**Legislative Council Bills Committee on Immigration (Amendment) Bill 2011**

**Follow-up to the First Meeting on 24 October 2011**

## Purpose

This paper sets out the Administration's response to issues raised by Members at the first meeting of the Bills Committee on Immigration (Amendment) Bill 2011 ("the Bill") on 24 October 2011.

## Claimants who had stayed at places other than a torture risk State before arriving at Hong Kong (new s. 37ZD(1)(b))

2. At the meeting, Members asked about the figures on claimants who have routed through and stayed at another place before arriving Hong Kong and making a torture claim here.

3. A torture claimant is required to provide information on the route of travel of his recent journey to Hong Kong. Up to end October 2011, 63% of the claimants reported that they had travelled to a country or place other than his place of origin before arriving at Hong Kong. Among them, the majority routed through the Mainland (86%), followed by Macao (10%), Thailand (1%), Bangladesh (0.5%) and Singapore (0.5%). Among these places, Singapore is not a party to the Convention Against Torture (CAT).

4. In these cases, if an immigration officer is satisfied that the claimant did not take advantage of a reasonable opportunity to make a torture claim before arriving at Hong Kong, he may consider this behaviour damaging to the claimant's credibility. This will not apply to cases where no such reasonable opportunity exists, e.g. if the torture risk did not arise or was not known to him before, or if non-refoulement protection under CAT was not available to him *en route* to Hong Kong.

## Internal relocation (new s. 37ZI(5))

5. Members asked whether internal relocation could be considered a relevant factor in determining whether a torture claim is substantiated.

6. In assessing a torture claim, the Immigration Department will take into account possible internal relocation of claimant (i.e. the claimant would not be in danger of being subjected to torture in another region in his home country) as one of the relevant considerations. The Court of First Instance (CFI) upheld in *TK v Jenkins* that the concept of internal relocation is applicable in the context of CAT.

**Claimant of substantiated claim may apply for permission to take employment (new s. 37ZV)**

7. Members asked about the permission by the Director of Immigration (D of Imm) for a claimant of substantiated claim to take employment where "exceptional circumstances" exist.

8. Torture claimants (including claimants of substantiated claims) are prohibited from taking any employment under the relevant provisions of Immigration Ordinance (Cap. 115) if they are illegal immigrants or overstayers in Hong Kong. In regard to claimants of substantiated claims, the D of Imm may consider each case on its individual merits and take into account any strong compassionate or humanitarian reasons or other special extenuating circumstances, in deciding whether to grant them permission to work on exceptional circumstances.

9. In *MA & Ors v D of Imm*, when considering the D of Imm's exercise of discretion in granting permission to work exceptionally, the CFI held that such may include considerations, among others, that the claimant has no choice but been stranded in Hong Kong for a very substantial period of time and has little prospect of departure in the immediately foreseeable future, and that the prolonged period of enforced unemployment may be detrimental to the claimant's mental health where there are materials to suggest it to be so.

10. Where there are exceptional circumstances which may justify the granting of permission to work in the particular circumstances of a case, the D of Imm may approve the claimant's application to take employment under the new section 37ZV. In other words, the D of Imm will take into account relevant individual circumstances and that it should not be presumed that such permission will be given generally without regard to individual special circumstances.

**Claimant not treated as ordinarily resident in Hong Kong (new s. 37ZW)**

11. Members asked whether torture claimants who have remained in Hong Kong for more than seven years might argue that they should be treated as "ordinarily resident" during the period.

12. In common law, a period of unlawful stay cannot be counted as a period of "ordinary residence". The unlawful stay of a person in Hong Kong is without the D of Imm's permission and cannot be counted as ordinary residence in common law. While the stay of such person may be tolerated by the D of Imm, such tolerance cannot be regarded as permission to stay so as to change the nature of his or her presence from unlawful to become lawful. In this regard, the Court was of the view that the constitutionality of section 2(4)(a)(ii) of the Immigration Ordinance (Cap. 115) cannot be challenged in the light of the common law position on the matter.

13. In essence, torture claimants' stay in Hong Kong is tolerated by the D of Imm. It is unlawful throughout the material time which cannot be counted as ordinary residence. Even if a torture claim is substantiated, the non-refoulement obligation under Article 3 of CAT does not require parties to the CAT (e.g. HKSAR) to grant resident status to the claimant. In fact, a torture claimant's stay in Hong Kong remains unlawful even after the claim has been substantiated (although the removal of the person concerned will be withheld for the time being) and as such cannot be treated as a period of ordinary residence in common law.

14. The new section 37ZW of the Bill makes it very clear that a claimant's stay in Hong Kong must not be treated as ordinary residence in Hong Kong, whether or not the claim is substantiated and whether or not permission to work has been given under the new section 37ZV where exceptional circumstances exist. Likewise, subsection (6) of the new section 37ZV avoids any argument that a permission for a claimant to work given under that section amounts to the D of Imm's permission for the claimant to stay in Hong Kong.

**Other Issues**

Publicly-funded legal assistance

15. Members asked whether the provision of publicly-funded legal assistance should be set out in the Bill.

16. Following the CFI's judgment in *FB v D of Immigration*, the Administration has enhanced the torture claim screening mechanism (effective from end 2009), under which publicly-funded legal assistance is available to torture claimants under a pilot scheme operated by the Duty Lawyer Service (DLS). In end 2010, considering that the pilot scheme has made a promising start during the first year, the DLS eventually agreed to extend the scheme by two years until end 2012. In this regard, we consider that it would be prudent and practical to accumulate necessary operational experience before deciding on the long-term arrangement.

Domestic implementation of international treaties

17. Members asked whether there are precedents whereby a local legislation seeks to implement only part of an international agreement.

18. The Government has employed different methods to implement international agreements in our domestic legal system to suit different types of international agreements and different policy needs. In practice, the method to be adopted is decided on a case by case basis having regard to the nature and substance of the international agreement in question and different policy objectives and requirements. Further details are set out in a paper issued to the Panel on Administration of Justice and Legal Service titled "Implementation of international agreements in the Hong Kong SAR" in March 2007 (LC paper No. CB(2)1398/06-07(04)).

Training on the CAT

19. Members asked about training conducted for duty lawyers, as well as for immigration officers and adjudicators since 2009.

20. From 2009, three CAT-specific training workshops were held for adjudicators. Trainers included senior adjudicators in the appeal authorities of the United Kingdom and New Zealand, a United Nations (UN) Special Rapporteur on Torture and a senior legal advisor of the UN office at Geneva, as well as a professor on international human rights

protection. The CAT-related law and practice, precedents and case assessment were covered in the workshops.

21. In regard to training for immigration officers, five training programmes were held during the period. Overseas experts in the capacity of senior case officer from a common law jurisdiction, as well as those from the Office of the High Commissioner for Human Rights were invited to conduct the programme sessions. Topics included mainly the processing of claims and operation of appeal procedures.

22. As regards duty lawyers, we understand that extensive CAT-specific training sessions were conducted by the Hong Kong Academy of Law in December 2009 and June 2010. Trainers included senior decision makers of other common law jurisdiction, UN and other legal experts, as well as local legal practitioners. Topics included the CAT and refugee law and procedures for torture claim screening.

Post-removal monitoring mechanism

23. Members asked whether the Administration has considered arranging for post-removal monitoring mechanism for claimants after they are removed to their home states.

24. Under the enhanced screening mechanism, a person will only be removed where there is no substantial ground for believing that he would be in danger of being subjected to torture. The obligation of parties to the CAT (e.g. HKSAR) under Article 3 concerns the "non-refoulement" of persons subject to torture risk and does not require the monitoring of the situation of persons removed to their home states after their torture claims are determined as not substantiated.

**Security Bureau**
**15 November 2011**