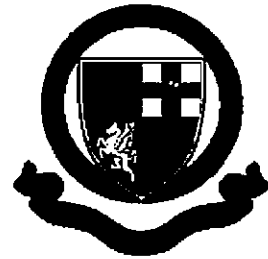




THE
LAW SOCIETY
OF HONG KONG
香港律師會



Practitioners Affairs
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CAHR/14/1718170

2nd May 2014

Mr. Lai Tung-kwok SBS IDSM JP
Secretary for Security
Security Bureau
10/F East Wing, Central Government Offices,
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Sir,

Unified Screening Mechanism of Non-refoulement Claims

1. The Hong Kong Bar Association and the Law Society of Hong Kong write to you jointly in respect of the Unified Screening Mechanism of Non-refoulement Claims ("USM") that the HKSAR Government introduced on 3 March 2014 to assess claims by individuals who have substantial grounds for believing that he or she would be tortured, ill-treated or persecuted if he or she is returned from Hong Kong to the country of origin or nationality. This Joint Letter is additional to the Submission of the Hong Kong Bar Association dated 14 February 2014, which you have received and replied.
2. We have reviewed the Note entitled "Determination of Non-refoulement Claims" of the Immigration Department (February 2014) ("the Note to Immigration Officers"). The Note to Immigration Officers is intended to provide an overview for immigration officers responsible for administering the USM of the statutory and administrative procedures and requirements for handling non-refoulement claims made under the USM. We note that the HKSAR Government has not consulted the legal profession on the Note to Immigration Officers when it was being drafted.

3. We have serious concerns that parts of the Note to Immigration Officers may affect the proper administration of the USM and the legality of the assessment made in respect of individual claims under the USM. There should be clarifications and/or corrections in a timely manner.

Consideration of Non-refoulement Claims

4. The USM makes provision for the assessment of non-refoulement claims on applicable grounds which include (i) torture under the Convention Against Torture (“CAT”)/ Part VIIC of the Immigration Ordinance (Cap 115), (ii) torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights, and (iii) persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention)¹.
5. We note that neither the UK (prior to 1997) nor the PRC has applied the Refugee Convention to Hong Kong. Nevertheless, it cannot thereby be said that the principles of and the definitions in the Refugee Convention are not applicable to Hong Kong. The Court of Final Appeal most recently in *C v Director of Immigration* (FACV 18, 19 & 20/2011) was asked whether or not the principles in the Refugee Convention have become part of the local law. Sir Anthony Mason NPJ recognized that the HKSAR Government has already asserted publicly that, although not bound by the Refugee Convention, it voluntarily complies with its requirements², and therefore,

“[having] adopted that policy in these circumstances, no doubt by reason of the powerful humanitarian considerations which are involved in [refugee status determinations] and the consequences they may entail, the requirement of fairness, arising from the adoption by the Director of a policy under the authority of the statute, calls for him to make an independent assessment of the UNHCR determination, especially in those cases where the UNHCR determination is adverse to the claimant. In making that assessment, the Director must observe high standards of fairness...” [emphasis supplied]³
6. In any event, and *irrespective of* the whether the Refugee Convention applies locally, the non-refoulement principles in the Refugee Convention ought to be and are highly relevant to the consideration by the Immigration Department under the USM. This is because a claimant for non-refoulement protection whose claim is accepted as substantiated on the ground of persecution risk will under the USM have his or her case information passed to the UNHCR for consideration of recognition of refugee status under its mandate and seeking durable solution for him or her, including arrangement of resettlement in a third country (see *Note to Immigration Officers, para 56*). If the definitions and principles used by the Immigration Department in non-refoulement claims determination do not follow those used in the international community, it would become extremely difficult, if not impossible, for the UNHCR to arrange resettlement of the refugee claimants in a third country. The third countries could quite legitimately refuse any

¹ Press Release on USM on 7 Feb 2014

² See para 90 and 98 of the judgment

³ Para 98 (ibid)

such resettlement requests, when the HKSAR is using its own definitions which the international community does not recognize in full or at all.

7. Those definitions and parts of the Note to Immigration Officers which we identify as problematic and which require clarifications and/or corrections are set out in the following paragraphs.

Difficulties in the Note

8. The Note to Immigration Officers provides in para 12 a definition of persecution risk. This definition does not follow the definition of refugees in the Refugee Convention, and lacks the three components internationally recognized: *Inclusion* (Article 1A(2) of the Refugee Convention), in terms of what elements needs to be present; *Cessation* (Article 1C of the Refugee Convention), in terms of when the definition ceases to be operative; and *Exclusion* (Articles 1D, 1E and 1F of the Refugee Convention), in terms of the classes of persons who are excluded from the definition.
9. Instead the para 12 definition purports to require satisfaction of two cumulative requirements, consisting of para 12(a), which is only a selective extract of Article 1A(2) of the Refugee Convention with a deviation from the language used in that provision, and para 12(b), which is a selective adoption of Article 33.
10. Furthermore, we note that the Note to Immigration Officers has muddled in para 59 the concepts of “exception” and “exclusion” in refugee status determination (RSD). The *Exclusion* aspect in the RSD serves to safeguard confidence in the integrity of the refugee regime by providing that the status of refugee would not be accorded to persons unworthy of international protection. *Exceptions* under Article 33(2) address a separate matter, namely the safety and security of the receiving state, but only as an exception to the duty of non-refoulement. These two concepts serve very different purposes and it is essential that, as a matter of policy, these two concepts should be clearly distinguished in the implementation of the USM scheme.
11. The specific terms of para 59 could also be problematic: Paragraph 59(a) is not a matter included in the international convention. Paragraph 59(d) appears to reinstate the prohibited practice of “buck-passing” that the Court of Final Appeal had ruled against in the *Prabakar* case⁴ and the *C* case⁵.
12. We have not been advised of any justification for the USM to be employing a definition for assessment of persecution risk that is different from the definition of refugees in the international convention. Since (i) the basis for the non-refoulement protection on the ground of persecution risk comes from Article 33 of the Refugee Convention and (ii) it is part of the object of the USM that a substantiated case of non-refoulement claim on the ground of persecution risk would be passed to the UNHCR for refugee status recognition, we take the view that Hong Kong should have an effective,

⁴ [2004] 7 HKCFAR 187

⁵ FACV 18,19 & 20/2011, see para 5 above.

simple and uncomplicated regime for the protection of refugees which dovetails seamlessly with resettlement criteria applied by the UNHCR and the resettlement countries.

Initiating Non-refoulement Claims

13. Paragraphs 21 to 24 of the Note to Immigration Officers set out the procedure for initiating non-refoulement claims. A claimant must signify to an immigration officer in writing his intention to seek non-refoulement protection. A non-refoulement claim will not be considered made unless the Immigration Department is satisfied that the written signification has given a general indication of the reasons for making such claim being reasons that relate to an act falling within torture, ill-treatment and/or persecution by reference to the instruments. It appears that the Immigration Department's decision in this regard is crucial as this would determine whether or not a claimant's case would be assessed under the USM. There is a clear risk of potential abuse, and "pre-screening", particularly when claimants are in detention, and before they have legal representation. **We suggest that assistance, including legal representation, should be made available when the claimant is asked to give the indication.**
14. We regard the procedure for initiating non-refoulement claims to be a critical aspect of the USM and **call for the introduction of safeguards**, including the introduction of an avenue for challenging or appealing against a decision of the Immigration Department that a claimant's claim has not been considered made. The Immigration Department should **also clarify whether the submission of a further written signification after a decision that a claim has not been considered made triggers the "subsequent claim" provisions in paras 76 to 81 of the Note to Immigration Officers.**

Other Applicable Grounds

15. At present, there is a question on the claim form about "other applicable grounds" but there is no indication as to what such "other applicable grounds" are. **It would be helpful if the Government can clarify the "other grounds" referred to in para 54 of the Note to Immigration Officers.**

No Protection against Chain Refoulement

16. We consider that para 16 of the Note to Immigration Officers does not appear to protect against the danger of a person expelled from Hong Kong being, in turn, expelled by a non-risk state to a risk state and **invite the Government to review this aspect.**

Fairness

17. The time frame of 28 days for returning the completed Non-refoulement Claim Form is too short, bearing in mind, among other matters, the need for the duty lawyer to interview the claimant (often with an interpreter), preparation and translation of the supporting documents, carrying out of country of origin research, and obtaining documents and other evidence. We note, as with the whole of the USM, that there has been no consultation on this fundamental issue prior to the promulgation of the finalized guidelines, and **suggest the HKSAR Government should re-consider extending the time frame, even though extension of time can be granted by the Immigration Department upon request with justifiable reasons.**
18. It is proposed that the Immigration Department should make available by way of a continuing arrangement with the Duty Lawyer Service the **disclosure and supply of reports and information gathered by immigration officers** in field trips to potential risk states, as well as a list of the categories and description of other country of origin information that case officers refer to in making assessment decisions under the USM. As a matter of procedural fairness, such reports or country of origin information relied upon by the decision-makers should be put to the claimant and his or her lawyer for comment prior to a decision being made. These should also be made available at the website of the Security Bureau and/or the Torture Claims Appeal Board.

Medical Evidence

19. **We urge the Government to look into any difficulties of claimants and their lawyers could have when they are to obtain medical evidence** to support a claimant's claim for non-refoulement. Furthermore, the arrangements for obtaining medical examinations, including mental health assessments, are not adequately transparent and the training of the medical practitioners are not publicly available so that it is unclear what training they have had in the Istanbul Protocol. Any delays in allowing claimants to undergo medical examinations could have consequences with respect to the high standards of fairness.

UNHCR Decisions

20. The uncertain remaining role of the UNHCR is a concern for claimants and lawyers expected to advise them on the present system. Furthermore, given that the HKSAR Government will give "weight to determinations conducted by the UNHCR"⁶, concerns remain that **there will continue to be reliance on UNHCR determinations** (where claims were determined without the benefit of legal advice and without the procedural standards as set out in the case of *FB v Director of Immigration*⁷ and where immigration officers had

⁶ See para 4 of the Note

⁷ [2009] 2 HKLRD346

worked within the UNHCR on RSD will be unfair and not meet the high standards of fairness), for example, for the purpose of revocation of a substantiated non-refoulement claim.

Publication of Decisions under the Immigration Ordinance Part VIIC and USM

21. Presently, no decisions of Torture Claims Appeal Board (TCAB) are made available to the public and/or the legal profession by the HKSAR Government and/or the TCAB office. It is likely that the Director of Immigration as the Respondent in every appeal will have knowledge of and/or access to all prior decisions of the TCAB and in order to be fair to the appellants they should also be given access to the decision. **In many jurisdictions such tribunal decisions are published to promote transparency, consistency and encouragement of high quality, fair and well-reasoned decisions.**
22. Paragraph 50 of the Note to Immigration Officers briefly considers the **internal flight alternative** but **should include reference to more specific criteria.**

Ongoing Training

23. For the reasons expressed **there needs to be ongoing training of the decision-makers and of lawyers representing claimants** particularly given the lack of consultation and the piecemeal release of information about the procedures to be followed, in particular, the transitional provisions, the ongoing role of the UNHCR and the complexities of dealing with vulnerable persons. It is in this regard noteworthy that quite a number of attendees at the recent Academy of Law training held in February 2014 consider it important to have training in mental health issues.

Conclusion

24. We acknowledge the intent of the Government to implement a screening mechanism which meets the high standards of fairness required by law on the one hand and which prevents abuse by economic migrants who aim to protract their unlawful stay in Hong Kong on the other.
25. Nevertheless, in light of the crucial issues identified above, the USM Scheme could be amenable to legal challenges and judicial reviews. These potential legal challenges are not conducive to the policy objectives or the proper discharge of the duties of the Director of Immigration on immigration control, having regard to his legal obligations and the high standards of fairness required.
26. **In order to meet the necessary requirements under applicable law on non-refoulement claims, we urge the HKSAR Government to review the USM in consultation with the legal profession, the Legislative Council, and other stakeholders as a matter of urgency. It should conduct a**

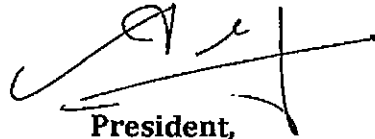
review of the USM Scheme as soon as practicable, with a view to issuing supplemental directions and guidance notes which address the above issues. Periodic reviews should also be carried out to seek views from the legal profession. In the meantime, the HKSAR Government should without delay co-ordinate with various stakeholders to provide the necessary training.

27. If you have any views on the above observations, we are most happy to meet and discuss with you.
28. We are copying this letter to the Secretary for Justice (SJ) for his information, as the SJ is your legal advisor. If a meeting is called for, we consider that the SJ should also be invited.
29. We shall wait for your favourable response to the above.

Yours sincerely,



**Chairman,
HONG KONG BAR ASSOCIATION**



**President,
LAW SOCIETY OF HONG KONG**

cc.

1. Secretary for Justice
2. Director of Immigration
3. Chairman, Legislative Council Panel on Security

