

## 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 informs you about your rights and responsibilities as a claimant.

### Applicable grounds for non-refoulement protection

*Torture defined under section 37U of the Immigration Ordinance, Cap.115 (“the Ordinance”)*

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 Ordinance 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.

*Absolute and non-derogable rights under the Hong Kong Bill of Rights Ordinance, Cap.383 (“**HKBORO**”)*

3. In December 2012, the Court of Final Appeal (“**CFA**”) ruled in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 (“*Ubamaka*”), inter alia, that if there are substantial grounds for the Immigration Department (“**ImmD**”) to believe that there is a **personal** and **substantial** risk of an absolute and non-derogable right under the Hong Kong Bill of Rights (“**HKBOR**”) as set out under section 8 of the HKBORO<sup>1</sup> of a person

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<sup>1</sup> The right in question in *Ubamaka* was the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (“**CIDTP**”) under Article 3 of the HKBOR.

not having the right to enter and remain in Hong Kong being violated by the receiving country should the person be sent there, it constitutes a ground for restraining the Government of the Hong Kong Special Administrative Region (“**HKSAR**”) from proceeding to remove / deport that person to that country.<sup>2</sup> Accordingly, under USM, ImmD would assess whether a claimant, if removed from Hong Kong, would face a personal and substantial risk of his absolute and non-derogable rights under the HKBOR being violated at another country (e.g. right to life under Article 2 and torture or CIDTP under Article 3 of the HKBOR).

4. Not all the rights under the HKBOR are absolute and non-derogable entailing non-refoulement obligation on the part of the HKSAR Government.<sup>3</sup> Non-refoulement protection will be afforded to claimants who on substantial grounds will be subject to real and personal risks on any applicable grounds.

5. In respect of other rights under the HKBOR (which is derogable and/or not absolute), the immigration reservation in section 11 of the HKBORO stipulates that, as regards persons not having the right to enter and remain in Hong Kong, the HKBORO does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.<sup>4</sup>

#### *Persecution risk with reference to the Refugee Convention*

6. The 1951 Convention Relating to the Status of Refugees (“**the RC**”) or its 1967 Protocol has never been applied to Hong Kong. The HKSAR Government 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* (2013) 16 HKCFAR 280 (“**C & Ors**”), 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 ImmD has to

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<sup>2</sup> See §§136 and 137 read together with §160 of *Ubamaka*.

<sup>3</sup> §135, *Ubamaka*

<sup>4</sup> §115, *Ubamaka*

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**

7. In this Notice, unless otherwise stated,

- (a) **“Appeal Board”** means second-tier decision makers of non-refoulement claims, whether as members of the Torture Claims Appeal Board under section 37ZQ(1) of the Ordinance to hear appeals and applications under section 37ZQ(2) of the Ordinance, or 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 all applicable grounds except torture under section 37U of the Ordinance;
- (b) **“All applicable grounds”** means all grounds set out in paragraphs 2, 3, and 6 of this Notice;
- (c) **“Any applicable grounds”** means any ground set out in paragraphs 2, 3, or 6 of this Notice;
- (d) **“BOR 2”** means Article 2 of section 8 of the HKBORO;
- (e) **“BOR 2 risk”** means risk to a person’s right to life under BOR 2;
- (f) **“BOR 3”** means Article 3 of section 8 of the HKBORO;
- (g) **“BOR 3 risk”** means risk of being subjected to torture or CIDTP under BOR 3;
- (h) **“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;
- (i) **“Finally determined”** means a non-refoulement claim that has been finally determined in the manner described at paragraphs 67 to 68 below;
- (j) **“Non-refoulement claim”** means a claim for non-refoulement protection in Hong Kong;
- (k) **“Non-refoulement protection”**, in relation to a claimant, means protection against expulsion, return or surrender of the claimant to a Risk State;
- (l) **“Ordinance”** means the Immigration Ordinance (Cap. 115);
- (m) **“Persecution risk”** means a persecution risk as explained at paragraph 13 below;

- (n) “**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;
- (o) “**Risk State**” means another country in respect of which the claimant has made a non-refoulement claim;
- (p) “**Substantiated claim**” means a non-refoulement claim which is substantiated in the manner described at paragraphs 51 to 53 below;
- (q) “**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;
- (r) “**Torture claim**” means a claim for non-refoulement protection in Hong Kong on the ground of 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);
- (s) “**Torture risk**” means a risk of being subjected to torture as defined under section 37U of the Ordinance;
- (t) “**Torture or CIDTP**” means torture or cruel, inhuman or degrading treatment or punishment under BOR 3;
- (u) “**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 paragraphs 62 below or treated as withdrawn in accordance with paragraphs 64 to 66 below.

8. For the purpose of this Notice, second-tier decision makers on non-refoulement claims, whether as members of the Appeal Board under section 37ZQ(1) of the Ordinance or 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 all applicable grounds except torture under section 37U of the Ordinance will be collectively referred to as the “**Appeal Board**”.

*“Torture” under the CAT Convention*

9. 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.

*Absolute and non-derogable rights under HKBOR (including “right to life” under BOR 2 and “torture or CIDTP” under BOR 3)*

10. The respective precise scopes of the “right to life” under BOR 2 and “torture or CIDTP” under BOR 3 are not defined under the HKBORO (or the International Covenant on Civil and Political Rights (“**ICCPR**”), which the HKBORO implements). In *Ubamaka*<sup>5</sup>, the CFA ruled 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*<sup>6</sup> 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 jurisprudence (case law and other reference materials) from time to time.

11. Following *Ubamaka* and with reference to the international jurisprudence, a claimant should not be removed from Hong Kong if there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by BOR 2 in the Risk State as a result of the

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<sup>5</sup> §172 and 173, *Ubamaka*.

<sup>6</sup> §174, *Ubamaka*.

claimant's deportation or removal there. This is a highly fact-sensitive issue based on the information to be provided by the claimant in support of his non-refoulement claim. References should likewise be made to relevant jurisprudence (case law and other reference materials) from time to time.

12. For other rights under the HKBORO than BOR 2 and BOR 3, please refer to paragraphs 4 and 5.

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

13. Drawing reference from relevant instruments and case law<sup>7</sup>, 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 nationality<sup>8</sup> 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 opinion<sup>9</sup> should he be expelled or returned to the frontiers of a Risk State.

### **Claiming non-refoulement protection in Hong Kong**

14. A person who is outside the 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, he does not have a right of abode or

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<sup>7</sup> §63, *C & Ors v the Director of Immigration*.

<sup>8</sup> 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.

<sup>9</sup> 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.

right to land in, or right to return to, any other State in which he would be entitled to non-refoulement protection;<sup>10</sup> or  
(b) the person is a person whose surrender is requested in surrender proceedings.<sup>11</sup>

### **Effect of making a non-refoulement claim**

15. A claimant may not be removed from Hong Kong to a Risk State.<sup>12</sup> A person may be so removed when he ceases to be a claimant.

16. The making of a non-refoulement claim does not affect the validity of any removal order or deportation order that has been made against the claimant, preclude the making of a removal order or a deportation order against the claimant, or preclude the HKSAR Government from liaising with any party (including the Risk State) after the non-refoulement claim is rejected, a revocation decision is made in relation to the non-refoulement claim, or the non-refoulement claim is withdrawn, for the purpose of making arrangements for the removal of the claimant.<sup>13</sup>

17. A claimant may be removed to a specified country<sup>14</sup> that is not a Risk State.<sup>15</sup> Non-refoulement protection does not extend to the removal of a claimant to another country other than a Risk State.

### **Duties of a claimant**

18. 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 on any applicable grounds, were you 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

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<sup>10</sup> For torture claims, see sections 37W(1)(a) and (b) of the Ordinance.

<sup>11</sup> For torture claims, see section 37W(2) of the Ordinance.

<sup>12</sup> For torture claims, see section 37Z(1) of the Ordinance. For non-refoulement claims on BOR3 risk, see *Ubamaka*.

<sup>13</sup> For torture claims, see section 37Z(2) of the Ordinance.

<sup>14</sup> “Specified country” means a country or territory: (a) of which a person who is to be removed from Hong Kong is a national or citizen; (b) in which that person has obtained a travel document; (c) in which that person embarked for Hong Kong; or (d) to which an immigration officer or immigration assistant has reason to believe that that person will be admitted (see definition in section 2(1) of the Ordinance).

<sup>15</sup> For torture claims, see section 37Z(3)(a) of the Ordinance.

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.

19. 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**

20. 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 any applicable grounds. A person will be requested to allow an immigration officer or immigration assistant to take his fingerprints and photographs.<sup>16</sup> Once a non-refoulement claim is made, the claim will be screened on all applicable grounds.

21. 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 any applicable grounds

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<sup>16</sup> For torture claims, see section 37X(3) of the Ordinance.



must be complied with.

22. After a person has signified in writing his intention to seek non-refoulement protection in accordance with paragraph 20 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.<sup>17</sup> Once the requirements referred to at paragraph 20 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.

23. 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 20 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**

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

- (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

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<sup>17</sup> For torture claims, see section 37X(3) of the Ordinance.

- (e) provide you with an information leaflet about the publicly-funded legal assistance available.

25. 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**

26. Publicly-funded legal assistance may be provided by the Duty Lawyer Service (“DLS”) or the Pilot Scheme Office for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants (“PSO”) to assist you in making your claim. The scope and eligibility criteria for assistance will be explained to you by the DLS / PSO (as the case may be). On passing the relevant eligibility test, i.e. the means and merits test, the DLS / PSO will assign a lawyer who will provide legal assistance to you where appropriate. For example, you may seek the advice of the lawyer in completing the non-refoulement claim form or be accompanied by the 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**

27. 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 support 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 material facts and supporting documents at the first available opportunity without reasonable excuse may damage your credibility.**

28. You must return the completed non-refoulement claim form to the office of the RAS at 8th Floor, Enforcement Tower, Immigration Headquarters, 61 Po Yap Road, Tseung Kwan O, New Territories **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.

29. Any 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 evidence or any other documents 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 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.

30. 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, you have exercised, or had exercised, all due diligence to return the completed non-refoulement claim form but will not be able to, or failed to, do so within the time limit because of circumstances beyond your control. 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 you have exercised, or had exercised, all due diligence to return the completed non-refoulement claim form but will not be able to, or failed to, do so within the time limit because of circumstances beyond your control.

**31. 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 exercised all due diligence but failed to return the completed non-refoulement claim form as required because of circumstances beyond your control.

32. You should therefore exercise all due diligence 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 you have, or had, exercised all due diligence to return the completed non-refoulement claim form but will not be able to, or failed to, do so within the time limit because of circumstances beyond your control. 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 if you have, or had, exercised all due

diligence to return the completed non-refoulement claim form but will not be able to, or failed to, do so within the time limit because of circumstances beyond your control.

### **Further information from claimant**

33. After you have returned the completed non-refoulement claim form to us, your case officer may require you to provide any information or evidence related to your claim. You must submit such information or 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.

34. 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 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.

35. 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**

36. You must attend an interview at the date, time and place specified by an immigration officer in the written request referred to in paragraphs 27 and 28 to provide information and answer questions relating to your non-refoulement claim. The date of the interview must be a date after the expiry of the period for returning the completed non-refoulement claim form. If your case officer allows a further period for you to return the completed non-refoulement claim form, and the date of the original interview specified in the written request is within the further period, your case officer must change it to a date after the expiry of the further period. You must also attend any further interview required by your case officer at the date, time and place specified by your case officer. 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.

37. 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 evidence readily available to you should be provided before the interview. During the interview, you should not raise or submit irrelevant issues or evidence whether or not the same have been raised or submitted before. New issues raised or evidence 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.

38. 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.

39. 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.

40. 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.

41. 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.

### **Language for communications**

42. Your case officer or (on an appeal / petition) the Appeal Board may direct you to communicate in a language that your case officer or (on an appeal / petition) the Appeal Board reasonably considers that you are able to understand and communicate in. When considering whether you can reasonably understand and communicate in a language, your case officer or (on an appeal / petition) the Appeal Board will take into account all information and documents available, including but not limited to the evidence submitted by you, your previous communications with ImmD, the Appeal Board and with the Court, and any other evidence demonstrating your proficiency in another language.

## **Medical examination**

43. 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. You must give any consent that is necessary to enable a medical examination of you to be arranged or conducted. 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.

44. If a medical examination is arranged by your case officer, you must undergo the examination at the date, time and place specified by your case officer and notified to you in writing. You must disclose the full report of the arranged medical examination within 3 working days after a request for the disclosure is made by your case officer or (on an appeal / petition) the Appeal Board. A failure, without reasonable excuse, to give consent, to undergo a medical examination or to disclose the full medical report of the arranged medical examination as required may be taken as a behaviour damaging your credibility.

45. If you fail to comply with the requirements set out in paragraphs 43 and 44 and fail to provide sufficient evidence in writing to satisfy your case officer or (on an appeal / petition) the Appeal Board that you had exercised all due diligence but failed to comply with abovementioned requirements because of circumstances beyond your control, your case officer or the Appeal Board may decide not to take into account your disputed physical or mental condition.

## **Behaviour damaging credibility**

46. 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.



47. 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.

48. Furthermore, without limiting paragraph 47(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 evidence required by your case officer;
- (e) a failure, without reasonable excuse, to attend an interview as

- required or provide information or answer any question put by your case officer at such an 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 of the first interview that you are required to attend;
  - (g) a failure, without reasonable excuse, to give consent that is necessary to enable a medical examination to be arranged or conducted, to undergo a medical examination, or to disclose to your case officer and (on an appeal / petition) the Appeal Board the full medical report as required; 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.

49. 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 47 and 48 above when considering the claimant's credibility for the purpose of assessing their claims. Further, paragraphs 47 and 48 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**

50. 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.<sup>18</sup> A decision may be made by your case officer even if you have failed to attend an interview as required, have failed to comply with the requirements set out in paragraphs 43 and 44, or have otherwise failed to

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<sup>18</sup> For torture claims, see section 37ZI(1) of the Ordinance.

proceed with the claim.<sup>19</sup> 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 a risk under any applicable grounds.<sup>20</sup>

51. 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 the claimant would be in danger of being subjected to torture under Part VIIC of the Ordinance if the claimant were removed or surrendered to a Risk State.

52. Your non-refoulement claim must be accepted as substantiated if there are substantial grounds for believing that there is genuine and personal risk that an absolute and non-derogable right under the HKBOR (including BOR 2 and BOR 3 risks) of the claimant would be violated at the Risk State if the claimant were removed or surrendered there.

53. Your non-refoulement claim should be accepted as substantiated on the ground of persecution risk if the claimant has a well-founded fear of being persecuted in the manner explained at paragraph 13 above if the claimant were removed or surrendered to a Risk State, and he does not fall within any of the exceptions to persecution non-refoulement protection taking into account relevant considerations including those set out at paragraph 57 below.

54. Your non-refoulement claim should otherwise be rejected if all applicable grounds are not substantiated.

### **Notification of Decision**

55. 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).<sup>21</sup> Where your claim is rejected (i.e. none of the applicable grounds is substantiated) the written notice will also inform you

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<sup>19</sup> For torture claims, see section 37ZI(2) of the Ordinance.

<sup>20</sup> For torture claims, see section 37ZI(5) of the Ordinance.

<sup>21</sup> For torture claims, see section 37ZJ(1) of the Ordinance.

of the reasons for the rejection and your right under section 37ZR of the Ordinance / Article 48(13) of the Basic Law to appeal / petition against the decision.<sup>22</sup>

56. If your claim is substantiated but certain ground(s) is (are) 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**

57. 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 been 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
- (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**

58. You may appeal if you are aggrieved by the decision of your case officer rejecting your non-refoulement claim, your appeal would be considered by the Appeal Board –

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<sup>22</sup> For torture claims, see section 37ZJ(2) of the Ordinance.

- (a) as an appeal (against the case officer's decision on the non-refoulement claim in respect of torture risk under the Ordinance) under section 37ZR(b) of the Ordinance; and / or
- (b) as a petition (against the case officer's decision on the non-refoulement claim on all applicable grounds except torture risk under subparagraph (a) above) under Article 48(13) of the Basic Law.

59. The notice of appeal / petition must be duly completed, signed and must be filed with the Appeal Board **within 14 days** after the notice of decision is given to you unless late filing of the notice is allowed by the Appeal Board.<sup>23</sup> Once the notice has been filed, you would be deemed to be appealing all the grounds rejected by the ImmD. The Appeal Board will review all the grounds in one go.

60. 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 the 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 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.<sup>24</sup> The Appeal Board will give its decision with reasons in writing; and its decision is final.<sup>25</sup>

61. A person who has filed a notice of appeal / petition within 14 days or more than 14 days if late filing is allowed may, at any time before the Appeal Board determines the appeal / petition, withdraw the appeal / petition

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<sup>23</sup> For torture claims, see sections 37ZS(1) and 37ZT of the Ordinance. Under section 37ZT(3), the Appeal Board may allow the late filing of the notice of appeal if the person filing the notice provides sufficient evidence in writing to satisfy the Appeal Board that the person had exercised all due diligence to file the notice within the period specified in section 37ZS(1); but failed to file the notice within the period because of circumstances beyond the person's control.

<sup>24</sup> For torture claims, see section 23(1) in Schedule 1A to the Ordinance.

<sup>25</sup> For torture claims, see sections 23(3) and (4) in Schedule 1A to the Ordinance.

by filing a written notice with the Appeal Board. An appeal / petition against a decision is withdrawn once a notice to withdraw the appeal / petition is received by the Appeal Board and no further notice of appeal / petition may be filed in relation to the decision.<sup>26</sup>

### **Withdrawal of a claim**

62. 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.

### **Re-opening a withdrawn claim**

63. Your non-refoulement claim which has been withdrawn by you under paragraph 62 above 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.<sup>27</sup>

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

64. 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 or any further period that your case officer may have allowed pursuant to an extension application made by you.<sup>28</sup> Where a claim is taken as withdrawn in such circumstances, the case officer will notify you by a written notice stating that the non-refoulement claim is treated as withdrawn and you may apply to

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<sup>26</sup> For torture claims, see section 37ZTA of the Ordinance.

<sup>27</sup> For torture claims, see sections 37ZE(2) and 37ZF(3) of the Ordinance.

<sup>28</sup> For torture claims, see section 37ZG(1) of the Ordinance.

re-open the claim.<sup>29</sup> 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 exercised all due diligence but failed to return the completed non-refoulement claim form as required because of circumstances beyond your control.<sup>30</sup>

### **Deemed withdrawal on departure from Hong Kong**

65. Your non-refoulement claim will be treated as withdrawn and must not be re-opened if you leave Hong Kong for whatever reasons.<sup>31</sup> 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.<sup>32</sup>

66. Furthermore, if you leave Hong Kong after giving notice to withdraw a non-refoulement claim in writing, such claim is also to be treated as having been withdrawn and must not be re-opened.<sup>33</sup>

### **When non-refoulement claim is finally determined**

67. Subject to paragraph 68, a non-refoulement claim is finally determined once a decision on the claim is made by an immigration officer under paragraph 50 above.

68. For a non-refoulement claim rejected by a decision under paragraph 50, 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 a notice to withdraw the appeal / petition is received by the Appeal Board or when the appeal / petition has been disposed of (if an appeal / petition has been lodged against the decision).<sup>34</sup>

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<sup>29</sup> For torture claims, see section 37ZG(2) and (3) of the Ordinance.

<sup>30</sup> For torture claims, see section 37ZG(3) of the Ordinance.

<sup>31</sup> For torture claims, see section 37ZF(1) of the Ordinance.

<sup>32</sup> For torture claims, see section 37ZF(2) of the Ordinance.

<sup>33</sup> For torture claims, see section 37ZF(1) and (3) of the Ordinance.

<sup>34</sup> For torture claims, see section 37V(1) and (2) of the Ordinance.

## **Effect of Making a Claim**

69. 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.

70. 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, preclude the making of a removal order or a deportation order against you, nor does it preclude the HKSAR Government from liaising with any party (including the Risk State) after the non-refoulement claim is rejected, a revocation decision is made in relation to the non-refoulement claim, or the non-refoulement claim is withdrawn, for the purpose of making arrangements for your removal.

71. 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).

72. 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 to you to take employment).

## **Confidentiality**

73. 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 79 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.

74. 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 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, or where ordered by the Court.

## **Other matters**

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

75. 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 51 above. You may, however, request the ImmD to assess your non-refoulement claim on all applicable grounds

except torture under section 37U of the Ordinance.

76. 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.

*Non-refoulement claims already decided under the USM*

77. Since commencement of USM, the ImmD has clearly indicated that all applicable grounds for non-refoulement protection would be screened under USM in one go. The ImmD also informed claimants that once a non-refoulement claim is made, the claim will be screened on all applicable grounds; and that claimants 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. As an exceptional one-off measure to afford claimants with reasonable opportunities to establish their claim in accordance with the high standards of fairness, arrangements have been made for claimants in respect of whom the screening procedures under USM have been commenced (whether their claim is pending or has been rejected) before 12 September 2016 to submit any additional facts in relation to any other applicable grounds which they would wish to rely on for non-refoulement protection (in case they omitted some facts before because of any misunderstanding on what “all / other applicable grounds” means). For the avoidance of doubt, ImmD’s previous decision already made on the risk of being subjected to torture, CIDTP and persecution grounds upon return will not be affected.

*Non-applicability of the RC*

78. 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 he has a substantiated non-refoulement claim on the ground of persecution risk as described at paragraph 53 above. Refugees are recognised by the UNHCR in Hong Kong under its mandate as the UNHCR sees fit to do so.

79. If your non-refoulement claim have 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 recognised as refugee under its mandate and, if so, seeking durable solution including resettlement for you in a third country as appropriate.

*Notices*<sup>35</sup>

80. 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 25 above;
- (c) if you are held in custody, detained or imprisoned, by leaving it for you, or by sending it by post addressed to you, at the place where you are held in custody, detained or imprisoned;
- (d) 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; or
- (e) if you are acting by a non-legal representative (in the case of a minor or a mentally incapacitated person), by giving it to the representative personally, or by leaving it for the representative, or by sending it by post addressed to the representative at the last known residential or correspondence address provided by you or the representative to the ImmD or the Appeal Board, or the representative's place of business (if any).

81. A notice or other document served or given in the manner described at paragraph 80, 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

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<sup>35</sup> For torture claims, see section 37ZV of the Ordinance.

given; or

- (b) if it is left at a place or an address, on the second working day after it was so left.

82. A notice or other document served or given by sending it by post in the manner described at paragraph 80 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**  
**22 April 2024**