

Notice to Persons Making a Non-refoulement Claim

Purpose

This notice gives a brief overview of the screening process and what you can expect while we are considering your non-refoulement claim made under the unified screening mechanism (“USM”). It also tells you about your rights and responsibilities as a claimant.

Background

2. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT Convention”) has been extended to Hong Kong since 1992. Article 3(1) of the CAT Convention requires State Parties not to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Part VIIC of the Immigration Ordinance, Cap. 115, Laws of Hong Kong provides for a statutory process for determining torture claims made by persons in Hong Kong for non-refoulement protection under Article 3 of the CAT Convention. All claims made under Part VIIC of the Ordinance will be handled and processed in accordance with the Ordinance.

3. In addition, the Court of Final Appeal (the “CFA”) ruled in *Ubamaka v the Secretary for Security* ([2013] 2 HKC 75) (“*Ubamaka*”) on 21 December 2012, *inter alia*, that if a person not having the right to enter and remain in Hong Kong has sufficiently established a threat of Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance, Cap.383 (“**HKBORO**”) being violated by the receiving country should the person be deported there, it constitutes a ground for restraining the Government from proceeding with the deportation.

4. The 1951 Convention Relating to the Status of Refugees (“**the RC**”) or its 1967 Protocol has never been applied to Hong Kong. The Government of the Hong Kong Special Administrative Region (HKSAR) has a long-established firm policy of not granting asylum to or determining

the refugee status of anyone. In March 2013, the CFA ruled, in *C & Ors v the Director of Immigration and Another* (FACV Nos. 18, 19 and 20 of 2011, 25 March 2013), that in exercising the powers to execute the removal or deportation of a person to a State of putative persecution, on the basis of the practice of the Director of Immigration (“**the Director**”) of taking into account humanitarian considerations and taking a well-founded fear of persecution as a relevant humanitarian consideration, the Immigration Department (ImmD) has to assess (independently of the United Nations High Commissioner for Refugees (“**UNHCR**”) and giving weight to any determination by the UNHCR) whether a person has established a well-founded fear of persecution before the removal or deportation of the person to that State of putative persecution.

Definitions

5. In this Notice, unless otherwise stated,
- (a) “**Appeal Board**” means the Torture Claims Appeal Board (established by section 37ZQ of the Ordinance), all members of which have also been delegated with authority of the Chief Executive under Article 48(13) of the Basic Law as Adjudicators to handle petitions on non-refoulement claims in respect of applicable grounds including BOR 3 and persecution risks. See paragraphs 6 and 51 below;
 - (b) “**BOR 3**” means Article 3 of section 8 of the HKBORO;
 - (c) “**Torture or CIDTP**” means torture or cruel, inhuman or degrading treatment or punishment under BOR 3;
 - (d) “**Torture or CIDTP risk**” means substantial grounds for believing that a claimant would be at real risk of being subject to an act within the meaning of torture or CIDTP under BOR 3;
 - (e) “**Claimant**” means a person whose non-refoulement claim (not being a non-refoulement claim that has been withdrawn) – (a) is not yet finally determined; or (b) is a substantiated claim;
 - (f) “**Finally determined**” --- see paragraphs 58 to 59 below.
 - (g) “**Non-refoulement claim**” means a claim for non-refoulement protection in Hong Kong;
 - (h) “**Non-refoulement protection**”, in relation to a claimant, means protection against expulsion, return or surrender of the claimant to a Risk State;
 - (i) “**Ordinance**” means the Immigration Ordinance (Cap. 115);

- (j) “**Persecution risk**” means a persecution risk as explained at paragraph 9 below;
- (k) “**Removal**” means the removal of a person from Hong Kong under section 18 of the Ordinance or under a removal order or a deportation order;
- (l) “**Risk State**” means another country in respect of which the claimant has made a non-refoulement claim, including on grounds of torture risk under the Ordinance, torture or CIDTP risk under BOR 3, and/or persecution risk with reference to the non-refoulement principle under Article 33 of the RC;
- (m) “**Substantiated claim**” means a non-refoulement claim which is substantiated in the manner described at paragraphs 44 to 47 below;
- (n) “**Surrender**” means the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503), and “**surrender proceedings**” means proceedings instituted for such surrender;
- (o) “**Torture claim**” means a claim for non-refoulement protection in Hong Kong on the ground of a torture risk made under section 37X of the Ordinance or treated as having been made by virtue of section 37ZP(2)(b), including a torture claim re-opened under section 37ZE(2) or 37ZG(3) of the Ordinance or a subsequent torture claim made under section 37ZO(2);
- (p) “**Withdrawn**” means withdrawn in accordance with section 37ZE of the Ordinance or treated as withdrawn under section 37ZF or 37ZG of the Ordinance (in relation to a torture claim) / withdrawn in accordance with paragraph 53 below or treated as withdrawn in accordance with paragraphs 55 or 56 below.

6. For the purpose of this Notice, second-tier decision makers on non-refoulement claims will be collectively referred to as the “**Appeal Board**” although, in handling petitions against decisions relating to non-refoulement claims on applicable grounds including BOR 3 or persecution risks, these second-tier decision makers are acting as Adjudicators delegated with authority of the Chief Executive under Article 48(13) of the Basic Law, to handle petitions on non-refoulement claims in respect of applicable grounds including BOR 3 and persecution risks.

Grounds on which the provision of non-refoulement protection need to be considered

“Torture” under the CAT Convention

7. The meaning of “**torture**” under section 37U(1) of the Ordinance follows Article 1 of the CAT Convention, i.e. an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person –

- (a) for such purposes as –
 - i) obtaining from that person or a third person information or a confession;
 - ii) punishing that person for an act which that person or a third person has committed or is suspected of having committed; or
 - iii) intimidating or coercing that person or a third person; or
- (b) for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, excluding pain or suffering arising only from, inherent in or incidental to lawful sanctions.

“Torture or CIDTP” under BOR 3

8. “Torture or CIDTP” is not defined under the HKBORO (or the International Covenant on Civil and Political Rights (“ICCPR”), which the HKBORO implements). The CFA ruled in its judgment in *Ubamaka*¹ that a claimant who invokes the protection of BOR 3 must meet two main requirements that (a) the ill-treatment (physical and/or mental suffering) he would face if expelled attains what has been called “a minimum level of severity” and (b) he faces a genuine and substantial risk of being subjected to such ill-treatment. The threshold is very high, and it generally involves actual bodily injury or intense physical or mental suffering. As to the degree of risk which the claimant must establish, the CFA ruled in *Ubamaka*² that the claimant must show substantial or strong grounds for believing that if returned (to a Risk State), he faces a “genuine risk” of being subjected to torture or CIDTP. References should be made to relevant

¹ §172 and 173 of *Ubamaka*.

² §174 of *Ubamaka*.

jurisprudence (case law and other reference materials) from time to time.

“Persecution” with reference to the non-refoulement principle under Article 33 of the RC

9. Drawing reference from relevant instruments and case law³, a person should be considered as having a **persecution risk** for the purpose of his non-refoulement claim if:

- (a) he, owing to well-founded fear of being persecuted on account of one or more of **race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality⁴ and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; and,
- (b) his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion⁵ should he be expelled or returned to the frontiers of a Risk State.

Claiming non-refoulement protection in Hong Kong

10. A person who is outside his country of his nationality and **in Hong Kong** may claim for non-refoulement protection only if (a) the person is subject or liable to removal from Hong Kong and, apart from a Risk State, the person does not have a right of abode or right to land in, or right to return to, any other State in which the person would be entitled to non-refoulement protection⁶; or (b) the person is a person whose surrender is requested in surrender proceedings.⁷

³ §63, CFA’s judgment in *C & Ors v the Director of Immigration*.

⁴ In case of a person who has more than one nationality, the term “country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reasons based on a well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

⁵ Article 33(1) of RC provides that no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Drawing on the above provision, the expression ‘life or freedom’ may be considered as a shorthand for the risks that are similar to those that give rise to refugee status under the terms of Article 1 of RC.

⁶ For torture claims, see sections 37W(1)(a) and (b) of the Ordinance.

⁷ For torture claims, see section 37W(2) of the Ordinance

Duties of a claimant

11. For the purpose of making your non-refoulement claim, the burden of proof is on you to establish that you should be afforded non-refoulement protection for such reason(s) including that there are substantial grounds for believing that you would be in danger of being subjected to torture (pursuant to Part VIIC of the Ordinance), or there is a real risk of torture or CIDTP (pursuant to BOR 3), or that you have a well-founded persecution risk (with reference to the non-refoulement principle under Article 33 of the RC) if you were to be expelled, returned or surrendered to a Risk State. In this regard, you have an obligation to provide all information relevant to the claim and make prompt and full disclosure of all material facts in support of the claim, including any document supporting those facts. The task of ascertaining and evaluating all relevant facts is shared between you and your case officer. Your case officer is mindful of the difficulties of proof faced by you.

12. It is your duty to substantiate your non-refoulement claim by providing to the Director and, on an appeal / petition, to the Appeal Board all information relevant to the claim and making prompt and full disclosure of all material facts in support of the claim, including any document supporting those facts. It is also your duty to comply with every requirement, procedure and condition (including any time limit) prescribed, or required or specified by any person under Part VIIC of the Ordinance or by an immigration officer or the Appeal Board under this Notice in establishing your non-refoulement claim. Furthermore, you must provide us with your residential address in Hong Kong and the correspondence address (if different from the residential address); and must notify in writing of any change in those addresses as soon as practicable after the change. To facilitate our communications with you, you are also requested to provide us with your contact telephone numbers and to notify us of any subsequent change as soon as practicable.

Making of a claim

13. A person who claims non-refoulement protection in Hong Kong must signify to an immigration officer in writing his intention to seek non-refoulement protection. The written signification must give a general indication of the person's reasons for claiming non-refoulement protection in Hong Kong, which may include reasons that relate to an act falling within

the meaning of (a) torture under the Ordinance, (b) torture or CIDTP under BOR 3 and/or (c) persecution with reference to the non-refoulement principle under Article 33 of the RC. A person will be requested to allow an immigration officer or immigration assistant to take his fingerprints and photographs.⁸ Once a non-refoulement claim is made, the claim will be screened on all applicable grounds.

14. While there are no specific express words required in order to make a claim in writing, the requirement that the written signification must give a general indication of the reasons for making such claim, which may include reasons that relate to an act within the meaning of torture as defined in the Ordinance⁹, torture or CIDTP under BOR 3, or persecution with reference to the non-refoulement principle under Article 33 of the RC must be complied with.

15. After a person has signified in writing his intention to seek non-refoulement protection in accordance with paragraph 13 above, officers of the Removal Assessment Section (“RAS”) of the ImmD should make arrangement to take fingerprints and photograph of the person as soon as practicable.¹⁰ Once the requirements referred to at paragraph 13 above have been complied with, the RAS should acknowledge the claimant in writing that the non-refoulement claim is made and will be processed in due course.

16. A non-refoulement claim will not be considered made unless the ImmD is satisfied that the written signification has given a general indication of the reasons for making such a claim being reasons set out at paragraph 13 above. If the claimant’s written signification fails to give such indication, his claim will be considered not made. A person who has submitted a written signification will receive a written reply from the ImmD as to whether his claim has been considered made.

Briefing session

17. A briefing session by the RAS will be arranged for you. The purpose of the briefing session is to –

⁸ For torture claims, see section 37X(3) of the Ordinance.

⁹ For torture claims, see section 37X(2) of the Ordinance.

¹⁰ For torture claims, see section 37X(3) of the Ordinance.

- (a) explain the non-refoulement claim process to you;
- (b) attend to any special needs in relation to the investigation or assessment of your non-refoulement claim so raised;
- (c) tell you how we expect you to stay in contact with us;
- (d) provide you with a blank non-refoulement claim form for completion, and inform you that a written request will be made to you to return the completed non-refoulement claim form, together with all documents supporting the claim that are readily available, to the office of the RAS **within 28 days** from the date the ImmD issues this request to you (or any further period that an immigration officer may have allowed pursuant to an extension application made by you); and
- (e) provide you with an information leaflet about the publicly-funded legal assistance available.

18. You will be asked to acknowledge receipt of this Notice, the non-refoulement claim form and your understanding that the completed non-refoulement claim form must be submitted **within 28 days** from the date when the ImmD issues a written request to you in writing (or any further period that an immigration officer may have allowed pursuant to the extension application made by you), and to provide your residential address and correspondence address (if different from the residential address). You should inform the RAS during this briefing session if you have any special needs in relation to the investigation or assessment of your non-refoulement claim.

Publicly-funded legal assistance

19. You may apply for publicly-funded legal assistance provided by the Duty Lawyer Service (the “DLS”) to assist you in making your claim. The scope and eligibility criteria for assistance will be explained to you by the DLS. On passing the relevant eligibility test, i.e. the means and merits test, the DLS will assign a duty lawyer who will provide legal assistance to you where appropriate. For example, you may seek the advice of the duty lawyer in completing the non-refoulement claim form or be accompanied by the duty lawyer to attend the screening interview(s). At the appeal stage (if any), publicly-funded legal assistance will also be available for meritorious

cases. Please refer to the information leaflet about the publicly-funded legal assistance scheme for details. Alternatively, you may instruct your own legal representative at your own expense should you wish to do so.

Non-refoulement claim form

20. You will be provided a blank non-refoulement claim form. You must complete and return the completed form, together with all documents supporting the claim that are readily available to you, to the office of the RAS **within 28 days** from the date when the ImmD issues a written request to you to return the completed form (or any further period that an immigration officer may have allowed pursuant to an extension application made by you). You must complete the non-refoulement claim form in English or Chinese to provide all grounds and facts in support of your claim as well as all such other information as is required in the form for the purpose of investigating, assessing and making decision on your claim. **You have to provide all material facts and supporting documents in support of your non-refoulement claim in your answers to the non-refoulement claim form. Failure to make a prompt and full disclosure of all materials facts and supporting materials at the first available opportunity without reasonable excuse may damage your credibility.**

21. You must return the completed non-refoulement claim form to the office of the RAS at Unit 903B - 910A, 9/F, Skyline Tower, 39 Wang Kwong Road, Kowloon Bay, Kowloon **within 28 days** from the date when the ImmD issues a written request to you to return the completed form unless a further period has been allowed by us. The non-refoulement claim form is not taken as completed unless it is duly completed and signed.

22. Any documentary evidence or information that you wish to submit in support of your claim, **if readily available**, must be provided to the RAS together with the completed non-refoulement claim form. If any documentary evidence or any other document(s) is not readily available and may only be submitted after return of the completed non-refoulement claim form, you will still have the opportunity to do so provided that, when returning the completed non-refoulement claim form, you have clearly indicated in writing your intention to submit further supporting document(s) at a later stage with details given. Depending on individual circumstances,

you may be given reasonable time to submit such supporting document(s) after return of the completed non-refoulement claim form. You should provide English or Chinese translation if any documentary evidence or information provided by you are in languages other than English and Chinese. You should request assistance from officers of the RAS if you do not speak or write English or Chinese and have no intention to instruct a legal representative to represent you.

23. Any application to extend the 28-day time limit for returning the completed non-refoulement claim form must be made in writing **before** the expiry of the time limit with full explanation as to why the time limit cannot be met. Each application for extension will be considered on its merits. Such application will only be acceded to if your case officer is satisfied that, by reason of special circumstances, it would be unjust not to allow a further period to return the completed non-refoulement claim form. If you are unable to return the non-refoulement claim form due to serious illness, you should produce a medical certificate for verification in support of your application for time extension. Please note that your application for extension of time will be rejected if you fail to provide sufficient information to satisfy an immigration officer that by reason of special circumstances, it would be unjust not to allow a further period for returning the completed non-refoulement claim form.

24. **It is important to note that if you fail to return the completed non-refoulement claim form within the required time limit of 28 days from the date when the ImmD issues the written request to you or any such further period as allowed by us, your claim will be treated as withdrawn.** Any subsequent request for re-opening your claim which has been treated as withdrawn will only be allowed if you can provide sufficient evidence in writing to satisfy an immigration officer that you had not been able to return the completed non-refoulement claim form as required due to circumstances beyond your control.

25. You should therefore use your best endeavours to ensure that your completed non-refoulement claim form is returned to us within the required time limit. In this regard, you should not assume that your application for time extension (if any) will definitely be approved, as approval for such application would be subject to whether there are special circumstances in

your case which would make it unjust not to allow for a further period for returning the completed non-refoulement claim form. It is at your own risk that your non-refoulement claim will be treated as withdrawn on failure to return the completed non-refoulement claim form within the time limit of 28 days or any further period allowed by us if your application for time extension is subsequently not approved. To ensure that there is sufficient time for us to process your application for extension of time limit, you should submit your extension application as early as possible should there be special circumstances in your case which would make it unjust not to allow you further time for returning your completed non-refoulement claim form.

Further information from claimant

26. After you have returned the completed non-refoulement claim form to us, your case officer may require you to provide any information or documentary evidence related to your claim. You must submit such information or documentary evidence required within the time specified by your case officer. You should present originals, where available, or best available copies of all identity documents or other documents supporting your claim. You are reminded that it is an offence for you to use for the purposes of Part VIIC of the Ordinance, or to have in your possession, any false document of identity. The production of a false document as proof of your identity may also damage your credibility.

27. The provision of information by you in relation to your non-refoulement claim is on a voluntary basis. However, you are reminded that failure to provide sufficient details relating to your identity and your non-refoulement claim may jeopardize the assessment of your non-refoulement claim or your appeal / petition. A failure by you, without reasonable excuse, to provide the information or documentary evidence required by your case officer, to provide or answer any question put by your case officer at the interview, or to comply with any requirement, procedure or condition prescribed by Part VIIC of the Ordinance or the USM or required or specified by your case officer thereunder etc. may be taken into account as behaviour damaging your credibility in considering your claim and may jeopardize the assessment of your claim.

28. You are reminded that any person who makes a false statement or

representation which he knows to be false or does not believe to be true, or use any forged or false documents, or has in his possession of any such forged or false documents for the purposes of Part VIIC of the Ordinance commits an offence. You are further reminded that any person who knowingly misleads any member of the Immigration Service by giving false information or by making false statements or uses a false instrument shall be guilty of an offence. A person convicted of any of the above offences shall be liable to a fine and to imprisonment.

Screening interview

29. Your case officer will require you to attend an interview after you have returned your completed non-refoulement claim form. Your case officer will notify you the time and place of the interview and you must attend the interview as scheduled. A failure, without reasonable excuse, to attend an interview scheduled by your case officer may be taken into account as a behaviour damaging your credibility.

30. The screening interview arranged by your case officer is a forum for clarifying issues and for testing claims which are considered to be material, including any issues which may arise in the course of interview. It will be the principal opportunity for you to respond to any requests for clarification of your case by your case officer and to address the points of contention. You are reminded that all relevant information and supporting documents readily available to you should be provided before the interview. During the interview, you should not raise or submit irrelevant issues or documents whether or not the same have been raised or submitted before. New issues raised or supporting documents submitted during the interview without a reasonable explanation as to why they have not been raised or submitted at an earlier time may damage your credibility.

31. Information given by you at the interview will be used for making our decision on your claim. You must provide information or answer any question put by your case officer at the interview. A failure to do so without reasonable excuse may damage your credibility. During the interview, an interpreter will be provided if you need one. If you would prefer a case officer or interpreter of the same gender for the interview, you should inform your case officer as early as possible in advance. Case

officers may, on being satisfied that there are sufficient grounds supporting your request, accede to your request as far as practicable.

32. If you choose to attend your interview with a legal representative, he/she should inform the RAS of his/her representation in your case in advance. If your legal representative fails to turn up at a pre-scheduled interview, your case officer will normally not be able to postpone your scheduled interview to give you more time to get legal advice or representation. Your case officer may proceed with the interview in the absence of your legal representative. Therefore, you should make the necessary arrangement for legal representation at the interview as early as possible should you consider it necessary to do so.

33. If you fail to attend an interview scheduled by your case officer or otherwise fail to proceed with the claim, your case officer may make a decision on your non-refoulement claim based on all the available information. If you are unable to attend a scheduled interview due to illness, you should produce a medical certificate for verification.

34. If you wish your interview to be audio-recorded, you are required to indicate in the non-refoulement claim form for such a need. Arrangement for audio recording may be made by your case officer after considering your request.

Medical examination

35. If your physical or mental condition is in dispute and is relevant to the consideration of your claim, your case officer or (on an appeal / petition) the Appeal Board may require you to undergo a medical examination to be conducted by a medical practitioner as arranged by us. Your case officer may also, upon your request, arrange for such a medical examination where the above conditions are met. Where a claim of past injuries is not in dispute or that the alleged injuries are not relevant to the consideration of your claim, medical examination may not be arranged. Nevertheless, you may submit medical reports issued by private medical practitioners at your own expense, or other qualified persons who provide the service voluntarily to support your claim.

36. If a medical examination is arranged by your case officer, you must attend the examination at the time and place that your case officer notifies you. You must disclose the report of the medical examination to your case officer and (on an appeal / petition) the Appeal Board. A failure, without reasonable excuse, to attend a medical examination so arranged or to disclose the report of the medical examination may be taken as a behaviour damaging your credibility.

Behaviour damaging credibility

37. Certain behaviour of you may be taken into account by your case officer or (on an appeal / petition) the Appeal Board as damaging your credibility in assessing a claim.

38. Behaviour that may be taken as damaging your credibility include:

- (a) any behaviour that the immigration officer or the Appeal Board considers is designed to, or is likely to be designed to conceal information, mislead, or obstruct or delay the handling or determination of your claim;
- (b) a failure to take advantage of a reasonable opportunity to claim non-refoulement protection in respect of a Risk State while in a place outside Hong Kong to which the CAT Convention, the ICCPR and/or the RC apply (other than a Risk State);
- (c) if you are a person who is subject or liable to removal, a failure to make your claim when, or as soon as practicable after you have become subject or liable to removal, or the events on which your claim is based have taken place, whichever is later;
- (d) if you are a person whose surrender is requested in surrender proceedings, a failure to make your claim when, as soon as practicable after it comes to your notice that the surrender proceedings have been commenced, or the events on which your claim is based have taken place, whichever is later; and
- (e) a failure to make your claim before being arrested or detained under a provision of the Ordinance unless you had no reasonable opportunity to make the claim before the arrest or detention, or the claim relies wholly on matters arising after the arrest or detention.

39. Furthermore, without limiting paragraph 38(a) above, a behaviour described in any of the following items is behaviour within the meaning of that item:

- (a) the production of a false document as proof of your identity;
- (b) a failure, without reasonable excuse, to produce a document as proof of your identity on request by an immigration officer;
- (c) the destruction, alteration or disposal, without reasonable excuse, of a passport, ticket or other document(s) containing information about the route of your travel to Hong Kong;
- (d) a failure, without reasonable excuse, to provide the information or documentary evidence required by your case officer;
- (e) a failure, without reasonable excuse, to attend an interview scheduled by your case officer or provide information or answer any question put by your case officer at the interview;
- (f) a failure, without reasonable excuse, to make full disclosure of the material facts in support of your non-refoulement claim, including any document supporting those facts, before the date fixed for the first interview;
- (g) a failure, without reasonable excuse, to attend an arranged medical examination or disclose to your case officer and (on an appeal / petition) the Appeal Board the medical report of the examination; and
- (h) a failure, without reasonable excuse, to comply with any requirement prescribed by Part VIIC of the Ordinance or required or specified by any person under that Part of the Ordinance, or any requirement prescribed, required or specified by an immigration officer or the Appeal Board under this Notice.

40. Being a claimant with credibility damaged does not necessarily imply that the claim will be rejected upon finding of these behaviours. In general, case officers would request claimants to provide reasons for their behaviour that may be taken as damaging their credibility referred to at paragraphs 38 and 39 above when considering the claimant's credibility for the purpose of assessing their claims. Further, paragraphs 38 and 39 above do not prevent the case officer or the Appeal Board from taking into account any other behaviour of the claimant as damaging the claimant's credibility. Whether or not a claimant's credibility in a claim has been damaged would

depend on an overall assessment of all the relevant circumstances of the case.

Decision on non-refoulement claim

41. Unless your non-refoulement claim is withdrawn, your case officer must decide whether to (a) accept your claim as substantiated; or (b) reject your claim.

42. In determining whether your claim is substantiated, your case officer must, having regard to the individual circumstances of your case, take into account all relevant considerations including relevant country information and whether there is any region within the Risk State(s) in which you would not be subjected to torture, BOR 3 and/or persecution risk.

Notification of Decision

43. The decision on a non-refoulement claim (whether accepting the claim as substantiated or rejecting the claim) will be served on you in written form (notice of decision). Where your claim is rejected the written notice will also inform you of the reasons for the rejection and your right to appeal / petition against the decision.

44. Your non-refoulement claim must be accepted as substantiated on the ground of torture risk (in accordance with section 37ZI of the Ordinance) if there are substantial grounds for believing that you would be in danger of being subjected to torture under Part VIIC of the Ordinance if you were removed or surrendered to a Risk State.

45. Your non-refoulement claim must be accepted as substantiated on the ground of torture or CIDTP risk under BOR 3 if there are substantial grounds for believing that you would face a genuine risk of being subjected to torture or CIDTP under BOR 3 if you were removed or surrendered to a Risk State.

46. Your non-refoulement claim should be accepted as substantiated on the ground of persecution risk if you have a well-founded fear of being persecuted in the manner explained at paragraph 9 above if you were

removed or surrendered to a Risk State, and you do not fall within any exceptions to persecution non-refoulement protection taking into account relevant considerations including those set out at paragraph 50 below.

47. Your non-refoulement claim may be accepted as substantiated if there are other grounds that warrant the provision of non-refoulement protection to you.

48. Your non-refoulement claim should otherwise be rejected if none of the applicable grounds is substantiated.

49. If your claim is rejected, the case officer must notify you in writing of the reasons for the rejection and inform you of your right to appeal / make petition against the decision.¹¹ If your claim is substantiated but certain ground(s) is rejected, the case officer must also notify you in writing of the reasons for the rejection for those rejected grounds. You may **not** appeal / petition against the ImmD's decision to accept your non-refoulement claim on the basis that your claim is accepted on certain grounds but not others.

Exceptions

50. In respect of persecution risk, the ImmD may insist on removal in suitable cases. Some considerations that the ImmD will take into account include –

- (a) there are serious reasons for considering that the person has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership of a particular social group, or political opinion;
- (b) the person has been convicted of a particularly serious crime in the HKSAR and/or there are serious reasons for considering that the person has convicted of a particularly serious crime or has committed a serious non-political crime elsewhere;
- (c) there are reasonable grounds to believe that the person is a danger to the security of the HKSAR; or

¹¹ For torture claims, see section 37ZJ(2) of the Ordinance.
(03/2014)

- (d) the person is not eligible to be recognised as a refugee or for non-refoulement protection, as opined by the UNHCR or any other competent authority, because the person falls within the exceptions to international protection, including (but not limited to) applicable exceptions set out in the RC or other applicable exceptions in law.

Appeal / petition

51. If you are aggrieved by the decision of your case officer rejecting your non-refoulement claim, you may appeal and / or petition (as appropriate) by filing a notice of appeal / petition with the Appeal Board **within 14 days** after the notice of decision is given to you. Late filing of the notice of appeal / petition may be allowed by the Appeal Board only if the Appeal Board is satisfied that by reason of special circumstances, it would be unjust not to allow such late filing. Your appeal and / or petition will be considered by the Appeal Board. Once your notice of appeal / petition has been filed, you would be deemed to be appealing all the grounds rejected by the case officer. The Appeal Board will review all the grounds in one-go.

52. Depending on the circumstances of your case, the Appeal Board may conduct an oral hearing with you and representative(s) from the ImmD for the appeal and / or petition, or determine your appeal and / or petition without a hearing if the Appeal Board is satisfied that the appeal and / or petition can be justly determined without a hearing. Where an oral hearing is to be conducted, you will be informed by the Appeal Board of the date, time and place of the hearing; and the hearing will be held in private unless the Appeal Board directs that it to be held in public. On an appeal and / or a petition against a case officer's decision(s) to reject all grounds of a non-refoulement claim (i.e., none of the applicable grounds is substantiated), the Appeal Board may confirm and / or reverse the decision made by the case officer. The Appeal Board will give its decision with reasons in writing; and its decision is final.

Withdrawal of a claim

53. Before your non-refoulement claim is decided by your case officer,

you may withdraw your claim by notifying us in writing. In this regard, you must provide your signed written notification clearly indicating your intention to withdraw your non-refoulement claim.

54. Your non-refoulement claim which has been withdrawn by you may be re-opened only if you can provide sufficient evidence in writing to satisfy an immigration officer that: (a) since the withdrawal, there has been a change of circumstances that could not reasonably have been foreseen by you when you gave the withdrawal notification and when taken together with the material previously submitted for the claim, could increase the prospect of success of the claim; or (b) by reason of special circumstances, it would be unjust not to re-open the claim. If you leave Hong Kong after you have given notice to withdraw your non-refoulement claim, the claim must not be re-opened.

Deemed withdrawal on failure to return completed non-refoulement claim form

55. Your non-refoulement claim will be treated as withdrawn if you fail to return the completed non-refoulement claim form within 28 days from the date when the ImmD issues a written request to you for returning the completed non-refoulement claim form or any further period as allowed by us. Your non-refoulement claim treated as withdrawn in the circumstances may be re-opened only if you can provide sufficient evidence in writing to satisfy us that you had not been able to return the completed non-refoulement claim form as required due to circumstances beyond your control.

Deemed withdrawal on departure from Hong Kong

56. Your non-refoulement claim will be treated as withdrawn and must not be re-opened if you leave Hong Kong for whatever reasons. This applies equally where your claim has been determined as substantiated. A claim that is treated as withdrawn in such circumstances must not be re-opened.

57. For the avoidance of doubt, where a non-refoulement claim is treated as withdrawn (including by your written signification, on your departure,

and/or on failure to return the non-refoulement claim form) after the implementation of the USM, it is treated as withdrawn in entirety on all applicable grounds.

When non-refoulement claim is finally determined

58. Subject to paragraph 59, a non-refoulement claim is finally determined once a decision on the claim is made by an immigration officer under paragraph 41 above.

59. For a non-refoulement claim rejected by a decision under paragraph 48, the claim is finally determined (a) when the period within which an appeal / petition may be lodged against the decision has expired (if an appeal / petition against the decision has not been lodged within that period); or (b) when the appeal / petition has been disposed of (if an appeal / petition has been lodged against the decision).¹²

Effect of Making a Claim

60. You, as a claimant, will not be removed from Hong Kong to a Risk State until you cease to be a claimant, i.e. when your claim is withdrawn or finally determined as unsubstantiated, or when a decision to accept your non-refoulement claim as a substantiated claim is revoked.

61. In this regard, you are reminded that the making of your non-refoulement claim does not affect the validity of any removal order or deportation order that has been made against you, nor does it preclude the making of a removal order or a deportation order against you.

62. Furthermore, despite the making of a non-refoulement claim, you may still be removed to a specified country that is not your (claimed) Risk State(s).

63. You will not be treated as ordinarily resident in Hong Kong for the purposes of the Ordinance during any period in which you remain in Hong Kong only by virtue of your non-refoulement claim (whether or not your claim is a substantiated claim and whether or not permission has been given

¹² For torture claims, see section 37V(1) and (2) of the Ordinance.
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to you to take employment).

Confidentiality

64. The information you provided for the purpose of your claim will be treated in confidence and :

- (a) will be used (including transferred to a relevant third party if necessary) for the purpose of assessing your non-refoulement claim or in the investigation of other non-refoulement claims made in Hong Kong where a claimant is related to you or where the claim is in some way linked to you, and other purposes directly related;
- (b) may be disclosed to other HKSAR government departments / bureaux, agencies, authorities, international organisations or other bodies where necessary for immigration and nationality purposes or to enable them to carry out their functions, or to secure entry facilities for repatriation;
- (c) if a medical examination is to be conducted for the purpose of assessment of your non-refoulement claim, the information may be disclosed to relevant persons, bodies or organisation in charge of the medical examination where necessary; and
- (d) will be passed to the UNHCR for purposes referred to at paragraph 67 below if your non-refoulement claim has been substantiated on the ground of, *inter alia*, persecution risk and the UNHCR may further pass the information to overseas authorities for such purposes.

65. As a general rule, neither the information indicating that you have made a non-refoulement claim nor any information pertaining to your claim will be provided to any government of the Risk State(s) without your express consent (except in cases where you are a person whose surrender is requested in surrender proceedings where the HKSAR Government must fulfil legal obligations under the relevant fugitive offenders agreement(s)). In addition, nothing at all said by you in either the non-refoulement claim form or at the interview(s) will be used against you in any subsequent

criminal proceedings of any nature except an attempt to pervert the course of justice, or a charge of the offence(s) of making of false statements, forgery of documents and use and possession of forged documents for the purpose of or in connection with Part VIIC of the Ordinance, of misleading of any member of the Immigration Service by giving false information or by making false statements, or of using a false instrument.

Other matters

Non-applicability of the RC

66. The RC and its 1967 Protocol do not apply to the HKSAR. Despite assessing non-refoulement claims on the ground of, *inter alia*, persecution risk purely as a matter of humanitarian consideration, the HKSAR Government accepts no obligation to grant asylum to or determine the refugee status of any person, whether or not you have a substantiated non-refoulement claim on grounds of persecution as described at paragraph 46 above. Refugees are recognised by the UNHCR in Hong Kong under its mandate as the UNHCR sees fit to do so.

67. If your non-refoulement claim has been substantiated on the ground of, *inter alia*, persecution risk, your personal information will be passed to the UNHCR for considering if you should be recognized as refugee under its mandate and, if so, seeking durable solution for you including resettlement to a third country as appropriate.

Torture claims already decided and asylum seekers previously registered with the UNHCR

68. For the avoidance of doubt, where the ImmD had decided your torture claim under the former enhanced administrative mechanism or the statutory mechanism, that decision will not be reviewed under the USM, notwithstanding paragraph 44 above. You may, however, request the ImmD to assess your non-refoulement claim on the other applicable grounds including BOR 3 and / or persecution risks.

69. If you have registered an asylum application with the UNHCR before the commencement of the USM, you may make a non-refoulement

claim with the ImmD under the USM.

*Notices*¹³

70. A notice or other document (howsoever described) required to be served or given (howsoever described) by the ImmD or the Appeal Board on or to you under the USM may be served on or given to you -

- (a) personally;
- (b) by leaving it for you, or by sending it by post addressed to you at the last known residential or correspondence address provided by you to the ImmD or the Appeal Board under paragraph 18 above; or
- (c) if you are acting by a legal representative, by leaving it for the legal representative, or by sending it by post addressed to the legal representative, at the place of business or correspondence address of the legal representative.

71. A notice or other document served or given in the manner described at paragraph 70, other than by sending it by post, is conclusively presumed to have been served or given and received at the following time -

- (a) if it is served on or given to you personally, when it is so served or given; or
- (b) if it is left at a place of abode or business or an address, on the second working day after it was so sent.

72. A notice or other document served or given by sending it by post in the manner described at paragraph 70 is presumed, in the absence of evidence to the contrary, to have been served or given and received on the second working day after it was so sent.

Immigration Department
March 2014

¹³ For torture claims, see section 37ZV of the Ordinance.
(03/2014)