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**Paper for the House Committee Meeting  
on 8 January 2021**

**Legal Service Division Report on  
Immigration (Amendment) Bill 2020**

**I. SUMMARY**

- 1. The Bill**

The main object of the Bill is to amend the Immigration Ordinance (Cap. 115) to (i) enhance the efficiency of screening torture claims by the Immigration Department and processing appeals by the Torture Claims Appeal Board; and (ii) 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. It also provides for savings and transitional arrangements. The Bill also seeks to amend the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238) to enable members of the Immigration Service to possess arms and weapons otherwise prohibited by those Ordinances.
- 2. Public Consultation**

The Administration received comments from the Hong Kong Bar Association and the Law Society of Hong Kong on the legislative proposals. The Administration has also exchanged views with relevant human rights groups from time to time.
- 3. Consultation with LegCo Panel**

The Panel on Security was briefed on 10 July 2018 and 8 January 2019 on the Administration's proposed legislative amendments. The Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims was also briefed on the relevant proposals on 27 November 2018. Members expressed various concerns on the Administration's proposals.
- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill proposes to make certain changes to the screening procedures for non-refoulement claims and introduce enhanced measures for law enforcement relating to torture claimants, Members may consider forming a Bills Committee to study the Bill in detail.

## **II. REPORT**

The date of First Reading of the Bill is 16 December 2020. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: SB CR 10/3221/15) issued by the Security Bureau on 2 December 2020 for further details.

### **Object of the Bill**

2. The main object of the Bill is to amend the Immigration Ordinance (Cap. 115) to enhance the efficiency of screening torture claims by the Immigration Department ("ImmD") and processing appeals by the Torture Claims Appeal Board ("TCAB"), and to strengthen the capability of ImmD in handling torture claim cases and taking enforcement actions, including removing unsuccessful claimants and detaining claimants pending final determination of their torture claims. It also provides for savings and transitional arrangements relating to the handling of torture claims.

3. The Bill also seeks to amend the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238) to enable members of the Immigration Service to possess arms and weapons otherwise prohibited by those Ordinances.

### **Background**

4. According to paragraph 2 of the LegCo Brief, the Administration commenced a comprehensive review of the handling of non-refoulement claims in 2016 as a response to the rising number of torture claims pending the screening procedures by ImmD under the Unified Screening Mechanism ("USM"), which was established in 2014. According to paragraph 3 of the LegCo Brief, there has been a significant number of unsuccessful claimants currently remaining in Hong Kong, and in addition there has also been a steady increase in new claims received. In order to tackle the aforesaid, the Administration introduces the Bill, which seeks to improve the overall screening procedures for non-refoulement claims, and to introduce enhanced measures in respect of law enforcement, removal and detention of claimants.

### **Provisions of the Bill**

5. The key provisions of the Bill are summarized in the ensuing paragraphs.

#### Amendments relating to enhancing the efficiency of screening torture claims

6. Under the existing USM, immigration officers conduct screening interviews with claimants to verify their torture claims. Where a claimant's physical

or mental condition is in dispute and relevant to the consideration of claims, ImmD will make arrangements for the claimant to undergo medical examination to ascertain the alleged condition. According to paragraphs 8 and 9 of the LegCo Brief, the process is presently affected by delay tactics used by some uncooperative claimants, such as refusal to confirm interview arrangements, and abuse of the simultaneous interpretation service arranged by ImmD. The Bill seeks to introduce certain amendments to Cap. 115 to address the aforesaid issues, including:

- (a) adding new sections 37ZAB and 37ZAC to require claimants to attend interviews at the date, time and place specified by an immigration officer, and to enable an immigration officer to specify the language (that the officer reasonably considers the claimant is able to understand) to be used by a claimant for communications (clause 10);
- (b) requiring a claimant to give consent to enable a medical examination to be arranged or conducted, and to undergo the medical examination at the date, time and place specified by the immigration officer (clause 12); and
- (c) providing that if a claimant fails to attend an interview or undergo the medical examination, the immigration officer could nevertheless proceed to make a decision on the torture claim (clause 15).

#### Amendments relating to processing of torture claimants' appeals by TCAB

7. Currently, TCAB handles appeal applications lodged by claimants who disagree with ImmD's decision on their torture claims. The Bill proposes certain amendments to Cap. 115 relating to the processing of appeals by TCAB, including:

- (a) adding a new section 37ZTA to provide that a claimant who has filed a notice of appeal ("NoA") could withdraw the appeal by filing a written notice with TCAB before the appeal is determined; once TCAB receives the NoA, the appeal would be treated as having been withdrawn, and thereafter no further NoA may be filed in relation to the same decision (clause 20);
- (b) no action would be taken by TCAB in relation to a NoA that is not in the specified form or is not duly completed or signed (clause 18);
- (c) late filing of a NoA against an immigration officer's decision mentioned in section 37ZR (i.e. decision not to re-open a torture claim, decision rejecting a torture claim, or revocation decision) could be allowed by TCAB only if it could be demonstrated that the lateness is due to circumstances beyond the person's control (clause 19);
- (d) TCAB's Chairperson could (i) delegate certain powers and functions currently only exercisable by the Chairperson under Cap. 115 to a

Deputy Chairperson, such as the power to assign members to hear and determine appeals, and (ii) nominate a member of the board to preside over a hearing if a three-person board is to be appointed to consider an appeal (clause 25); and

- (e) TCAB could give less than 28 days' (but not less than seven days') notice of a hearing to parties if it considers appropriate to do so in a particular case (clause 25).

### Proposed measures to enhance law enforcement relating to torture claimants

#### *Detention and removal of claimants*

8. Under sections 32 and 37ZK of Cap. 115, ImmD is authorized to detain persons pending removal and during screening of their claims. The Bill seeks to amend sections 32 and 32ZK to provide that the detention of a claimant would not be unlawful by reason of the period of the detention if it could be shown that the period of detention is reasonable, having regard to factors such as whether there is a large number of claims or appeals pending screening or determination by ImmD or TCAB at the same time, or whether the final determination of a claim or the removal of a claimant is directly or indirectly prevented or delayed by the claimant's own action or lack of action (clauses 5 and 16).

9. Regarding the removal of unsuccessful claimants, the Bill seeks to amend section 37Z of Cap. 115 to provide that the making of a torture claim would not preclude the Government from liaising with any relevant entity or authority, for the purpose of making arrangements for the removal of the claimant, after (i) the torture claim is rejected, (ii) a revocation decision is made in relation to the torture claim, or (iii) the torture claim is withdrawn (clause 9).

#### *Unlawful employment and increased penalties*

10. The Bill proposes to amend section 38AA of Cap. 115 to provide that a torture claimant who was given permission to land in Hong Kong pursuant to section 11(1) of Cap. 115 would be subject to the prohibition of taking employment and establishing business under section 38AA, which is currently applicable to illegal immigrants or persons in respect of whom a removal order or a deportation order is in force (clause 23).

11. The Bill also proposes to amend section 17I of Cap. 115 to increase the penalties for employing an employee who is not lawfully employable under the amended section 38AA of Cap. 115 from a maximum fine of \$350,000 and three years' imprisonment to a maximum fine of \$500,000 and 10 years' imprisonment. The Bill also seeks to provide that if 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 a body corporate or a partner in a partnership, such persons would also commit the offence under section 17I (clause 4).

*Preventing potential claimants from entering Hong Kong*

12. The Bill also seeks to implement the International Civil Aviation Organization's latest requirement made in the Convention on International Civil Aviation concerning the Advanced Passenger Information ("API") system, with a view to enhancing the enforcement capability of ImmD, and preventing potential claimants from entering Hong Kong. Under API, airlines are required to provide passenger information to the immigration authorities in the destination countries before flight departure. The Bill seeks to empower the Secretary for Security to make regulations to:

- (a) provide that airlines or their owners or agents would be required to supply the Director of Immigration ("Director") with information relating to the passengers or crew members of a carrier; and
- (b) empower the Director to direct that a passenger or member of the crew of a carrier may or may not be carried on board the carrier (clause 3).

13. The Bill further seeks to amend section 40 of Cap. 115 to increase the penalty (from a level 3 fine (i.e. \$10,000) to a level 6 fine (i.e. \$100,000)) that could be imposed on the owner of an aircraft and his agent if a passenger of the aircraft arrives in Hong Kong without valid travel document (clause 24).

Savings and transitional arrangements

14. The Bill proposes to add a new Schedule 5 to Cap. 115 to provide for the savings and transitional arrangements relating to the handling of torture claims (e.g. if a claim is pending a decision, the pre-amended Cap. 115 would continue to apply) for torture claims made under Cap. 115 before the commencement of the enacted Ordinance if the Bill is passed by LegCo (clause 26).

Amendments to the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238)

15. The Bill also seeks to amend the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238) for the purpose of designating the Immigration Service as one of the classes of persons who may possess articles classified as "prohibited weapon" under Cap. 217 (such as steel batons) and "arms" and "ammunition" as defined in Cap. 238 on behalf of the Government, to enable immigration officers to handle emergencies and take enforcement actions at detention centres (clauses 27 and 28).

## **Commencement**

16. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

## **Public Consultation**

17. According to paragraph 26 of the LegCo Brief, comments were received by the Administration from the Hong Kong Bar Association and the Law Society of Hong Kong on the legislative proposals. The Administration has also exchanged views with relevant human rights groups from time to time.

## **Consultation with LegCo Panel**

18. As advised by the Clerk to the Panel on Security, the Panel was briefed on 10 July 2018 and 8 January 2019 on the Administration's proposed legislative amendments to Cap. 115 relating to the handling of non-refoulement claims under USM. The Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims was also briefed on the relevant proposals on 27 November 2018. Members expressed various concerns on the Administration's proposals. Members in general considered that the Administration should expedite the screening of non-refoulement claims, handling of relevant appeals and removal of rejected claimants. Some members, however, expressed concern that the standards of fairness as required by the court would be compromised under the proposed new requirements relating to submission of claim forms and lodging of appeals. Some members also expressed concern that the proposal to remove unsuccessful torture claimants who are seeking leave of the court to apply for judicial review ("JR") would undermine the rule of law and render the process of JR meaningless.

## **Conclusion**

19. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill proposes to make certain changes to the screening procedures for non-refoulement claims and introduce enhanced measures for law enforcement relating to torture claimants, Members may consider forming a Bills Committee to study the Bill in detail.

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