

**PRINCIPLES, PROCEDURES AND  
PRACTICE DIRECTIONS OF  
THE TORTURE CLAIMS APPEAL BOARD**

**Sixth Edition  
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## **PART 1 PRELIMINARY**

### **1. Torture Claims Appeal Board**

1.1 These Principles, Procedures and Practice Directions are issued by the Chairperson of the Torture Claims Appeal Board (the “**Board**”) pursuant to section 16 of Schedule 1A to the Immigration Ordinance (Cap. 115) (the “**Ordinance**”). The information provided on Principles and Procedures in Part 2 are intended primarily to provide information and/or guidance to the general public on the work of the Board, so it must be understood that that information is not meant to be an interpretation of, or to substitute for the law as contained in the Ordinance. When considering any Decision of the Board or decision of an immigration officer, regard must be had to the legislation itself. The Practice Directions are in Part 3. It is expected that the contents herein will require elaboration and/or amendment over time or as necessitated by circumstances.

1.2 The Board is an independent statutory body established under section 37ZQ of the Ordinance on 3 December 2012. The Board hears and determines appeals made under section 37ZR and applications for revocation decisions under section 37ZM of the Ordinance.

1.3 The Board is comprised of a Chairperson, Deputy Chairperson(s) and members as appointed by the Chief Executive under section 2 of Schedule 1A to the Ordinance. Pursuant to section 6 of Schedule 1A to the Ordinance, for hearing and determination of appeals, the Board is to consist of 1 member or 3 members having regard to the circumstances of a particular appeal.

### **2. Interpretation**

2.1 In these documents -

“**appeal**” means an appeal made under section 37ZR or an application for a revocation decision under section 37ZM of the Ordinance;

“**appellant**” means a person who initiates an appeal under section 37ZR of the Ordinance;

“**Board**” means the Torture Claims Appeal Board established under section 37ZQ of the Ordinance;

“**claimant**” means a person whose torture claim (not being a torture claim that has been withdrawn) - (a) is not yet finally determined; or (b) is a substantiated claim;

“**Convention**” means the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 as applied to Hong Kong;

“**Decision**” means a decision of the Board on an appeal against a decision referred to in section 37ZR of the Ordinance;

“**Directions Hearing**” means a hearing ordered by the Board for the purpose of giving directions to parties in relation to an appeal on torture claims;

“**Director**” means the Director of Immigration of the HKSAR Government unless otherwise specified;

“**he**” and “**his**” include the feminine gender;

“**HKSAR**” means the Hong Kong Special Administrative Region;

“**non-refoulement protection**”, in relation to a claimant, means protection under Article 3 of the Convention against expulsion, return or surrender of the claimant to a torture risk State;

“**notice of appeal**” means a form specified by the Chairperson of the Board under section 37ZS(2)(a) of the Ordinance;

“**Ordinance**” means the Immigration Ordinance (Cap. 115), Laws of Hong Kong, unless otherwise specified;

“**revocation decision**” means a decision made by an immigration officer under section 37ZL(1) or a decision made by the Board under section 37ZM(1) of the Ordinance;

“**Secretariat**” means any staff member of the Board (other than members as defined in section 1(1) of Schedule 1A to the Ordinance) who are authorized by the Chairperson to provide secretariat/administrative support to the Board;

“**State**” means a country other than China;

“**substantiated claim**” means a torture claim -

- (a) that is accepted as substantiated under section 37ZI(1)(a) of the Ordinance and in respect of which no revocation decision has been made by an immigration officer; or
- (b) in respect of which -
  - (i) a decision rejecting the claim under section 37ZI(1)(b) of the Ordinance was made but reversed on appeal to the Board and no revocation decision has been made by the Board; or
  - (ii) a revocation decision was made by an immigration officer but reversed on appeal to the Board;

“**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;

**“torture”** means 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 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) of the Ordinance;

**“torture risk”** means the danger of being subjected to torture;

**“torture risk State”**, in relation to a claimant, means a State in respect of which the claimant has made a torture claim on the ground that the claimant would be in danger of being subjected to torture in that State;

**“withdrawn”**, in relation to a claim, means withdrawn in accordance with section 37ZE or treated as withdrawn under section 37ZF or 37ZG of the Ordinance;

**“working day”** means any day of the week excluding Sundays, public holidays, gale warning days or black rainstorm warning days as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1), Laws of Hong Kong.

**PART 2**  
**PRINCIPLES AND PROCEDURES**

**3. The Convention**

3.1 The Convention, which was ratified by the United Kingdom in December 1988, was extended to Hong Kong in December 1992<sup>1</sup>. In June 1997, the Central People's Government of the People's Republic of China announced that the Convention would continue to apply to HKSAR with reservations.

3.2 Article 3(1) of the Convention states that “no State Party shall expel, return (“refouler”) 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”.

3.3 Article 3(2) of the Convention states that “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

**4. Restrictions on Persons Claiming Non-refoulement Protection in Hong Kong**

4.1 Under section 37W(1) of the Ordinance, a person may claim non-refoulement protection in Hong Kong only if -

- (a) the person is subject or liable to removal; and
- (b) apart from a torture 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 protection.

4.2 In addition, a person whose surrender is requested in surrender proceedings may claim non-refoulement protection in Hong Kong under section 37W(2) of the Ordinance.

4.3 Under section 37X(5) of the Ordinance, a torture claim may be made only in respect of a person's removal or surrender to a place outside China.

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<sup>1</sup> A copy of the Convention can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

## **5. Notice of Appeal**

5.1 An unsuccessful claimant who wishes to appeal against a decision referred to in section 37ZR of the Ordinance must file with the Board a notice of appeal as specified by the Chairperson (**Appendix A**)<sup>2</sup> within 14 days after notice of the decision is given to the person unless late filing of the notice is allowed by the Board under section 37ZT(3) of the Ordinance.

5.2 The notice of appeal must be accompanied by a copy of the notice of the decision being appealed against pursuant to section 37ZS(2) of the Ordinance.

5.3 Under section 37ZA of the Ordinance, it is the duty of the claimant to substantiate his torture claim, and to this end, he must, on appeal, provide to the Board 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 claimant must also provide to the Board both his residential address and correspondence address in Hong Kong (if different from the residential address) and must notify the Board in writing of any change as soon as practicable after the change. The service of notice or other document (howsoever described) in relation to the appeal proceedings of the Board is governed by section 37ZV of the Ordinance.

5.4 As soon as practicable after receiving a notice of appeal filed under section 37ZS(1) of the Ordinance, the Board must serve a copy of the notice on the Director pursuant to section 8(1) of Schedule 1A to the Ordinance.

5.5 It is only when the Board has decided to allow the late filing of a notice under section 37ZT(3) of the Ordinance that the Board must serve a copy of the notice on the Director, and in that event the notice must be served as soon as practicable.

## **6. Late Filing of Notice of Appeal**

6.1 Under section 37ZT of the Ordinance, if a notice of appeal is filed after the expiry of the 14-day period, it must include an application for late filing of the notice and a statement of the reasons for failing to file the notice within that period; and must be accompanied by any documentary evidence relied on in support of the reasons.

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<sup>2</sup> The same form will be used for lodging a petition by a petitioner who is aggrieved by an immigration officer's decision on the petitioner's non-refoulement claim based on all applicable grounds other than a torture risk. The applicable grounds include (i) risk of violation of an absolute and non-derogable right under the Hong Kong Bill of Rights (including "right to life" under Article 2 and "right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment" under Article 3) as set out under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383); and (ii) risk of persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.



6.2 The Board must decide, as a preliminary decision without a hearing, whether the Board allows the late filing of the notice of appeal, and in doing so (pursuant to section 37ZT(2) of the Ordinance), the Board may only take account of -

- (a) the statement of reasons stated in the application for late filing of the notice of appeal and any accompanying documentary evidence relied on in support of those reasons; and
- (b) any other relevant matters of fact within the knowledge of the Board.

6.3 If the Board is satisfied under section 37ZT(3) of the Ordinance that by reason of special circumstances, it would be unjust not to allow the late filing of the notice of appeal, the Board may allow the late filing of the notice and must, by written notice, inform the person filing the notice of the Board's Decision.

6.4 If the Board does not allow the late filing of the notice of appeal, the Board must, by written notice, inform the person filing the notice that the Board has refused the notice pursuant to section 37ZT(4) of the Ordinance.

## **7. Practice and Procedure of the Board**

7.1 Under section 16 of Schedule 1A to the Ordinance, the Chairperson may give directions, generally or in a particular case, on the practice and procedure of the Board in hearing and determining an appeal. In addition, under section 17 of Schedule 1A to the Ordinance, the Board may constitute its own procedure in the hearing of an appeal.

7.2 Section 7 of Schedule 1A to the Ordinance empowers the Chairperson to decide the order in which appeals and matters are to be heard or determined generally or in any particular circumstances which necessitates special arrangements to be made.

7.3 Upon receipt of the notice of appeal, the Board will decide whether or not to hold a hearing to determine the appeal having regard to the material before it and the nature of the issues raised.

7.4 A Directions Hearing may be ordered by the Board for the purpose of giving directions or determining any matters incidental to or in respect of the appeal. The Board may subsequently set aside, vary or give further directions after the Directions Hearing as he thinks fit.

7.5 The Secretariat must arrange for a Directions Hearing if so instructed by the Board. The Secretariat must inform the parties of the arrangements made.

7.6 All parties must appear either in person and/or by a legal representative at the Directions Hearing. If a party does not appear and is not legally represented at that hearing, and has not previously given any sufficient reason for being absent, the Board may make such orders or directions as it thinks fit including those adverse to the interests of the party being absent. The absent party may be treated as having forfeited his right to be heard.

## **8. Hearings**

8.1 The Board may on paper or hold an oral hearing to make its own findings of fact and come to its own Decision on the appeal. In this regard, the general principles pertaining to the holding of oral hearings as a question of procedural fairness and high standards of fairness as mentioned in paragraphs 8.2 to 8.4 below are applicable. The purpose of holding an oral hearing is not only to assist the Board in its decision-making, but also to reflect the appellant's legitimate interest in being able to participate in a Decision with important implications for him, where he has something useful to contribute.

8.2 The standards of fairness are not immutable. They may change with the passage of time. In other words, the requirements of fairness are flexible and are closely conditioned by the legal and administrative context. Where life and limb are in jeopardy and appellant's fundamental human right not to be subjected to torture is involved, high standards of fairness must be observed by the Board when making the Decision.

8.3 An opportunity to make worthwhile or effective representations is an important requirement of fairness in most if not all situations. It does not, however, follow that there must be an oral hearing before a Decision is made. There is no absolute right to an oral hearing. The question of whether an oral hearing should be afforded must depend on the standards of fairness required, the nature of the decision-making process in question, the procedural history of the matter including whether there has been an oral hearing before, the interest at stake, and the issues involved, and how the presence or absence of an oral hearing would affect the quality of the opportunity to make worthwhile or effective representations.

8.4 While the presence of material factual disputes which cannot be decided on paper is very often a good and sufficient reason in itself for holding an oral hearing, the converse is not necessarily true. There is an inherent limit to what was written, as opposed to what oral representations can achieve such that in appropriate cases, the applicable standards of fairness would require the holding of an oral hearing even when all facts are agreed. The question of whether an oral hearing should be held is whether an oral hearing may well contribute to achieving a just Decision.

8.5 The Board would consider all relevant matters before deciding whether to hold an oral hearing. Each case would turn on its own facts, and it is neither desirable nor possible to set out exhaustively what are the relevant considerations. Nonetheless, in most if not all cases, there are matters as mentioned in sub-paragraph (a) to (c) below, which may overlap, which the Board should bear in mind -

- (a) The interest at stake and the potential consequence of the Decision:
  - (i) What is involved is the fundamental human right of the claimant to be free from torture. That is an absolute human right, which admits of no exception. One is concerned with a fundamental right to be free from torture. The potential consequence of the Decision is grave. Where life and limb are potentially at risk, the high standards of fairness is required in the first place, this must be a weighty consideration favouring the holding of an oral hearing.
  - (ii) Depending on the facts, it may be appropriate for the Board to draw the appellant's attention to matters that obviously require clarification or elaboration so that they can be addressed by the appellant. On the other hand, there is no duty to keep on probing or inquiring where the objective circumstances make it reasonably clear that the appellant and those representing him are aware of what he wanted to show and has already produced or mentioned. The exercise of determining whether an appeal is valid is one of joint endeavour. A very practical result of all these requirements based on the high standards of fairness involved is that if any of these requirements cannot be fully satisfied without an oral hearing – and the appellant should be given the benefit of any doubt, an oral hearing should be held.
- (b) The high standards of fairness would require the appellant to be given an opportunity to be heard either orally or in writing where the Board considered there is anything in the appellant's evidence or submission which is material to the determination of the appeal. It is for the Board, in the exercise of its discretion, to take the most effective and fairest way to approach the concern in question. The following examples are strong pointer towards an oral hearing or (where appropriate) further written representations:
  - (i) If there is any point, factual or legal, which the Board is not sure, then an oral hearing or further submissions from the appellant would help.

- (ii) The Board is of the view that certain factual or legal point which is relevant to the determination has not been dealt with adequately or at all in the appeal. An obvious situation is where the Board is aware of an important authority on a material point which has been omitted or touched on superficially only in the notice of appeal.
  - (iii) The material placed before the Board calls for some further probing, questioning or inquiry. This is particularly so if the absence of such further probing, questioning or inquiry would lead to the Board drawing an inference adverse to the appellant.
  - (iv) Where the issue concerns the drawing of inference, the application of common sense, the giving of weight, or the assessment of risk, that is, matters involving essentially evaluation and judgment, oral arguments may well be a better means of representation than written submissions.
- (c) In deciding how to exercise its discretion to order an oral hearing, the Board should consider whether there is any advantage in holding an oral hearing as opposed to merely deciding the appeal on paper (whether based on the original appeal documents or based on the appeal documents plus further written representations submitted at the request of the Board). By nature, written submissions do not afford the flexibility of oral presentations. They deprive the appellant the chance to mould his arguments. Sometimes, an oral hearing is preferable to written representations simply because of the nature of the issues or arguments involved. Some arguments are best to be dealt with orally.

8.6 An oral hearing need not be lengthy. All that is required is a reasonable opportunity to be heard. The fact that at the first tier, there was already an interview by an immigration officer with the appellant (in the presence of his legal representative) is a relevant consideration to take into account. What has or what has not been covered at the interview, or in the Director's subsequent notice of decision, should also be seriously considered.

8.7 Under section 13 of Schedule 1A to the Ordinance, if the Board decides to hold a hearing, the Board must, not less than 28 days before the date of hearing, serve on the parties notice of the date, time and place of the hearing.

8.8 The hearing is to be held in private unless the Board directs that it be held in public pursuant to section 10 of Schedule 1A to the Ordinance.

8.9 Save for the circumstances set out in paragraph 8.10 below, a single Board member selected by the Chairperson will preside at a hearing of an appeal.

8.10 Having regard to the circumstances of a particular appeal, the Chairperson may select 3 members to hear and determine the appeal under section 6(2) of Schedule 1A to the Ordinance.

8.11 The Secretariat will inform both the Director and the appellant or his representative of the date, time and place of the hearing by way of a notice of hearing. Both parties are required to notify the Board in writing at least 5 working days before the date of the hearing if there are any changes of legal representative(s) and/or witness(es).

8.12 Save for the circumstances specified in paragraph 8.13, all parties must appear either in person<sup>3</sup> and/or by a legal representative at the hearing. Under section 15 of Schedule 1A to the Ordinance, if a party to an appeal fails to attend a hearing, either in person or by a legal representative, the Board, on proof that the party has been served a notice of the hearing, may proceed to hear the appeal in the absence of the party and determine the appeal.

8.13 The attendance of the Director's representative, including his legal representative, may be excused unless his attendance has been specifically requested by the Board. Even if his attendance at the hearing has been excused, he should still remain on standby and be available to answer any question/queries of the Board on the day of the hearing.

8.14 If the appellant fails to appear at the hearing, the Board may still determine his appeal, but before doing so, the Board must -

- (a) give the party written notice of the Board's intention to do so; and
- (b) state that the party may submit to the Board, within 7 days after the notice is given, a written explanation of the party's failure to attend the hearing, together with any documentary evidence supporting the explanation.

8.15 If the Board has not received the party's written explanation together with supporting documentary evidence (if any) within the period specified; or is not satisfied with the party's written explanation or supporting documentary evidence, the Board may proceed to determine the appeal.

8.16 If the Board is satisfied on the basis of the party's written explanation and supporting evidence that the failure to attend was due to a reasonable cause, the Board may re-fix the hearing of the appeal to a new date, time and place.

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<sup>3</sup> In the context of the Director, "in person" refers to an immigration officer who is authorised by the Director to attend the hearing.

## **9. Matters to be Attended to Before a Hearing**

9.1 If the appellant is legally represented, his legal representative and the Director's representative should confer and consider as early as possible in advance of the hearing what agreement can be reached on the scope of the issues. It is in the interests of all parties and in the wider public interest to ensure that the hearing proceeds as fairly, quickly and efficiently as possible. The representatives should assist the Board by producing a list of agreed issues.

9.2 Any further statement of the appellant to be adduced for the purposes of the hearing before the Board should be directed at the remaining live issues, and not be a repetition of what has already been said in earlier statements.

9.3 Skeleton arguments/submissions should be prepared and be directed at the live issues in the appellant's case.

9.4 Under section 14 of Schedule 1A to the Ordinance, the responsibility for the preparation of the hearing bundle falls on the Director. The hearing bundle shall include all the documents and submissions (including skeleton arguments/submissions referred to in paragraph 9.3) relied upon by the Director and the appellant and information as specified by the Board.

9.5 The Board may require the appellant to file with the Board and serve on the Director a list of the witnesses the appellant intends to call and statements of their evidence.

9.6 The documents and submissions referred to in paragraphs 9.4 and 9.5 above shall be incorporated by the Director's representative into the paginated and indexed hearing bundle. Copies of the hearing bundle shall be sent to the Board and to the appellant no later than 5 working days prior to the date of the hearing.

9.7 The hearing bundle should include all the documents<sup>4</sup> and submissions relied upon by the Director and the appellant. As the Director must send copies of the hearing bundle to the Board and the appellant no later than 5 working days prior to the date of the hearing, in order to comply with aforesaid requirement, it is the appellant's responsibility to ensure that all his documents<sup>5</sup> are sent to the Director in sufficient time for inclusion in the hearing bundle.

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<sup>4</sup> It will only be necessary to insert the relevant parts of any document relied upon, together with the internet link.

<sup>5</sup> It will only be necessary to insert the relevant parts of any document relied upon, together with the internet link.

9.8 The following comments are of general application -

- (a) all relevant documents must be presented in logical order and be legible;
- (b) where the document is not in English or Chinese, a typed English or Chinese translation of the document signed by the translator certifying that the translation is accurate, must be inserted in the hearing bundle next to the copy of the original document;
- (c) skeleton arguments or written submission must be brief, and all live issues should be arranged or set out in numerical order. All relevant pages of the hearing bundle relating to the live issues should be identified;
- (d) the relevant part of any document should be identified by reference to page and paragraph number, and/or by highlighting;
- (e) materials placed in the hearing bundle must not be unnecessary, repetitive or outdated. Materials that have no relevance to the case must not be placed in the hearing bundle. It is an unnecessary waste of resources to include irrelevant materials. Materials not identified by page number/paragraph number/highlighting as having some relevance to the case will be disregarded by the Board. If necessary, the parties may be asked to justify the inclusion of materials at the hearing;
- (f) the country of origin information (the “**COI**”) has been defined as “*any information that should help to answer questions about the situation in the country of nationality or former habitual residence of a person seeking asylum or another form of international protection*”<sup>6</sup>. Parties must ensure that only the part or parts of the COI that is relevant to their case is placed in the hearing bundle, with the relevant parts identified by page number/paragraph number/highlighting. It is not necessary to put the whole COI in the hearing bundle. Provision of the internet link to the COI in question will enable the Board and the other side to peruse the full document;
- (g) as the appellant may need to refer to some of the documents in the hearing bundle when he is giving evidence, it is the responsibility of his legal representative to ensure that he is given a separate copy of those documents for his own use; and
- (h) the Board may bring to the attention of the Director and/or the Duty Lawyer Service that unnecessary wastage of resources has been incurred by the inclusion of irrelevant materials in the hearing bundle.

## 10. Observers

10.1 No persons other than the appellant, the representative of the Director and their respective legal representatives may be present at a hearing except that -

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<sup>6</sup> See Barbara Svec of the Austrian Centre for Country of Origin and Asylum Research and Documentation (“**ACCORD**”), Vienne, in presentation to the IARLJ November 2005 Budapest Conference.

- (a) custody officers escorting an appellant in custody may be present during the hearing but will not be allowed to take part in the proceedings;
- (b) staff members of the Secretariat may be present during the hearing to assist the Board in administrative matters but will not be allowed to take part in the proceedings;
- (c) persons who have been given permission by the Board may be present at the hearing but will not be allowed to take part in the proceedings;
- (d) interpreters arranged by the Duty Lawyer Service may be present at the hearings as and when requested by the Board.

## **11. Adjournments**

11.1 The Board has full discretion to decide whether to grant an adjournment or not. If there is an application to adjourn a hearing, full reasons must be given. After hearing the parties, the Board must decide whether it is in the interests of justice to grant the adjournment. If the adjournment is granted, the Board will give directions as to the date and time of the adjourned hearing, together with any other appropriate directions.

11.2 If an adjournment is sought by an appellant on medical grounds, a medical certificate/report must be presented to the Board as soon as practicable as the basis for an adjournment. If the Board allows the adjournment of a hearing, details of the date and time of the adjourned hearing will be given, together with any other appropriate directions.

11.3 If an appellant wishes to rely upon his medical condition for the purposes of adjourning a hearing, he must adduce sufficient/satisfactory evidence by way of a medical certificate/report issued by a medical practitioner.

## **12. Determination of Appeal Without a Hearing**

12.1 After having taken into consideration the general principles and considerations stated in paragraphs 8.1 to 8.6 above, under section 12 of Schedule 1A to the Ordinance, the Board may determine an appeal without a hearing if, having regard to the material before it and the nature of the issues raised, the Board is satisfied that the appeal can be justly determined without a hearing.

## **13. Medical Examination**

13.1 Under section 37ZC of the Ordinance, if the physical or mental condition of the appellant is in dispute and is relevant to the consideration of a torture claim -

- (a) upon an appeal, the Board may require the appellant to undergo a medical examination to be conducted by a medical practitioner as arranged by an immigration officer; or



- (b) an immigration officer may, at the request of the appellant, arrange for a medical examination of the appellant to be conducted by a medical practitioner.

Once the immigration officer has made the arrangements, he must notify the appellant of the date, time and place where the medical examination will take place.

13.2 If a medical examination is arranged, the appellant must attend the examination.

13.3 The appellant must disclose to the immigration officer and (on an appeal) the Board the medical report of any examination arranged for the appellant pursuant to section 37ZC(3) of the Ordinance.

#### **14. Credibility of Appellant**

14.1 Under section 37ZD of the Ordinance, in considering a torture claim, an immigration officer or the Board may take into account, as damaging the appellant's credibility, the following behaviour of the appellant -

- (a) any behaviour that the Board considers is designed to, or is likely to be designed to -
  - (i) conceal information;
  - (ii) mislead; or
  - (iii) obstruct or delay the handling or determination of the appellant's torture claim;
- (b) a failure to take advantage of a reasonable opportunity to claim non-refoulement protection in respect of a torture risk State while in a place outside Hong Kong to which the Convention applies (other than a torture risk State);
- (c) if the appellant is a person who is subject or liable to removal, a failure to make the claim when, or as soon as practicable after -
  - (i) the appellant has become subject or liable to removal; or
  - (ii) the events on which the claim is based have taken place, whichever is later;
- (d) if the appellant is a person whose surrender is requested in surrender proceedings, a failure to make the claim when, or as soon as practicable after -
  - (i) it comes to the appellant's notice that the surrender proceedings have been commenced; or
  - (ii) the events on which the claim is based have taken place,

whichever is later; and

- (e) a failure to make the claim before being arrested or detained under a provision of the Ordinance, unless -
  - (i) the appellant had no reasonable opportunity to make the claim before the arrest or detention; or
  - (ii) the claim relies wholly on matters arising after the arrest or detention.

14.2 Furthermore, without limiting paragraph 14.1(a) above, any behaviour described in any of the following paragraphs is behaviour within the meaning of paragraph 14.1(a) above -

- (a) the production of a false document as proof of the appellant's identity;
- (b) a failure, without reasonable excuse, to produce a document as proof of the appellant's identity on request by an immigration officer;
- (c) the destruction, alteration or disposal, without reasonable excuse, of a passport, ticket or other document containing information about the route of the appellant's travel to Hong Kong;
- (d) a failure, without reasonable excuse, to provide the information or documentary evidence required by an immigration officer under section 37ZB(1)(a) of the Ordinance;
- (e) a failure, without reasonable excuse, to -
  - (i) attend an interview scheduled by an immigration officer under section 37ZB(1)(b) of the Ordinance; or
  - (ii) provide information or answer any question put by an immigration officer at the interview;
- (f) a failure, without reasonable excuse, to make a full disclosure of the material facts in support of the torture claim, including any document supporting those facts, before the date fixed for the first interview scheduled by an immigration officer under section 37ZB(1)(b) of the Ordinance;
- (g) a failure, without reasonable excuse, to -
  - (i) attend a medical examination arranged under section 37ZC of the Ordinance; or
  - (ii) disclose to an immigration officer and (on an appeal) the Board the medical report of the examination;

- (h) a failure, without reasonable excuse, to comply with any requirement, procedure or condition (including any time limit) -
  - (i) prescribed by Part VIIC of the Ordinance; or
  - (ii) required or specified by any person under Part VIIC of the Ordinance.

14.3 Notwithstanding paragraphs 14.1 and 14.2 above, the Board may take into account any other behaviour of the appellant as damaging the appellant's credibility.

14.4 Whether or not an appellant's credibility in a claim has been damaged would depend on an overall assessment of all the relevant circumstances of the case.

## **15. Evidence Considered by the Board**

15.1 When the Board reviews the merits of a case in an appeal under section 37ZR of the Ordinance, it may consider the same evidence that was before an immigration officer or evidence that was not before an immigration officer (see section 18 of Schedule 1A to the Ordinance).

15.2 The Board may consider evidence that was not before an immigration officer if -

- (a) the evidence relates to matters that have occurred after the decision being appealed against was made;
- (b) the evidence was not reasonably available before the decision being appealed against was made; or
- (c) the Board is satisfied that exceptional circumstances exist that justify the consideration of the evidence.

15.3 Under section 20 of Schedule 1A to the Ordinance, in an application for a revocation decision under section 37ZM of the Ordinance, the Board has the power to review the merits of the case and may consider any evidence that the Board considers relevant.

## **16. Notice of New Evidence**

16.1 Under section 19 of Schedule 1A to the Ordinance, a party to an appeal who wishes to present any evidence under section 18(2) of Schedule 1A to the Ordinance at a hearing must file with the Board a written notice to that effect and serve a copy of the notice on the other party.

16.2 The notice must indicate the nature of the evidence and explain why the evidence was not made available to the immigration officer before the decision being appealed against was made.

16.3 Applications to adduce new evidence must be made in sufficient time in order that the application can be dealt with properly and in time for inclusion in the hearing bundle (please refer to paragraph 9.7 above and the Practice Direction No. 1 in Part 3). Otherwise, the Board may refuse the application. The Board may also refuse to adjourn the hearing for the purpose of dealing with new evidence that is not adduced in sufficient time.

## **17. Witnesses**

17.1 Under section 22 of Schedule 1A to the Ordinance, the Board may, on an application by a party to an appeal, or on its own motion, direct a person to attend as a witness at the hearing of the appeal at the time and place the Board specifies, and answer any questions, give evidence on oath, or produce any document in the person's possession, custody or power that may relate to any issue in the appeal.

## **18. Decision of the Board**

18.1 On an appeal against a decision referred to in section 37ZR of the Ordinance, the Board may confirm or reverse that decision.

18.2 On an application for a revocation decision under section 37ZM of the Ordinance, the Board may allow or refuse the application.

18.3 The Board must give its Decision with reasons in writing.

18.4 The Board's Decision is final.

18.5 The Decision will be sent by post addressed to the appellant's usual or last known place of abode or business or his legal representative's place of business or correspondence address if he is legally represented. Where considered appropriate by the Board, the Decision may also be served on the appellant personally. A copy of the Decision will be sent to the Director.

## **19. Revocation**

19.1 For the reasons set out in section 37ZN of the Ordinance, even after a claimant's torture claim may have been substantiated or accepted, it may still be revoked in the circumstances set out in section 37ZL or 37ZM of the Ordinance.

19.2 The grounds for revocation are set out in section 37ZN of the Ordinance. They are -

- (a) any information or documentary evidence submitted in support of the claim is false or misleading and the false or misleading information or evidence is material to the substantiation of the claim;
- (b) the information was not disclosed to an immigration officer or (on an appeal) the Board and the undisclosed information would undermine, to a material extent, the merits of the claim; and/or
- (c) the torture risk giving rise to the claim has ceased to exist due to changes in the circumstances of the claimant or the torture risk State.

*Revocation by an immigration officer*

19.3 If an immigration officer decides to revoke on the basis of a ground specified in section 37ZN of the Ordinance, the immigration officer must follow the procedure as set out in section 37ZL of the Ordinance. Before revocation, the immigration officer must give written notice to the claimant. In his written notice, the immigration officer must state the reasons why he proposes to revoke the decision; and the claimant may, within 14 days after the notice of proposed revocation is given, make his objections in an objection notice (see section 37ZL(2)(b) of the Ordinance). After giving the claimant written notice, the immigration officer may proceed to make a revocation decision -

- (a) if the claimant fails to give an objection notice pursuant to section 37ZL(2)(b) of the Ordinance; or
- (b) after the immigration officer has considered the claimant's objection notice.

If the immigration officer makes a revocation decision, by section 37ZL(3) of the Ordinance he must inform the claimant of that decision in a written notice, giving his reasons for that decision, and informing the claimant of his right of appeal pursuant to section 37ZR of the Ordinance.

*Revocation by the Board*

19.4 If the Board had made a Decision that reversed the decision of an immigration officer under section 37ZI(1)(b) of the Ordinance, an immigration officer may apply to the Board pursuant to section 37ZM(1) of the Ordinance to revoke that Decision on the basis of any of the grounds specified in section 37ZN of the Ordinance. However, before the immigration officer applies to the Board to exercise its power of revocation, the immigration officer must give the claimant written notice of his intended application. In his written notice, the immigration officer must state the reasons for the intended application, and he must allow 14 days for the claimant to make his objections in an objection notice (referred in section 37ZM(2)(b) of the Ordinance). After giving the claimant written notice of his intended application to the Board, the immigration officer may proceed -

- (a) if the claimant fails to give an objection notice pursuant to section 37ZM(2)(b) of the Ordinance; or
- (b) after the immigration officer has considered the claimant's objection notice.

In his application to the Board, the immigration officer must use the specified form (**Appendix B**)<sup>7</sup> and a copy of his notice of application must be served on the claimant.

## **20. Deemed Withdrawal of a Torture Claim on the Claimant/Appellant's Departure**

20.1 Under section 37ZF of the Ordinance, a torture claim (whether a claim pending final determination or a substantiated claim) made by a claimant/appellant who is subject or liable to removal must be treated as withdrawn if he (for whatever reason) leaves Hong Kong. A torture claim that is treated as withdrawn under such circumstances must not be re-opened.

20.2 If a person leaves Hong Kong after he has given notice of withdrawal of his torture claim under section 37ZE(1) of the Ordinance, the claim must be treated as having been withdrawn and must not be re-opened.

## **21. Withdrawal of an Appeal**

21.1 An appeal may be withdrawn by the appellant by his filing of a written notification with the Board. The Board will, upon consideration of the written notification, direct the Secretariat to confirm with the appellant in writing that the appeal has been withdrawn and to inform him that no further action will be taken on his appeal. For the avoidance of doubt, where an appeal is withdrawn (including by the appellant's written notification and/or by his departure from Hong Kong), it is treated as withdrawn in entirety on all the applicable grounds under the Unified Screening Mechanism.

## **22. Record of Proceedings**

22.1 Under section 24 of Schedule 1A to the Ordinance, the Board must keep a record or summary of proceedings and of its Decisions in such form as the Chairperson may determine.

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<sup>7</sup> The same form will be used for making an application to an adjudicator to revoke the adjudicator's previous decision that reversed the immigration officer's decision rejecting a non-refoulement claim based on all applicable grounds other than a torture risk. The applicable grounds include (i) risk of violation of an absolute and non-derogable right under the Hong Kong Bill of Rights (including "right to life" under Article 2 and "right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment" under Article 3) as set out under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383); and (ii) risk of persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

22.2 All hearings will be audio recorded. The master copy of the record of hearing will be kept by the Board for record purposes.

### **23. Correction of Errors**

23.1 Under section 25 of Schedule 1A to the Ordinance, the Board may correct a Decision made by it to the extent necessary to rectify an error of translation or transcription or a clerical error.

### **24. Miscellaneous**

#### *Special Needs of Appellants*

24.1 Appellants are required to indicate their special needs, if any, in Section 1(K) of the Notice of Appeal/Petition at **Appendix A**. The Board will take steps to accommodate such special needs as far as practicable.

#### *Appellants in Custody*

24.2 As a general rule, an appellant should attend the hearing. If an appellant is in custody, the Director's representative must inform the Board and the Board will request the Director, the Commissioner of Correctional Services and/or other relevant authorities to bring the Appellant to the hearing.

#### *Confidentiality*

24.3 Unless the appellant himself gives an express consent for such disclosure, the Board must treat information provided by an appellant in the course of an appeal as confidential. The Board can only use such information for arriving at a Decision. The Board must not release any information indicating that the appellant has made a torture claim to a third party.

24.4 Notwithstanding paragraph 24.3 above, the Board may disclose an appellant's information to other HKSAR government departments/bureaux, agencies, international organisations or other bodies if such information is necessary for immigration or nationality purposes, or to enable them to carry out their functions, or to secure entry facilities for repatriation should the appeal fail.

### *Criminal Liability*

24.5 Under section 42(1)(a) of the Ordinance, any person who makes or causes to be made to an immigration officer, immigration assistant or any other person lawfully acting under or in the execution of Part IB, II, III, IV or VIIC of the Ordinance any statement or representation which he knows to be false or does not believe to be true shall be guilty of an offence. This offence provision covers appellants who make or cause to be made any false statement or representation to the Board in the appeal process.

24.6 Under section 43A of the Ordinance, a person who, without reasonable excuse, disrupts the proceedings of the Board commits an offence and is liable to a fine at level 3 and to imprisonment for 6 months.

### *Privileges and Immunities of Members*

24.7 Under section 26(1) of Schedule 1A to the Ordinance, in the performance of their functions under Part VIIC of the Ordinance, the Chairperson, Deputy Chairperson and other members of the Board have the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that court.

### *Typhoons and Rainstorm Warnings*

24.8 If tropical cyclone warning signal No. 8 or above or the black rainstorm warning as issued by the Hong Kong Observatory is in force within two hours prior to the commencement of a hearing, the hearing will be postponed to a date and time to be fixed by the Board. The Board will notify the parties of the details of the adjourned hearing as soon as practicable.

### *Documents Served by Post*

24.9 In relation to documents served by post by the appellant, the computation of time in paragraphs 1, 2 and 3 of PD 19.2 of the High Court applies with appropriate modifications/adaptations.



**PART 3**  
**PRACTICE DIRECTIONS**

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**PRACTICE DIRECTION No. 1**  
**ADDUCING NEW EVIDENCE**

1.1 For the avoidance of doubt, this Practice Direction only relates to new evidence within the meaning of section 18(2) of Schedule 1A to the Ordinance that should have been submitted together with the appellant's notice of appeal. (The appellant should have previously disclosed all the material facts and documents in the substantiation of his torture claim as stipulated in section 37ZA of the Ordinance.)

1.2 An application to adduce new evidence by way of a written notice under section 19 of Schedule 1A to the Ordinance must be made and filed with the Board in sufficient time for the application to be dealt with properly.

1.3 The written notice must comply with section 19(2) of Schedule 1A to the Ordinance.

1.4 After the notice has been filed with the Board, a copy of the notice must be served on the other side, allowing the other side sufficient time and opportunity to respond.

1.5 If the appellant does not allow sufficient time for the other side to respond to the application, the Board may disallow the application or refuse to adjourn the hearing.

Dated this 12<sup>th</sup> September 2016

(Ms Betty Kwan)  
Chairperson

**PRACTICE DIRECTION No. 2**  
**PREPARATION FOR HEARINGS**

*Conferring in advance of the hearing*

1.1 It is in the interest of all parties and in the wider public interest that hearings proceed as fairly, quickly and efficiently as possible.

1.2 The appellant must inform the Board at least 5 working days before the hearing is held of any change of legal representative or witness(es).

1.3 If the appellant is represented, his legal representative and the Director's representative should confer and consider as early as possible in advance of the hearing what agreement, if any, that can be reached on the issues.

1.4 A list of ***agreed issues*** is an efficient device for focusing on the remaining ***live issues***. Such lists will be of assistance to the Board, and help save the time and effort of all concerned.

1.5 The list of ***agreed issues*** and the list of ***live issues*** should be placed in the hearing bundle.

*Further Statement of the Appellant*

2. The appellant may adduce a further statement for the oral hearing, but the further statement must be directed at the live issues and should not be a repetition of what is already contained in his earlier statements.

*Skeleton Arguments/Submissions*

3.1 The representatives of the parties should also prepare their skeleton arguments/submissions in good time so that these can be included in the hearing bundle.

3.2 Skeleton arguments/submissions should be directed at the live issues in the appellant's case.

*Contents of the hearing bundle*

4.1 An application to adduce new evidence should be made in accordance with Practice Direction No. 1.

4.2 The documents relied upon by the parties shall be incorporated by the Director's representative into a paginated and indexed hearing bundle.

4.3 If the parties cannot agree upon the documents to be included in the hearing bundle, a written application can be made to the Board for directions to be given generally or pursuant to section 14(2) of Schedule 1A to the Ordinance. Normally only those documents and materials relating to the live issues or relevant to the appellant's case need be placed in the hearing bundle.

4.4 Copies of the hearing bundle shall be sent to the Board and to the appellant no later than 5 working days prior to the date of the hearing.

Dated this 3rd day of March 2014

(Ms Betty Kwan)  
Chairperson

**PRACTICE DIRECTION No. 3**  
**WORK AND HEARING ARRANGEMENTS**  
**UNDER INCLEMENT WEATHER CONDITIONS**

1.1 The work arrangements of the Board under inclement weather conditions will be as follows:

- (a) When a No. 8 or higher Tropical Cyclone Warning Signal or a Black Rainstorm Warning Signal has been issued **before office hours**:
  - (i) If the signal is lowered to No. 3 (or below) or cancelled at or before 6:45 a.m., the Board will open as usual in the morning;
  - (ii) If the signal is lowered to No. 3 (or below) or cancelled after 6:45 a.m. and not less than 2 hours before the end of office hours, the Board will open within 2 hours after the signal is lowered or cancelled;
  - (iii) Notwithstanding paragraphs (i) and (ii) above, in the event that the Government has announced to the public that, due to certain extreme conditions (the “extreme condition”), employees should be advised to stay in their places or safe locations for another two hours (or longer if extended) after the No. 8 or higher Tropical Cyclone Warning Signal has been lowered to No. 3 (or below) or cancelled, the Board will follow the advice accordingly. If the “extreme condition” is cancelled not less than 2 hours before the end of office hours, the Board will open within 2 hours after the “extreme condition” is cancelled.
- (b) If a No. 8 or higher Tropical Cyclone Warning Signal is issued **during office hours**, the Board will close immediately. If the signal is lowered to No. 3 (or below), or an “extreme condition” in force is cancelled, whichever is the later, not less than 2 hours before the end of office hours, the Board will re-open within 2 hours after the signal or the “extreme condition” is lowered or cancelled.
- (c) In any event, the Board will remain closed if a No. 8 or higher Tropical Cyclone Warning Signal is lowered to No. 3 (or below), or a Black Rainstorm Warning Signal or the “extreme condition” is lowered or cancelled, whichever is the later, less than 2 hours before the end of office hours.

1.2 The hearing arrangements under inclement weather conditions will be as follows:

- (a) If a No. 8 or higher Tropical Cyclone Warning Signal is issued **during a hearing**, the hearing will stop immediately. If appropriate, the Board will give directions for the resumed hearing of the appeal.
- (b) When a No. 8 or higher Tropical Cyclone Warning Signal is lowered to No. 3 (or below), or a Black Rainstorm Warning Signal or an “extreme condition” in force is lowered or cancelled, whichever is the later, **at or before 8:00 a.m.**, the hearing of the appeal will commence as scheduled.
- (c) When a No. 8 or higher Tropical Cyclone Warning Signal is lowered to No. 3 (or below), or a Black Rainstorm Warning Signal or the “extreme condition” in force is lowered or cancelled, whichever is the later, **at or before 12:30 p.m.**,
  - (i) the hearing of the appeal scheduled for the morning session only will be adjourned and postponed to a date and time to be fixed by the Board;
  - (ii) the hearing of the appeal scheduled for the afternoon session only will commence as scheduled; or
  - (iii) the hearing of the appeal scheduled for the whole day will be postponed to commence at 2:30 p.m..
- (d) When a No. 8 or higher Tropical Cyclone Warning Signal is lowered to No. 3 (or below), or a Black Rainstorm Warning Signal or the “extreme condition” in force is lowered or cancelled, whichever is the later, **after 12:30 p.m.**, the hearing will remain adjourned for the whole day. The hearing will be postponed to a date and time to be fixed by the Board.

Dated this 28<sup>th</sup> day of August 2019

(Ms Betty Kwan)  
Chairperson