



Joint Position Paper by the Law Society of Hong Kong and the Hong Kong Bar Association on the Framework for Convention Against Torture (“CAT”) Claimants and Asylum Seekers

On the 5 December 2008, in the case of *FB & Ors v Director of Immigration & Anor (HCAL 51/2007)* (*FB*), the High Court declared the CAT assessment process to be unfair and unlawful in a number of respects including:

- The practice of not permitting the presence of a legal representative during the completion of the questionnaire or during the interview;
- The practice to refuse to provide, at the expense of the Respondents, legal representation to a Convention claimant;
- The systemic anomaly in which the examining officer and the decision-maker are not the same person;
- The fact that the decision-makers are insufficiently trained (at the first level and on petition); and
- The failure to provide for an oral hearing on a petition and, as before, the lack of provision for legal representation at that oral hearing.

At the Opening of the Legal Year on 12 January 2009 the President of the Law Society expressed his concerns given the “*momentous importance*” of the decision for the individual concerned and urged the Government to address the “issues stemming from these cases” and called for a legislative or regulatory framework to ensure high standards of fairness.

On the 3 February 2009, at a meeting of the Legislative Council’s Security Panel, Deputy Secretary for Security Ngai Wing-chit said the Government would submit a “*legislative framework*” for a regime to assess the CAT claimants by the end of the year.

New Information

The Law Society, The Bar Association and the Hon. Ms. Margaret Ng (Legal Functional Constituency) have only recently (March 2009) been made aware of the following:

1. Security Bureau has already been negotiating with the Duty Lawyer Service (“DLS”) on the provision of legal services;
2. The HKSARG propose to put a system in place to assess CAT claimants by mid 2009—prior to the introduction of a “legislative framework”; and
3. Some training of immigration officers has already taken place.

Concerns and Questions Arising

In addition to the developments above, the Law Society is mindful of the recent Concluding Observations of the United Nations CAT Committee (November 2008), which are only the latest in a long list of criticisms from the UN bodies and human rights advocates over the years, which express the concern that “*there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure*” and “*The Committee is also concerned that there are no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol*”. Further, the Committee recommends that the HKSAR should:

- a) *incorporate the provisions contained in article 3 of the Convention under the Crimes (Torture) Ordinance;*
- b) *consider adopting a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of its obligations under article 3 of the Convention, the merits of each individual case;...*

The Law Society and the Bar Association also note that the Refugee Convention has been extended to the Macau SAR which has legislated for the assessment of asylum seekers.

Both The Law Society and the Bar Association are also aware of the procedural deficiencies and potential for abuse in having a separate assessment process for refugee status determination (“RSD”) in the HKSAR which is presently carried out by the United Nations High Commissioner for Refugees (“UNHCR”). The UNHCR assessment process, if it was amenable to the jurisdiction of the Hong Kong courts, would not meet the high standards of fairness and would most likely be declared unlawful for substantially the same reasons as in FB. Further, it is unfair and anomalous that the ultimate decision on the individual’s refugee status by the UNHCR is not amenable to judicial scrutiny. Indeed, the UNHCR itself has been calling on the HKSAR to legislate and carry out RSD for a number of years.

Given that the HKSAR has an obligation to screen CAT claimants and by its own numbers there are more persons availing themselves of that process than the procedurally unfair UNHCR process (3,196 vs 1,591) and given the similarity in the nature of the processes, the Law Society and the Bar Association invite the HKSAR to consider responding favourably to the recommendations of the UN CAT and put in place comprehensive legislation for refugee status determination (“RSD”) and CAT screening. Undoubtedly the majority of applicants will claim both. Since the HKSAR must interview for CAT, if increasing resources are to be spent on a complete revision of the

process, and a decision on refugee status can be made based on the same interview process (as is done in other developed jurisdictions), there does not seem to be any impediment to the HKSAR taking control, in a fair and efficient way, of the entire process and putting in place a comprehensive legislative framework. This would include, *inter alia*, basic screening legislation, including the setting up of an independent tribunal, legislation governing immigration status pending a decision and legislation for related issues such as provision of social assistance during the process. All of these are presently lacking.

The Law Society and the Bar Association note that this is a matter of great public importance and concerns. At stake are fundamental rights of the most serious kind.

The Law Society and the Bar Association are of the view that this is a critical juncture and an opportunity to implement a coherent and comprehensive system. Legislation should be passed to help prevent abuse which may affect not only CAT claimants but asylum seekers and claimants. An inadequate system will only invite abusive claims that exploit weaknesses in the system, and further poor decision-making and legal challenges. The lack of legislation or a detailed and accessible policy governing detention of CAT claimants was criticized by the Court of Appeal in *A & others and DOI* (CACV 134/2007) and may result in costing the HKSARG millions in legal fees and damages for unlawful detention.

Consultation with the Legal Profession/LegCo

Consistent with and in furtherance of fundamental rights, rule of law and procedural fairness set out above, both the Law Society and the Bar Association are of the view that the legal profession and LegCo should be consulted at the earliest stages of development of any proposed administrative scheme. Both the Law Society and the Bar Association are concerned that they have not hitherto been consulted even though the DLS is a creation of the Law Society and the Bar Association. Not only is it important to ensure that any such proposed scheme meets the highest standards of fairness but issues such as proposed models for rendering legal advice (legal aid system or DLS?), training for the profession and selection and training for proposed Tribunal members all require input and expertise from the legal professional bodies and LegCo.

Questions for the HKSARG

In light of the above the Law Society and the Bar Association request the HKSARG to provide as a matter of priority the following information:

- 1. Full details of the proposed scheme including any comparative research and possible models that have been considered.**
- 2. Details of the proposal to the DLS and the present status of the negotiations including any timetable.**
- 3. Details of the steps taken to implement the judgment in the case of FB including the details of the training that has taken place to date.**

4. **What consideration has been given to the HKSARG taking on RSD and putting in place comprehensive legislation to effectively and efficiently manage the issues of status while awaiting decisions under CAT or RSD, social welfare, education for minors etc.**

Both the Law Society and the Bar Association will continue to monitor developments in this area and engage all stakeholders and look forward to the early provision of the information requested above. Both organizations can then effectively contribute its expertise and views on the early implementation of a fair and efficient administrative system in line with the HKSAR's international obligations to assist genuine claimants.

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