**Submissions of the Hong Kong Bar Association ("HKBA")**

**On Proposals to Amend the Immigration Ordinance (Cap. 115) Pursuant to the Comprehensive Review on the Strategy of Handling Non-refoulement Claims**

Backdrop

1. In 2016, the Government commenced a comprehensive review of the strategy of handling non-refoulement claims in view of the perceived "acute surge"in the number of claims pending commencement of screening procedure and the delay in the processing of claims since the Universal Screening Mechanism ("USM") was implemented in 2014. The review included measures seeking to expedite the commencement of screening procedure for pending claims, shorten screening time per claim and expedite the handling of appeals.[1]

2. In September 2017, the Government launched thePilot Scheme on Provision of Publicly-funded Legal Assistance to Non- refoulement Claimants under the Unified Screening Mechanism ("**Pilot Scheme**") to run in parallel to the existing scheme run by the Duty Lawyer Service ("**DLS**") for the purpose of meeting the policy target to step up the number of determination of non-refoulement claims to 5,000 or above per year beginning 2017/18.[2]

3. Non-refoulement claims have now dropped significantly by 80% with only 2997 claims pending as of June 2018 (representing a drop of 70% from peak).[3]HKBA observes that the concerns with any crisis over a flood of claimants is, or should almost be, over.

4. Accordingly, HKBA takes the view that the Government's current focus should be on improving the quality and fairness of the decision-making process and

[1] Security Bureau (LC) Paper No. CB21426/17-18(01), May 2018: §§3, 4, 12
[2]Ibid, §13; see also Security Bureau (LC) Paper No. CB(2)1110/17-18(01), March 2018: §15; 17
[3]Security Bureau (LC) Paper No. CB(2)1751/17-18(01), July 2018: §2.

not merely tofurther enhance the efficiency of processing claims with time being a paramount consideration, as is currently proposed.

5. The recent judgments of the Court of First Instance in *M v TCAB* [2018] 3 HKC 497 (CFI) and *Villarico v TCAB* [2018] 3 HKC 529 (CFI) make it abundantly clear that the pursuit of speed and efficient determination of claims and appeals to the extent of ignoring the medical and personal circumstances of the claimant is plainly inhuman and degrading and incompatible with the high standards of fairness required in the derermination of such claims. (The claimant Villarico was refused an adjournment of a TCAB hearing even though she was about to go into labour and almost had to give birth during the hearing).

6. Against that backdrop, HKBA is concerned that the Government is in fact proposing a number of worrying amendments purportedly to further streamline the mechanism but which would have the effect of seriously compromising the fairness of the decision-making process.

7. These include, by way of summary and further explained below, reducing the already inadequate period to return a non-refoulement claim form, reducing the statutory timeframe for lodging an appeal, narrowing the scope for granting extensions, disallowing further evidence or documents to be produced in support of the claim after the submission of the claim form, narrowing the scope for applying for adjournments of screening interviews and appeals and requiring claimants to conduct screening interviews and appeals in a language other than their mother tongue against the express wishes of the claimant. These proposals harbour great potential for injustice and must be considered with circumspection.

8. HKBA notes that the Government in making the current proposals said it has considered “overseas legal provisions and practices”.[4] HKBA is of the view that the challenges in the processing of non-refoulement claims are often localised and specific to a particular jurisdiction. HKBA observes that any legislative proposals must necessarily reflect and embody the views of the

[4]Ibid: §5

legal profession as engendered by the accumulated experience of the local lawyers who have day-to-day working knowledge of the USM and the current Pilot Scheme. The HKBA sets out below its submissions on the proposals for legislative amendments in specific areas.

Submission of claim form

9. There is no justification for tightening the existing time frames for submission of claim form and the procedure for extension application. Insofar as such proposals are premised on perceived delaying tactics on the part of the claimants, concrete evidence of obstruction and/or deliberate delay tactics should be produced. The current proposal is premised upon a prejudiced and not objectively verifiable view that claimants linger in Hong Kong and prolong their stay to receive humanitarian assistance from the public coffers whilst pursuing illegal employment.

10. In particular, the present 49-day arrangement[5] (statutory allowance plus administrative extension) has worked well. Because of the current administrative arrangement of pre-booking the screening interview, a majority of claims are processed within the time frame desired by the Immigration Department.

11. The proposed criteria for extension of time on proof of "exceptional" and "uncontrollable" circumstances notwithstanding the exercise of due diligence are vague and excessively onerous; there is no reason to fetter the general discretion in determining whether an application of extension should be granted and such fettering only serves to compromise the high standards of fairness required in the determination of such claims.

Submission of documents and evidence

[5] Ibid, §6

12. The proposed drastic reduction of the time for returning the claim form also has effect on the preparation of the claim through the submission of documents and other evidence. This proposal plainly fails to recognize the logistical and financial needs and difficulties a claimant and her legal representative face in the collection and preparation of documents and evidence for submission. Very few claimants come to Hong Kong with a full and relevant dossier of past activities and records ready for submission in one of the official languages of Hong Kong. Very often the claimant needs to have documents sent by relatives and friends from the country of origin by non-instantaneous means due to financial and technological limitations (such as surface mail). The documents are often not in Chinese and English and time needs to be taken for them to be translated into English before submission.

13. The proposal requiring claimants to submit all relevant supporting documents with the claim form will not meet the high standards of fairness especially when it is considered with the 'tight' time frame proposed for the returning of the claim form.

14. The proposal requiring claimants to submit a list of outstanding documents with explanation and pinpointing the parts relevant to their claim with the claim form is clearly unrealistic: most often the claimant relies on others to gather and send the documents to her; the claimant only comes to know of the contents and, with legal assistance, becomes able to assess the relevance of such documents and/or pinpoint the parts that are relevant after receiving the documents in the surface mail.

15. The circumstances that are described above are frequent and ordinary occurrences. They are due to financial and logistical difficulties in developing countries. It is questionable whether immigration officers are likely to regard them as 'exceptional' and 'uncontrollable' circumstances.

Screening Interviews

16. HKBA is of the view that the contemplated proposal to dispense with the requirement to provide interpretation in a claimant's most proficient language if a claimant is reasonably supposed to understand and to be able to

communicate in another language[6] is uncalled for and may lead to unfairness and injustice.

17. It is unclear how the Immigration Department will decide if a claimant is 'reasonably supposed to understand and be able to communicate in a another language' – any purportedly objective as opposed to subjective assessment would clearly be unreasonable. At present, a claimant is required to declare their first language and any other languages they can speak or write at Q.16 and Q.17 of the Non-Refoulement Claim Form ("NCF") yet there is no opportunity to indicate the degree of fluency in each. In the absence of any clear warning that an immigration officer could use such information to elect to hold a screening interview in any of the languages listed, the current proposal presents a great risk of unfairness and injustice for the average claimant who may list a number of languages in which he has very elementary knowledge.

18. The situation should be handled on a case by case basis bearing in mind the high standards of fairness. If the Security Bureau is minded to act upon this proposal, a warning must be incorporated into the NCF and further, the decision must be exercised fairly, rationally and based on subjective evidence of the claimant's language abilities.

19. Furthermore, with regard to the scheduling of the screening interviews, the proposal to impose requirements that a claimant may only apply for re-scheduling of an interview if there are "exceptional" and "uncontrollable" circumstances is unduly harsh and oppressive. There could be many reasons why a claimant might need to re-schedule an interview. For example, if the duty lawyer being retained to represent the claimant was subsequently unavailable to attend the scheduled interview, this would unlikely be regarded as an "exceptional" circumstance. Nor would it necessarily avail a claimant who simply failed to turn up for this reason: under the current proposal, any application for a fresh appointment due to "no show" at the original interview has to be supported by evidence that the claimant has exercised "all due diligence" to attend the original interview "as far as practicable"; if the claimant

[6]Ibid, §15

did not, or could not, find an alternative Duty Service lawyer to accompany her at the interview, this might not have been regarded as “all due diligence” having been exercised as far as practicable. Likewise, if a claimant suffers from a medical condition which prevented her from attending the interview, this would also likely not be accepted as an “exceptional” circumstance. On the other hand, in such a situation, there is already in place an administrative measure requiring absent claimants to furnish medical reports to the Immigration Department within one working day of the scheduled interview, failure in which the Immigration Department may and would proceed with the screening procedures. HKBA sees no compelling reasons requiring legislative amendments to impose inflexible rules for arranging or re-arranging screening interviews.

Medical Examination

20. Similarly, proposed legislative provisions to prevent claimants who fail to attend medical examination or to produce medical reports from relying on medical grounds will not further rational and fair decision-making. HKBA is of the view that such situations should remain to be dealt with on a case by case basis and not by adherence to an inflexible rule as proposed. It is not uncommon that persons with medical conditions (particularly psychiatric conditions)deign scheduled medical appointments or disclosure of medical reports which is often part of the medical condition itself.

Lodging appeals

21. HKBA takes the view that the proposed shortening of the time limit for lodging appeals is unwarranted. The DLS and the duty lawyer have to explain to the claimant the immigration officer's decision, take instructions and give advice on whether there are prospects of success of the appeal; further if there are grounds for appeal, the duty lawyer has to take time to draft the appeal grounds.

22. HKBA notes that the Security Bureau recognizes that the TCAB considers the grounds of the claim and relevant supporting documents from the claimant afresh and does not determine whether the immigration officer has made the

right decision. The Security Bureau would also recognize that the TCAB conducts the appeal/hears the petition not by way of an interview but in an adversarial setting with the Director of Immigration represented by Government Counsel. Legal issues can and often arise. The conduct of the appeal/hearing of the petition under this hearing arrangement is clearly unfair and to the disadvantage of the claimant, who has to establish her claim afresh. HKBA therefore proposes that the Security Bureau consider that funding be provided to the DLS for legal representation for all claimants who decide to appeal/petitionto ensure the equality of arms before the TCAB.

23. It is also unfair to render an incomplete or unsigned Notice of Appeal automatically invalid, when there may be circumstances leading to the claimant filing a deficient Notice of Appeal. The situation should be dealt with on a case-by-case basis.

24. With regard to late appeals, the proposal to delete the provision permitting TCAB to take into account “any relevant matters of fact” within its knowledge and restricting the TCAB in considering only matters relevant to the lateness in filing an appeal is unfair.The TCAB is intended to be an independent and impartial tribunal that is subject to fairness. The Security Bureau is making a proposal on behalf of the TCAB which damages the independence and impartiality of the TCAB. If the proposal is enacted, it means that the TCAB will be under no legal obligation under the common law to take into account any other relevant matters of fact within its knowledge and only under a legal obligation under the common law to take into account the reasons for the late filing stated on the Notice of Appeal. What if the claimant commits a procedural error by, for example, filling in the form erroneously and puts everything including the reasons for late filing in the one page of blank space intended for the grounds of appeal? The possibility is very real where the claimant is not legally represented. Under the current proposals, such occurrencewould render the late appeal not admissible.

<u>Hearing arrangements</u>

25. The proposal to give 7 days' notice for a hearingand the tightening of criteria for rescheduling an appeal hearing (by proof of "exceptional" and "uncontrollable" circumstances notwithstanding exercise of due diligence) creates tremendous potential for injustice.

26. HKBA observes that the TCAB can have up to three members dealing with the same case so that it can be heard in short notice when one of the members is available. On the other hand, the claimant is either unrepresented or has as is usual instructed one legal representativeonly; if the lawyer is unavailable due to short notice, the replacement lawyer is likely to have sufficient time to prepare for the appeal, including reading into the case, taking instructions and producing skeleton submission. The claimant has every reason to insist on the lawyer who has represented her/him in the previous stages to represent her in the appeal, yet such a preference is unlikely to qualify as having exercised all due diligence within practicality and her absence as a result of the unavailability of the legal representative is unlikely to qualify as "exceptional" and "uncontrollable" circumstances.

27. There is no justification for dispensing with the requirement to provide interpretation in the claimant's most proficient language if a claimant is reasonably supposed to understand and to be able to communicate in another language. Such proposal if implemented would likely lead to unfairness and injustice as it would in the interview stage as explained above.

Withdrawal of claims/ appeals; subsequent claims

28. There is no objective justification why a withdrawn claim (or appeal) should not be re-opened or a new claim submitted change in circumstances. It is observed that the Director of Immigration has the statutory entitlement to revoke an accepted claim for protection from removal if there is a subsequent change in circumstances.

Abscondence or loss of contact

29. The proposal to deem abscondence or loss of contact as a withdrawal of the claim except on grounds of "exceptional" or uncontrollable circumstances is overly restrictive. A claimant could have many reasons for losing contact such as losing the Form 8 (recognisance), getting robbed, having the effects seized or thrown away by the Food and Environment Hygiene Department because of sleeping rough, but these will unlikely be regarded as exceptional and uncontrollable. This is especially because of the view maintained by Government that there is humanitarian assistance available which should have kept the claimant at a level of subsistence.

Duties of ImmD/TCAB

30. HKBA is of the view that legislation and administrative guidelines cannot and cannot have the effect of displacing the high standards of fairness requiring "joint endeavour" by the claimant and ImmD/TCAB. The proposed legislative provisions and/or issuing of guidelines will not shield Government officials from legal challenge if their acts do not comply in fact with the high standards of fairness in the specific context of the screening of non-refoulement claim.

Management of detention facilities

31. HKBA is gravely concerned with the proposal to arm Immigration Department officers which is or could be perceived as divisive and unnecessarily threatening. There is no objective justification to presume claimants or detainees as inherently violent or criminal. The Government has not provided any clear explanation as to the "emergencies" that are envisaged to justify the proposal.

Removal procedures

32. HKBA objects in strongest terms to the proposal to enact legislative provisions to authorize the Director of Immigration to liaise with the consular authorities of the country of origin of a claimant to prepare for the claimant's

removal/repatriation after the immigration officer has rejected the claimant's non-refoulement claim. This is clearly unfair in pre-judging the outcome of any appeal/petition that the claimant has lodged or might lodge bearing in mind that as the Security Bureau has acknowledged in its LegCo Paper the TCAB conducts the appeal/hear the petition afresh and does not make any finding on whether the immigration officer makes the right decision. HKBA also considers the 'prerequisite' to be an illusory fig leaf since all such liaison is for the purpose of facilitating removal/repatriation and it is part of the well-known practice of the Director of Immigration to check whether there are any 'legal impediments' from removing the person concerned, with non-refoulement protection being one of them. Liaison with consular authorities in such circumstances puts the person concerned at risk by disclosing that the person concerned is in Hong Kong to the authorities of the Risk State in a matter of 'life and limb'.

Reservation

33. HKBA notes that the proposals for legislative amendments are provisional and general in nature. HKBA reservesthe right to make further submissions on further, detailed proposed legislative amendments in future.

Dated: 27 September 2018

Hong Kong Bar Association