13—  
**Add**  
**“13A. Director’s attendance at hearing**  
(1) The Director need not attend a hearing unless required to do so by a notice of hearing.  
(2) If, having regard to the particular circumstances of an appeal, the Appeal Board considers that the Director’s attendance at the hearing of the appeal is necessary, the Board may, by the notice of hearing, require the Director to attend the hearing.

- (3) The Director may also attend a hearing on the Director's own initiative.
- (4) If the Director intends to attend a hearing on the Director's own initiative, the Director must notify the Appeal Board and the claimant in writing as soon as practicable of the intention."
- (17) Schedule 1A, section 14, heading—  
**Repeal**  
"before hearing".
- (18) Schedule 1A, section 14(1)—  
**Repeal**  
everything after "receiving"  
**Substitute**  
"a notice of hearing, serve on the Appeal Board, with a copy to the claimant, a bundle of all the documents relating to the torture claim concerned."
- (19) Schedule 1A, section 14(2)(a), after "hearing"—  
**Add**  
"together with other information or evidence relating to the appeal that the Board considers necessary".
- (20) Schedule 1A, after section 14(2)—  
**Add**  
"(3) The statements, information, evidence and list referred to in subsection (2) must be filed and served within the period specified by the Appeal Board."
- (21) Schedule 1A—  
**Repeal section 15**  
**Substitute**

**"15. Claimant's absence from hearing"**

- (1) If a claimant does not attend a hearing in person, irrespective of whether the claimant is represented at the hearing by a legal representative, the Appeal Board may hear the appeal in the absence of the claimant.
- (2) If a claimant referred to in subsection (1) wishes the Appeal Board to fix another hearing date for the appeal, the claimant must, within 3 working days after the date of the hearing, submit a written request to the Appeal Board to fix another hearing date.
- (3) The request must contain a written explanation of the claimant's absence from the hearing together with all available evidence supporting the explanation.
- (4) The Appeal Board must proceed to determine the appeal by making a decision under section 23(1) of this Schedule if—
  - (a) no request is made under subsection (2); or
  - (b) where a request is made under subsection (2), the Board is not satisfied, on the basis of the written explanation and supporting evidence submitted with the request, that the claimant—
    - (i) had exercised all due diligence to attend the hearing; but
    - (ii) was absent from the hearing because of circumstances beyond the claimant's control.
- (5) The Appeal Board may fix another date, time and place for hearing the appeal if the Board is satisfied, on the basis of the written explanation and supporting evidence submitted with the request, that the claimant—
  - (a) had exercised all due diligence to attend the hearing; but

(b) was absent from the hearing because of circumstances beyond the claimant's control.”.

(22) Schedule 1A, section 18(2)(a), after “made;”—

**Add**

“or”.

(23) Schedule 1A, section 18(2)—

**Repeal paragraph (b)**

**Substitute**

“(b) the evidence relates to matters that occurred before the decision being appealed against was made, and the claimant provides sufficient evidence in writing to satisfy the Board that the claimant—

(i) had exercised all due diligence to provide the evidence to an immigration officer before the decision was made; but

(ii) failed to provide the evidence to an immigration officer before the decision was made because of circumstances beyond the claimant's control.”.

(24) Schedule 1A, section 18(2)—

**Repeal paragraph (c).**

(25) Schedule 1A, section 19—

**Repeal subsections (1) and (2)**

**Substitute**

“(1) A claimant who wishes to present any evidence under section 18(2) of this Schedule at a hearing must within 7 days after filing a notice of appeal under section 37ZS (or section 37ZT if late filing is allowed)—

(a) file with the Appeal Board a written notice to that effect; and

(b) serve a copy of the notice on the Director.

(2) The written notice must—

(a) indicate the nature of the evidence; and

(b) explain how the evidence supports the torture claim.

(3) If the evidence falls within the description in section 18(2)(b) of this Schedule, the written notice must also—

(a) state the circumstances leading to the failure referred to in that section;

(b) explain how, and to what extent, the circumstances led to the failure;

(c) state the steps that the claimant had taken with a view to providing the evidence to an immigration officer before the decision being appealed against was made and, in particular, the steps taken to deal with the circumstances; and

(d) be accompanied by all available evidence relied on in support of the claimant's case.

(4) A written notice filed after the expiry of the period specified in subsection (1) may not be accepted by the Appeal Board unless the claimant provides sufficient evidence in writing to satisfy the Board that the claimant—

(a) had exercised all due diligence to file the notice before the expiry of the period; but

(b) failed to file the notice before the expiry of the period because of circumstances beyond the claimant's control.”.

**26. Schedule 5 added**

After Schedule 4—

Add

**“Schedule 5**

[s. 37ZZ]

**Savings and Transitional Provisions in respect of  
Immigration (Amendment) Ordinance 2020****1. Interpretation**

(1) In this Schedule—

*Amendment Ordinance* (《修訂條例》) means the Immigration (Amendment) Ordinance 2020 ( of 2020);*appeal period* (上訴期) means the period specified in section 37ZS(1) of the pre-amended Ordinance for filing a notice of appeal with the Appeal Board;*commencement date* (生效日期) means the date on which the Amendment Ordinance comes into operation;*notice of appeal* (上訴通知) means a notice of appeal under section 37ZS(1) of the pre-amended Ordinance;*pre-amended Ordinance* (《原有條例》) means this Ordinance as in force immediately before the commencement date;*withdrawn torture claim* (已撤回的酷刑聲請) means a torture claim that is—

- (a) withdrawn under section 37ZE before the commencement date; or
- (b) treated as withdrawn under section 37ZG before the commencement date.

(2) An expression used in this Schedule has the same meaning as in Part VIIC.

**2. Amended Ordinance applies to torture claim under pre-amended Ordinance**

Except as provided in this Schedule, on and after the commencement date, this Ordinance as amended by the Amendment Ordinance applies in relation to a torture claim made under the pre-amended Ordinance.

**3. Torture claim in relation to which appeal is pending**

- (1) This section applies if, in relation to a torture claim, other than a torture claim referred to in section 4, 5, 6, 7, 8 or 9 of this Schedule, an appeal under section 37ZR of the pre-amended Ordinance is pending as at the commencement date.
- (2) The pre-amended Ordinance continues to apply in relation to the torture claim until the date on which the appeal is disposed of or withdrawn.

**4. Torture claim in relation to which decision is pending**

- (1) This section applies if a decision on a torture claim, other than a torture claim referred to in section 7, 8 or 9 of this Schedule, is pending under section 37ZI(1) of the pre-amended Ordinance as at the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the torture claim.
- (3) If the torture claim is accepted as substantiated by an immigration officer by a decision under section 37ZI(1)(a) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date of the decision.

- (4) If the torture claim is rejected by an immigration officer by a decision under section 37ZI(1)(b) of the pre-amended Ordinance—
  - (a) where no notice of appeal against the decision is filed within the appeal period—the pre-amended Ordinance applies until the date of expiry of the period; or
  - (b) where a notice of appeal against the decision is filed within the appeal period—the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn.
- (5) If the torture claim is withdrawn under section 37ZE(1) of the pre-amended Ordinance before a decision is made by an immigration officer under section 37ZI(1) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date on which the written notice to withdraw is received by an immigration officer.
- (6) If the torture claim is treated as withdrawn under section 37ZF(1) or (3) of the pre-amended Ordinance before a decision is made by an immigration officer under section 37ZI(1) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date on which the claimant or the person who has given notice to withdraw the torture claim leaves Hong Kong.
- (7) If the torture claim is treated as withdrawn under section 37ZG(1) of the pre-amended Ordinance before a decision is made by an immigration officer under section 37ZI(1) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date of expiry of the period within which a completed torture claim form in respect of the torture claim is to be returned under section 37Y(2) of the pre-amended Ordinance.

**5. Torture claim rejected or subject to revocation decision: appeal period expires on or after commencement date**

- (1) This section applies if—
  - (a) a decision was made by an immigration officer under section 37ZI(1)(b) or 37ZL(1) of the pre-amended Ordinance in relation to a torture claim; and
  - (b) in relation to the decision, the appeal period expires on or after the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the torture claim.
- (3) If no notice of appeal against the decision is filed within the appeal period, the pre-amended Ordinance applies until the date of expiry of the period.
- (4) If a notice of appeal against the decision is filed within the appeal period, the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn.

**6. Torture claim rejected or subject to revocation decision: application for late filing of notice of appeal pending**

- (1) This section applies if—
  - (a) a decision was made by an immigration officer under section 37ZI(1)(b) or 37ZL(1) of the pre-amended Ordinance in relation to a torture claim; and
  - (b) an application for late filing of a notice of appeal against the decision under section 37ZT(1) of the pre-amended Ordinance is pending as at the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the torture claim.

- (3) If late filing is allowed, the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn.
- (4) If late filing is not allowed, the pre-amended Ordinance applies until the date on which a written notice under section 37ZT(4) of the pre-amended Ordinance is given to the person filing the notice of appeal.

**7. Withdrawn torture claim pending decision as to re-opening**

- (1) This section applies if a decision as to whether a withdrawn torture claim is to be re-opened is pending under section 37ZE(2) or 37ZG(3) of the pre-amended Ordinance as at the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the withdrawn torture claim.
- (3) If the torture claim is re-opened and is accepted as substantiated by an immigration officer by a decision under section 37ZI(1)(a) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date of the decision.
- (4) If the torture claim is re-opened and is rejected by an immigration officer by a decision under section 37ZI(1)(b) of the pre-amended Ordinance—
  - (a) where no notice of appeal against the decision is filed within the appeal period—the pre-amended Ordinance applies until the date of expiry of the period; or
  - (b) where a notice of appeal against the decision is filed within the appeal period—the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn.

- (5) If an immigration officer makes a decision not to re-open the torture claim and no notice of appeal against the decision is filed within the appeal period, the pre-amended Ordinance applies until the date of expiry of the period.
- (6) If an immigration officer makes a decision not to re-open the torture claim and a notice of appeal against the decision is filed within the appeal period—
  - (a) where the Appeal Board reverses the decision and the claim is accepted as substantiated by an immigration officer by a decision under section 37ZI(1)(a) of the pre-amended Ordinance—the pre-amended Ordinance applies until the date of the last-mentioned decision;
  - (b) where the Appeal Board reverses the decision and the claim is rejected by an immigration officer by a decision under section 37ZI(1)(b) of the pre-amended Ordinance (*rejection decision*)—
    - (i) if no notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date of expiry of the period; or
    - (ii) if a notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn; or
  - (c) where the Appeal Board confirms the decision—the pre-amended Ordinance applies until the date on which the decision is confirmed.



**8. Re-opening of withdrawn torture claim not allowed: appeal period expires on or after commencement date**

- (1) This section applies if—
  - (a) a decision not to re-open a withdrawn torture claim was made by an immigration officer under section 37ZE(2) or 37ZG(3) of the pre-amended Ordinance; and
  - (b) in relation to the decision, the appeal period expires on or after the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the withdrawn torture claim.
- (3) If no notice of appeal against the decision is filed within the appeal period, the pre-amended Ordinance applies until the date of expiry of the period.
- (4) If a notice of appeal against the decision is filed within the appeal period—
  - (a) where the Appeal Board reverses the decision and the torture claim is accepted as substantiated by an immigration officer by a decision under section 37ZI(1)(a) of the pre-amended Ordinance—the pre-amended Ordinance applies until the date of the last-mentioned decision;
  - (b) where the Appeal Board reverses the decision and the torture claim is rejected by an immigration officer by a decision under section 37ZI(1)(b) of the pre-amended Ordinance (*rejection decision*)—
    - (i) if no notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date of expiry of the period; or

- (ii) if a notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn; or
- (c) where the Appeal Board confirms the decision—the pre-amended Ordinance applies until the date on which the decision is confirmed.

**9. Re-opening of withdrawn torture claim not allowed: application for late filing of notice of appeal pending**

- (1) This section applies if—
  - (a) a decision not to re-open a withdrawn torture claim was made by an immigration officer under section 37ZE(2) or 37ZG(3) of the pre-amended Ordinance; and
  - (b) an application for late filing of a notice of appeal against the decision under section 37ZT(1) of the pre-amended Ordinance is pending as at the commencement date.
- (2) Subject to this section, the pre-amended Ordinance continues to apply in relation to the withdrawn torture claim.
- (3) If late filing is allowed and the Appeal Board reverses the decision, and the torture claim is accepted as substantiated by an immigration officer by a decision under section 37ZI(1)(a) of the pre-amended Ordinance, the pre-amended Ordinance applies until the date of the last-mentioned decision.
- (4) If late filing is allowed and the Appeal Board reverses the decision, and the torture claim is rejected by an immigration officer by a decision under section

37ZI(1)(b) of the pre-amended Ordinance (*rejection decision*)—

- (a) where no notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date of expiry of the period; or
  - (b) where a notice of appeal against the rejection decision is filed within the appeal period—the pre-amended Ordinance applies until the date on which the appeal is disposed of or withdrawn.
- (5) If late filing is allowed and the Appeal Board confirms the decision, the pre-amended Ordinance applies until the date on which the decision is confirmed.
- (6) If late filing is not allowed, the pre-amended Ordinance applies until the date on which a written notice under section 37ZT(4) of the pre-amended Ordinance is given to the person filing the notice of appeal.”.
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## Part 3

### Amendments to Other Enactments

#### Division 1—Amendments to Weapons Ordinance (Cap. 217)

##### 27. Section 3 amended (application)

- (1) Section 3(b)(vi)—

**Repeal**

“and”.

- (2) Section 3(b)(vii)—

**Repeal the full stop**

**Substitute a semicolon.**

- (3) After section 3(b)(vii)—

**Add**

“(viii) the Immigration Service.”.

#### Division 2—Amendments to Firearms and Ammunition Ordinance (Cap. 238)

##### 28. Section 3 amended (possession on behalf of the Government etc.)

- (1) Section 3(b)(viii)—

**Repeal the full stop**

**Substitute a semicolon.**

- (2) After section 3(b)(viii)—

**Add**

“(ix) the Immigration Service.”.

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### Explanatory Memorandum

The main object of this Bill is to amend the Immigration Ordinance (Cap. 115) (*Ordinance*) to enhance the efficiency of screening torture claims by the Immigration Department and processing appeals by the Torture Claims Appeal Board (*Appeal Board*), and to strengthen the capability of the Immigration Department in handling torture claim cases and taking enforcement actions, including removing unsuccessful claimants and detaining claimants pending final determination of their torture claims.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 3 adds a new section 6A to the Ordinance to empower the Secretary for Security to make regulations to provide for the supply to the Director of Immigration (*Director*) of information relating to the passengers and crew members of a carrier. Such regulations may empower the Director to direct that any particular passenger or crew member may or may not be carried on board a carrier.
4. Clause 4 amends section 17I of the Ordinance to provide that if a corporation or a partner in a partnership commits an offence under the section, and it is proved that the offence is committed with the consent or connivance, or is attributable to any neglect, of any director or other partner, the director or partner also commits the same offence. It also increases the penalty that may be imposed on employers of persons prohibited from taking any employment or establishing or joining in any business under section 38AA of the Ordinance. Clause 23 amends section 38AA to include overstaying visitors in the prohibition.
5. Sections 32 and 37ZK of the Ordinance deal with the detention of a person pending removal or final determination of the person's torture claim. Clauses 5 and 16 amend those sections respectively to set out

some of the factors to be taken into account in deciding whether a period of detention is reasonable and lawful.

6. Section 37V of the Ordinance stipulates when a torture claim is finally determined. As a result of the addition by clause 20 of a new section 37ZTA to the Ordinance, which provides that an appeal may be withdrawn before a decision is made by the Appeal Board, section 37V is amended by clause 7. The effect is that for certain appeals, the torture claim is also finally determined when a notice to withdraw the appeal is received by the Board.
7. Clause 9 amends section 37Z of the Ordinance to make it clear that the making of a torture claim does not preclude the Government from liaising with any party after the claim is rejected etc. for making arrangements to remove the claimant.
8. Clause 10 adds a new section 37ZAB to the Ordinance to require claimants to attend interviews and adds a new section 37ZAC to the Ordinance to enable an immigration officer to specify the language to be used by a claimant for communications.
9. Clause 11 amends section 37ZB of the Ordinance to remove the word "documentary" from references to "documentary evidence" so as to widen the nature of the evidence that an immigration officer may require from a claimant.
10. Clause 12 amends section 37ZC of the Ordinance to require a claimant to give consents to enable a medical examination to be arranged and to provide that an immigration officer or the Appeal Board may decide not to take into account the disputed physical or mental condition of a claimant in certain circumstances.
11. Clause 15 amends section 37ZI of the Ordinance to provide, among others, that a decision may still be made by an immigration officer even if a claimant has failed to give consents to enable a medical examination to be conducted, to undergo a medical examination

arranged or to disclose the full medical report, as required by section 37ZC of the Ordinance.

12. Clause 17 amends section 37ZN of the Ordinance to revise one of the existing grounds, and to add a new ground, on which an immigration officer or the Appeal Board may, under sections 37ZL(1) and 37ZM(1) respectively of the Ordinance, revoke a previous decision made by an immigration officer or the Board.
13. Clause 18 amends section 37ZS of the Ordinance to provide that no action may be taken in relation to a notice of appeal that is not in the specified form or is not duly completed or signed.
14. Clause 19 amends section 37ZT of the Ordinance to enable the Appeal Board to allow late filing of a notice of appeal against an immigration officer's decision mentioned in section 37ZR of the Ordinance if the lateness is due to circumstances beyond the control of the person filing the notice.
15. Clause 24 amends section 40 of the Ordinance to increase the penalty that may be imposed on the owner of an aircraft in which a passenger who does not have a valid travel document arrives in Hong Kong. The fine originally at level 3 (\$10,000) is increased to level 6 (\$100,000).
16. Clause 25 amends Schedule 1A to the Ordinance (which deals with the members and procedures relating to the Appeal Board) to—
  - (a) empower the Chairperson of the Appeal Board to delegate certain powers and functions to a Deputy Chairperson (new section 5A of Schedule 1A);
  - (b) empower the Chairperson of the Appeal Board to nominate the presiding member when the Board hearing an appeal consists of 3 members (section 6 of Schedule 1A);
  - (c) empower the Appeal Board to specify the language to be used by a claimant or witness for communications in

proceedings before the Board (section 11 of Schedule 1A);

- (d) enable the Appeal Board to give less than 28 days' notice (but subject to a minimum of 7 days' notice) of a hearing to the parties if it considers appropriate to do so in a particular case (section 13 of Schedule 1A);
  - (e) deal with the Director's attendance at the hearing of an appeal (new section 13A of Schedule 1A);
  - (f) streamline the Appeal Board's procedures in determining an appeal where the claimant is absent from the hearing (section 15 of Schedule 1A); and
  - (g) specify the time limit and the requirements for presenting new evidence to the Appeal Board (section 19 of Schedule 1A).
17. Clause 26 adds a new Schedule 5 to the Ordinance to provide for the savings and transitional arrangements for torture claims made under the Ordinance before the commencement of the Immigration (Amendment) Ordinance 2020.
  18. Clauses 27 and 28 amend section 3 of the Weapons Ordinance (Cap. 217) and section 3 of the Firearms and Ammunition Ordinance (Cap. 238) respectively to provide that the prohibition on the possession of weapons, arms and ammunition under those Ordinances does not apply to a member of the Immigration Service.

## SUMMARY OF THE MEASURES UNDER THE COMPREHENSIVE REVIEW

- In early 2016, the Government commenced a comprehensive review of the strategy of handling non-refoulement claims with the following four major focuses (and *measures implemented so far or to be implemented*) –
  - (i) reducing at source the number of NECIs and overstayers who may lodge non-refoulement claims in Hong Kong;
    - *Mainland and Hong Kong Joint Operations against the Smuggling of NECIs (since early 2016)*
    - *Amendment of the Immigration (Unauthorized Entrants) Order (Cap. 115D) to increase penalties on smuggling syndicates and those assisting them (May 2016)*
    - *Pre-arrival registration requirement for Indian visitors (since early 2017)*
  - (ii) expediting the screening of the backlog of claims and appeals;
    - *Increase of resources for ImmD on screening, and streamlining of administrative procedures (since 2015)*
    - *Significant expansion of TCAB and increase of resources for its secretariat (since mid-2016)*
    - *Pilot Scheme to provide publicly-funded legal assistance for non-refoulement claimants (since Sep 2017)*
    - *Proposals to amend the Immigration Ordinance (since 2017)*
  - (iii) expediting the removal of claimants whose claims and appeals (if any) have been rejected; and
    - *Liaison with source country governments to secure their cooperation in expediting removal (since 2016)*

- *Identifying suitable flight options (including chartered flights) to facilitate removal (since 2017)*
- (iv) stepping up enforcement against crimes such as unlawful employment and studying detention strategies to increase deterrence.
- *Increasing operations targeting black spots of unlawful employment of claimants (since 2016)*
  - *Increasing publicity efforts targeting employers against employing persons not lawfully employable (since 2016)*
  - *Identifying suitable detention facilities and developing targeted strategy on detention (since 2016)*
- Measures implemented so far have achieved positive results, including –
    - (i) the number of NECIIs dropped by around 80% (from a monthly average of 318 in 2015 to 72 in 2019);
    - (ii) the number of overstaying visitors from India dropped by over 80% (from a monthly average of 38 in 2016 to less than 9 since 2017);
    - (iii) the number of new claims received dropped by around 80% (from a monthly average of 421 in 2015 to around 101 in 2019);
    - (iv) the average time for ImmD to handle a claim is reduced by 60% (from 25 weeks previously to 10 weeks at present);
    - (v) the backlog of outstanding claims by ImmD has been cleared (from the peak of over 11 000 cases in 2016 to about 300-400 at present);
    - (vi) the number of appeals determined by TCAB increased by almost four times (from a monthly average of 49 in 2016 to over 200 at present), reaching about 4 300 decisions in 2019;
    - (vii) the number of claimants removed from Hong Kong increased over the years (from 1 706 in 2016 to over 2 500 in 2017 and 2018, though

retracted to 1 618 in 2019 due to various impediments mainly JRs);  
and

- (viii) the number of non-ethnic Chinese persons on recognizance (mostly claimants) arrested for criminal offence dropped by about 55% (from 1 506 in 2016 and 1 542 in 2017 to 1 150 in 2018 and 657 in 2019).

## STATISTICS ON NON-REFOULEMENT CLAIMS

- (a) Claims received and determined by ImmD since the commencement of USM

Year	Claims received	Claims determined	Claims withdrawn or no further action can be taken	Pending claims
<i>USM (since March 2014) (Note 1)</i>				
Upon commencement of the USM				6 699
2014 (March to December)	4 634	826	889	9 618
2015	5 053	2 339	1 410	10 922
2016	3 838	3 218	1 561	9 981
2017	1 843	4 182	1 743	5 899
2018	1 216	5 467	1 102	546
2019	1 213	1 344	149	266
2020 (up to October)	794	699	49	312
<b>Total non-refoulement claims under USM</b>	<b>18 591</b>	<b>18 075</b> (Note 2)	<b>6 903</b>	<b>312</b>

*Note 1:* ImmD received a total of 4 906 torture claims from 2010 to 2013, an average of 102 per month. Since the commencement of USM to end 2015, ImmD received 9 687 claims, an average of 440 claims per month. Since the comprehensive review in early 2016, ImmD received an average of 320 claims per month in 2016, and an average of 154 claims per month in 2017, a decrease of 52%. In 2018, ImmD received 1 216 claims, an average of 101 claims per month, a further decrease of 34% as compared to 2017. In 2019 and the first 10 months in 2020, ImmD received 1 213 and 794 new claims, an average of 101 and 80 claims per month respectively.



*Note 2:* Among the 18 075 non-refoulement claims determined by ImmD under USM, 211 (1.17%) were substantiated (including 126 substantiated by TCAB on appeal).

(b) Claimants remaining in Hong Kong (Position as at 31 October 2020)

USM	Pending ImmD’s decision		312
	Within 14-day time limit for appeal to TCAB		57
	Pending TCAB’s decision		1 766
	Subtotal		2 135 (16%)
Former/Unsuccessful claimants pending removal	(i) Not yet actionable	JR impediment	8 324
		Absconded, imprisoned, remanded or involving in ongoing prosecution or investigation	1 324
		Subtotal	9 648 (74%)
	(ii) Removal being arranged		1 320 (10%)
Total claimants remaining in Hong Kong			13 103 (100%)

(c) Public expenditures on handling non-refoulement claims

<b>Year</b>	<b>Screening of claims and handling of appeals/petitions (\$Million)</b>	<b>Repatriation of unsuccessful claimants# (\$Million)</b>	<b>Publicly-funded legal assistance (\$Million)</b>	<b>Humanitarian assistance (\$Million)</b>	<b>Total* (\$Million)</b>
<b>2016-17</b>	281	-	122	729	<b>1 132</b>
<b>2017-18</b>	336	-	152	587	<b>1 074</b>

<b>2018-19</b>	401	-	207	531	<b>1 138</b>
<b>2019-20</b>	344	45^	93	482	<b>964</b>

# ImmD has deployed dedicated manpower to speed up the repatriation of unsuccessful claimants to their places of origin since 2019-20.

\* Individual items may not add up to total due to rounding.

^ Only manpower expenditure for the repatriation of non-refoulement claimants and relevant work is included. As other expenditures are incurred by duties (e.g. arrangement for air tickets and application for documents) which form part of ImmD's overall repatriation work, we do not maintain a separate breakdown for the claimants.