

**THE PRACTICE AND PROCEDURAL GUIDE OF
THE ADMINISTRATIVE
NON-REFOULEMENT CLAIMS PETITION SCHEME
("Petition Guide")**

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PART 1
PRELIMINARY

1. Practice and Procedural Guide of the Administrative Non-refoulement Claims Petition Scheme (“Petition Guide”)

1.1 This Petition Guide is issued by the Chairperson of the Torture Claims Appeal Board (“**TCAB**”) who has been, in his personal capacity, delegated by the Chief Executive (the “**CE**”) of the Hong Kong Special Administrative Region (“**HKSAR**”) with the authority under the Basic Law of HKSAR Article 48(13)¹ (“**BL48(13)**”) to determine the practice and procedure of the Administrative Non-refoulement Claims Petition Scheme (the “**Petition Scheme**”). This Petition Guide sets out the rules and guidelines to be followed by the decision-makers (the “**Adjudicators**”) handling petitions, the petitioners, the immigration officers, legal representatives acting for the petitioners and immigration officers, and the staff members of the Non-refoulement Claims Petition Office (the “**Petition Office**”) as to how petitions are to be processed and determined under this Petition Scheme. This Petition Guide will be subject to review from time to time in the light of the operational experience and the contents herein will require elaboration and/or amendment over time or as necessitated by circumstances. This Petition Guide and any subsequent amendments made will be uploaded onto the Internet website.

1.2 The Petition Scheme is operated to review the decisions made by the immigration officers on non-refoulement claims in relation to all applicable grounds other than torture risk under Part VIIC of the Immigration Ordinance, Cap. 115 (the “**Ordinance**”). These applicable grounds include risk of violation of an absolute and non-derogable right under the Hong Kong Bill of Rights (the “**HKBOR**”) (including “right to life” under Article 2 and “right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment” (“**torture or CIDTP**”) under Article 3) as set out under section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383 (the “**HKBORO**”); 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 (the “**RC**”) and its 1967 Protocol. For the avoidance of doubt, the incumbent Members of the TCAB (as established under section 37ZQ of the Ordinance) have been, in their personal capacity, delegated with the authority under BL48(13) to hear and determine the aforesaid petitions. Nothing in this Petition Guide shall be regarded as having been derived from the statutory powers conferred upon them under the Ordinance. Conversely, nothing in this Petition Guide shall affect the statutory powers to be exercised by the TCAB Members in handling and determining torture claims pursuant to the provisions of the Ordinance.

¹ Basic Law of HKSAR Article 48(13) provides that the Chief Executive of the HKSAR shall exercise the powers and functions to handle petitions and complaints.

13 Under the Unified Screening Mechanism (the “USM”) which has been introduced by the HKSAR Government with effect from 3 March 2014, this Petition Scheme is to be operated in parallel with the statutory torture claims appeal mechanism to ensure that an appeal/petition filed by a claimant for non-refoulement protection will be handled in a uniform way.

14 Where a non-refoulement claim, made on any applicable grounds, is found substantiated by an immigration officer, the Immigration Department of the HKSAR Government (the “ImmD”) will provide non-refoulement protection to the claimant. Where a claimant is unsuccessful in obtaining non-refoulement protection after the first-tier screening by the ImmD and files an appeal/petition, he will be deemed to be appealing/petitioning against the first-tier decision on all applicable grounds. The TCAB Member/Adjudicator will review all grounds and determine whether or not the appellant/petitioner shall be granted non-refoulement protection under any of these applicable grounds.

2 Interpretation

2.1 In this Petition Guide, unless otherwise stated,

- (a) “**Adjudicator**” means a Member of the TCAB who has been in his personal capacity delegated with the powers under BL48(13) to hear and determine petitions in relation to non-refoulement claims made on all applicable grounds other than torture risk. Where a petition is to be handled and determined jointly by three Adjudicators, the word “Adjudicator” in its singular form also represents a three-adjudicator panel;
- (b) “**all applicable grounds**” means all grounds set out under paragraphs 3.1 to 3.3 below;
- (c) “**any applicable grounds**” means any ground set out under paragraphs 3.1 to 3.3 below;
- (d) “**Administrative Non-refoulement Claims Petition Scheme**” (the “**Petition Scheme**”) means a petition scheme devised by the HKSAR Government under which Adjudicators are delegated with BL48(13) powers to determine petitions and the practice and procedure on handling such petitions;
- (e) “**appeal**” means an appeal made under section 37ZR or an application for a revocation decision under section 37ZM of the Ordinance;
- (f) “**BOR 2**” means Article 2 of section 8 of the HKBORO;
- (g) “**BOR 2 risk**” means risk to a person’s right to life under BOR 2;
- (h) “**BOR 3**” means Article 3 of section 8 of the HKBORO;
- (i) “**BOR 3 risk**” means risk of being subjected to torture or CIDTP under BOR 3;
- (j) “**CAT**” means the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (k) “**CFA**” means the Court of Final Appeal;

- (l) “**Chairperson**” means the Chairperson of the TCAB appointed under section 2 of Schedule 1A of the Ordinance who has been in his personal capacity delegated with the powers under BL48(13) to perform various functions in this Petition Scheme;
- (m) “**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;
- (n) “**Decision**” means a decision made by the Adjudicator in determining a petition under this Petition Scheme;
- (o) “**Directions Hearing**” means a hearing ordered by the Adjudicator for the purpose of giving directions to parties in relation to a petition under this Petition Scheme;
- (p) “**Director**” means the Director of Immigration of the HKSAR Government unless otherwise specified;
- (q) “**he**” and “**his**” include the feminine gender;
- (r) “**ICCPR**” means the International Covenant on Civil and Political Rights;
- (s) “**non-refoulement claim**” means a claim for non-refoulement protection in Hong Kong;
- (t) “**Non-refoulement Claims Petition Office**” (the “**Petition Office**”) means an office established for providing administrative and secretariat support to the Adjudicators under the Petition Scheme and is operated by the same team of staff members of the TCAB secretariat;
- (u) “**non-refoulement protection**”, in relation to a claimant, means protection against expulsion, return or surrender of the claimant to a Risk State;
- (v) “**Notice of Appeal/Petition**” means the prescribed form at **Appendix A** to this Petition Guide which shall be used for lodging a petition under this Petition Scheme. Under the USM, the same prescribed form shall be used for filing a torture claim appeal under the Ordinance;
- (w) “**Ordinance**” means the Immigration Ordinance, Cap. 115, unless otherwise specified;
- (x) “**persecution risk**” means a persecution risk as explained in paragraph 6.5 of this Petition Guide;
- (y) “**petitioner**” means a claimant who is aggrieved by and has made a petition under BL48(13) against an immigration officer’s decision (i) not to reopen a non-refoulement claim; (ii) rejecting a non-refoulement claim; or (iii) revoking an immigration officer’s previous decision accepting a non-refoulement claim as substantiated, in relation to the claimant’s non-refoulement claim made on applicable grounds other than torture risk;
- (z) “**PPP**” means a procedural note entitled “Principles, Procedures and Practice Directions of the Torture Claims Appeal Board” issued by the Chairperson pursuant to his statutory power under section 16 of Schedule 1A of the Ordinance to give general directions on the practice and procedure of the TCAB in handling statutory torture claim appeals;
- (aa) “**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;
- (ab) “**Risk State**” means another country in respect of which the claimant has made a non-refoulement claim;
 - (ac) “**substantiated claim**” means a non-refoulement claim which is substantiated in the manner described in paragraphs 21.2 and 21.3 of this Petition Guide;
 - (ad) “**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;
 - (ae) “**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) of the Ordinance;
 - (af) “**Torture Claims Appeal Board**” (the “**TCAB**”) means an Appeal Board established under section 37ZQ of the Ordinance;
 - (ag) “**torture or CIDTP**” means torture or cruel, inhuman or degrading treatment or punishment under BOR 3;
 - (ah) “**torture risk**” means a risk of being subjected to torture as defined under section 37U(1) of the Ordinance;
 - (ai) “**UNHCR**” means the United Nations High Commissioner for Refugees;
 - (aj) “**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.

3 Background

Torture under Part VIIC of the Ordinance

3.1 The CAT has been extended to Hong Kong since 1992. Article 3(1) of the CAT 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. In this regard, claims for non-refoulement protection under Article 3 of the CAT used to be handled by the ImmD under an administrative screening mechanism prior to the implementation of the statutory scheme under Part VIIC of the Ordinance².

Absolute and non-derogable rights under the HKBORO

3.2 In December 2012, the CFA ruled in *Ubamaka v the Secretary for Security* [2013] 2 HKC 75 (“*Ubamaka*”), *inter alia*, that if there are substantial grounds

² The statutory scheme has been in place since 3 December 2012 with the commencement of the Immigration (Amendment) Ordinance 2012.

for believing that there is a personal and substantial risk of an absolute and non-derogable right under the HKBOR as set out under section 8 of the HKBORO³ of a person 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 HKSAR Government from proceeding to remove/deport that person to that country⁴. 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 BOR 2 and right not be subjected to torture or CIDTP under BOR 3).

Persecution risks with reference to the Refugee Convention

33 The RC and its 1967 Protocol have never been applied to Hong Kong. The HKSAR Government has a long-established policy of not granting asylum or determining refugee status. In March 2013, the CFA ruled, in *C & Ors v the Director of Immigration and Another* [2013] 4 HKC 563 (“*C & Ors*”), that in exercising the powers to execute the removal or deportation of a person to a State of putative persecution, the ImmD has to assess independently whether a person has established a well-founded fear of persecution.

The Screening Procedures

34 The administrative screening mechanism for torture claims was subjected to reviews from time to time having regard to relevant changes in law and procedures. In *Secretary for Security v Sakthevel Prabakar* [2004] 7 HKCFAR 187, the CFA held that high standards of fairness must be demanded in the determination of torture claims as such determination is plainly one of the momentous importance to the individual concerned given that to him his life and limb could be in jeopardy and his fundamental human right not to be subjected to torture is involved. In *FB v Director of Immigration and Secretary for Security* [2009] 2 HKLRD 346, the Court of First Instance, when considering the fairness of the procedures of the then administrative scheme for torture claims, identified a number of shortcomings in the then prevailing administrative procedures. In late December 2009, an enhanced administrative screening mechanism with improvements made to the relevant procedures to ensure high standards of fairness was put in place.

³ The right in question in *Ubamaka* was the right not to be subjected to torture or CIDTP.

⁴ See paras. 136 and 137 read together with para. 160 of *Ubamaka*.

35 In July 2012, the Immigration (Amendment) Ordinance 2012 was enacted to underpin the enhanced administrative mechanism by way of legislation, introducing a new Part VIIC into the Ordinance setting out the procedures by which torture claims are to be handled. Part VIIC of the Ordinance provides for a statutory process for determining torture claims made by persons in Hong Kong including the establishment of a statutory appeal board, i.e. the TCAB⁵ to hear appeals against refusal decisions and related matters. The statutory scheme came into operation on 3 December 2012⁶.

36 In view of the CFA's judgments in *Ubamaka* and *C & Ors*, the ImmD will withhold removing or deporting any person to another country where the person has made a claim on ground of a risk of violation of his absolute and non-derogable rights under the HKBOR (e.g. right to life under BOR 2 and right not to be subjected to torture or CIDTP under BOR 3), and/or a persecution risk until his claim(s) have been finally determined in a manner that satisfies high standards of fairness. Where any of these claims, including a torture claim under the Ordinance, is substantiated, the ImmD will provide non-refoulement protection to the claimant.

37 The HKSAR Government has introduced administrative procedures to expand the statutory torture claims screening mechanism into a USM. Under the USM, the CE has delegated his powers under BL48(13) to Members of the TCAB to hear and determine petitions in relation to claims made on all applicable grounds other than torture risk⁷. Appeals/petitions against ImmD's refusal decisions on non-refoulement claims can therefore be handled in one go by qualified persons independently in a fair and effective manner. On 7 February 2014, the HKSAR Government announced publicly the launch of the USM with effect from 3 March 2014.

4 The Statutory Appeal Mechanism and the Administrative Petition Mechanism

4.1 As stated in paragraph 1.3 above, the statutory appeal mechanism and the administrative petition mechanism will operate in parallel to review non-refoulement claims under a unified procedural framework that fulfills high standards of fairness. The practice and procedures (including the various time limits) specified in this Petition Guide

⁵ Under section 37ZQ(2) of the Ordinance, the function of the TCAB is to hear and determine: (a) an appeal made under section 37ZR (i.e. in respect of an immigration officer's decision not to re-open a torture claim, rejecting a torture claim or revoking decision made by an immigration officer to accept a claim as substantiated); and (b) an application for a revocation decision under section 37ZM (i.e. revocation of TCAB's decision to reverse an immigration officer's decision rejecting torture claim).

⁶ As the statutory scheme is for determining claims made under the CAT, it is defined in Part VIIC of the Ordinance that the CAT refers to the one adopted by the General Assembly of the United Nations as applied to Hong Kong. See section 37U(1) of the Ordinance.

⁷ In relation to non-refoulement claims made on all applicable grounds other than torture risk, TCAB Members (in their capacity as Adjudicators) have been delegated with the powers under BL48(13) to determine petitions made by an aggrieved person against an immigration officer's decision (i) not to re-open a non-refoulement claim; (ii) rejecting a non-refoulement claim; or (iii) revoking an immigration officer's previous decision. They are also empowered to revoke their own previous decisions upon an application by an immigration officer.

will therefore closely mirror those specified in the Ordinance where applicable. A note in square bracket (e.g. [*cf. s.37xx*]) has been inserted at the end of the relevant paragraphs to denote the corresponding section(s) in the Ordinance for ease of cross-reference.

4.2 Whilst both the statutory appeal mechanism and administrative petition mechanism will be operated in parallel, nothing in this Petition Guide shall affect the validity of the PPP.

5. Scope of Review in relation to Persecution Risk in the Petition Proceedings

5.1 The RC and its 1967 Protocol do not apply to the HKSAR. Insofar as petition on the ground of persecution risk is concerned, any Decisions must be confined to a determination as to whether the petitioner has a well-founded fear of being persecuted in the manner as explained in paragraph 6.5 below. The Adjudicators have no power to determine the refugee status of anyone. The Adjudicators or the Petition Office will not disclose the Decisions or any information relating to the petition proceedings to the UNHCR. It would be for the ImmD, being a party to the petition, to consider passing any relevant information to the UNHCR if the petitioner's non-refoulement claim has been substantiated on the ground of, inter alia, persecution risk.

PART 2
PRACTICE AND PROCEDURE

6. Grounds of Petition under the Petition Scheme

Absolute and non-derogable rights under HKBOR (including “right to life” under BOR 2 and “right not be subjected to torture or CIDTP” under BOR 3)

6.1 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 **ICCPR**, which the HKBORO implements). In *Ubamaka*⁸, 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*⁹ 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.

6.2 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 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.

6.3. Not all the rights under the HKBOR are absolute and non-derogable entailing non-refoulement obligation on the part of the HKSAR Government¹⁰. Non-refoulement protection will be afforded to claimants who on substantial grounds will be subject to real and personal risks on any applicable grounds.

⁸ See para. 172 and 173 of *Ubamaka*.

⁹ See para. 174 of *Ubamaka*.

¹⁰ See para. 135 of *Ubamaka*.

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

6.4 Drawing reference from relevant instruments and case law¹¹, 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 nationality¹² 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 opinion¹³ should he be expelled or returned to the frontiers of a Risk State.

6.5 Protection against risk to persecution is not absolute. In a suitable case, the ImmD may insist on refoulement¹⁴. Some considerations that may be taken 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.

¹¹ See para. 63 of *C & Ors*.

¹² 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.

¹³ 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.

¹⁴ Para. 42 of *C & Ors*.

7. Claiming Non-refoulement Protection in Hong Kong

- 7.1 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 right to land in, or right to return to, any other state in which he would be entitled to non-refoulement protection; or
 - (b) the person whose surrender is requested in surrender proceedings.
[*cf. s.37W (1) & (2)*]

8. Notice of Appeal/Petition and Duties of Petitioner

8.1 An unsuccessful claimant who is aggrieved by an immigration officer's decision (in relation to any applicable grounds) (i) not to re-open a non-refoulement claim; (ii) rejecting a non-refoulement claim; or (iii) revoking an immigration officer's previous decision accepting a non-refoulement claim as substantiated may file a petition under this Petition Scheme. His appeal under Part VIIC of the Ordinance will be processed and determined together. He must file his petition within 14 days after notice of the decision is given to him. In this regard, late filing of the petition may be allowed by the Adjudicator if he is satisfied that by reason of special circumstances, it would be unjust not to allow the late filing of the notice. [*cf. ss.37ZS (1) & 37ZT (3)*]

8.2 Under this Petition Scheme, all petitions must be filed using the Notice of Appeal as specified under section 37ZS(2) of the Ordinance. Under this Petition Guide and for the purpose of this Petition Scheme, the designated form to be used for filing a petition is the Notice of Appeal/Petition. [*cf. s.37ZS(2)*]

8.3 The Notice of Appeal/Petition must be accompanied by a copy of the ImmD's notice of the decision being petitioned against. [*cf. s.37ZS(2)(b)*]

8.4 For the purpose of making a non-refoulement claim under this Petition Scheme, the burden of proof is on the petitioner to establish that he shall be afforded non-refoulement protection on any applicable grounds, were he to be expelled, returned or surrendered to the Risk State. It is the duty of the petitioner to substantiate his non-refoulement claim, and to this end, he must, upon filing of his petition, provide to the Adjudicator all information relevant to the claim and make prompt and full disclosure of all material facts in support of the claim, including any documents supporting those facts. He is also required to comply with the requirements, procedures and conditions (including any time limits) prescribed by this Petition Guide or required or specified by the Adjudicator. [*cf. s.37ZA (1)*]

85 In considering a non-refoulement claim, the Adjudicator may take into account the petitioner's behaviour referred to in paragraph 17 below as damaging his credibility. This also applies to the petitioner's behaviour during the first-tier screening. Petitioners should note that a failure, without reasonable excuse, to put forth the grounds in support of a petition (including any supporting documents) in the Notice of Appeal/Petition when filing a petition, or a failure, without reasonable excuse, to comply with any requirements, procedures and conditions (including any time limits) prescribed by this Petition Guide, or required or specified by the Adjudicator, may be taken as a behaviour damaging the petitioner's credibility. Notwithstanding that, being a petitioner with credibility damaged does not necessarily imply that the petition will be rejected upon finding of these behaviours.

86 The petitioner must also provide to the Petition Office both his residential address in Hong Kong and the correspondence address (if different from the residential address), and must notify the Petition Office in writing of any change as soon as practicable after the change. To facilitate communication with petitioners, by way of practice, petitioners should provide their contact telephone numbers and to notify the Petition Office of any subsequent change as soon as practicable. [*cf. s.37ZA (2)*]

87 Under this Petition Scheme, the service of notice or other document (howsoever described) in relation to the petition proceedings will follow the same rules as set out in section 37ZV of the Ordinance. [*cf. s.37ZV*]

88 As soon as practicable after receiving a Notice of Appeal/Petition, the Petition Office must serve a copy of the notice on the Director. [*cf. s.8(1) of Schedule 1A*]

89 Upon receipt of the Notice of Appeal/Petition from the Petition Office, the Director must, as soon as practicable, provide to the Petition Office and the petitioner (i) a copy of the completed non-refoulement claim form¹⁵; and (ii) a copy of the written record of any interview of the petitioner conducted by an immigration officer in considering the non-refoulement claim. [*cf. s.9(1)(a) of Schedule 1A*]

8.10 It is only when the Adjudicator has decided to allow the late filing of a Notice of Appeal/Petition that the Petition Office must serve a copy of the notice on the Director, and in that event the notice must be served as soon as practicable. [*cf. s.8(2) of Schedule 1A*]

¹⁵Under the USM, the non-refoulement claim form will be the torture claim form specified by the Director in accordance with s.37Y(4) of the Ordinance.

9. Late Filing of Notice of Appeal/Petition

91 If a Notice of Appeal/Petition 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. [*cf. s.37ZT(1)*]

92 The Adjudicator must decide, as a preliminary decision without a hearing, whether the Adjudicator allows the late filing of the Notice of Appeal/Petition, and in doing so, the Adjudicator may only take account of -

- (a) the statement of reasons stated in the application for late filing of the Notice of Appeal/Petition 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 Adjudicator.
[*cf. s.37ZT(2)*]

93 If the Adjudicator is satisfied that by reason of special circumstances, it would be unjust not to allow the late filing of the Notice of Appeal/Petition, the Adjudicator may allow the late filing of the notice and must, by written notice, inform the person filing the notice of the Adjudicator's Decision. [*cf. s.37ZT(3)*]

94 If the Adjudicator does not allow the late filing of the Notice of Appeal/Petition, the Adjudicator must, by written notice, inform the person filing the notice that the Adjudicator refuses the notice as it is filed out of time. [*cf. s.37ZT(4)*]

10. Practice and Procedure of the Petition Scheme

101 Under his delegated powers, the Chairperson may give directions, generally or in a particular case, on the practice and procedure in hearing and determining petitions. Subject to the above, Adjudicators may determine their own procedure in the hearing of a petition. [*cf. ss.16 & 17 of Schedule 1A*]

102 The Chairperson may also decide the order in which petitions and matters are to be heard or determined generally or in any particular circumstances which necessitate special arrangements to be made. [*cf. s.7 of Schedule 1A*]

103 Upon receipt of the Notice of Appeal/Petition, the Adjudicator will decide whether or not to hold a hearing to determine the petition having regard to the material before him and the nature of the issues raised.

104 A Directions Hearing may be ordered by the Adjudicator for the purpose of giving directions or determining any matters incidental to or in respect of the petition. The Adjudicator may subsequently set aside, vary or give further

directions after the Directions Hearing as he thinks fit.

105 The Petition Office must arrange for a Directions Hearing if so instructed by the Adjudicator. The Petition Office must inform the parties of the arrangements made.

106 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 Adjudicator may make such orders or directions as he 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.

11. Hearings

11.1 The Adjudicator may on paper or hold an oral hearing to make his own findings of fact and come to his own Decision. 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 11.2 to 11.6 below are applicable. The purpose of holding an oral hearing is not only to assist the Adjudicator in his decision-making, but also to reflect the petitioner's legitimate interest in being able to participate in a Decision with important implications for him, where he has something useful to contribute.

11.2 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 the petitioner's fundamental human right not to be subjected to torture is involved, high standards of fairness must be observed by the Adjudicator when making the Decision.

11.3 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.

11.4 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.

115 The Adjudicator 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 Adjudicator 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 Adjudicator to draw the petitioner's attention to matters that obviously require clarification or elaboration so that they can be addressed by the petitioner. On the other hand, there is no duty to keep on probing or inquiring where the objective circumstances make it reasonably clear that the petitioner and those representing him are aware of what he wanted to show and has already produced or mentioned. The exercise of determining whether a petition 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 petitioner should be given the benefit of any doubt, an oral hearing should be held.
- (b) The high standards of fairness would require the petitioner to be given an opportunity to be heard either orally or in writing where the Adjudicator considered there is anything in the petitioner's evidence or submission which is material to the determination of the petition. It is for the Adjudicator, in the exercise of his 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 Adjudicator is not sure, then an oral hearing or further submissions from the petitioner would help.
 - (ii) The Adjudicator 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 petition. An obvious situation is where the Adjudicator is aware of an important authority on a material point which has been omitted or touched on superficially only in the Notice of Appeal/Petition.
 - (iii) The material placed before the Adjudicator 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 Adjudicator drawing an inference adverse to the petitioner.
 - (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 his discretion to order an oral hearing, the Adjudicator should consider whether there is any advantage in holding an oral hearing as opposed to merely deciding the petition on paper (whether based on the original petition documents or based on the petition documents plus further written representations submitted at the request of the Adjudicator). By nature, written submissions do not afford the flexibility of oral presentations. They deprive the petitioner 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.

11.6 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 petitioner (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.

11.7 If the Adjudicator decides to hold a hearing, the Petition Office 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. [*cf. s.13 of Schedule 1A*]

11.8 The hearing is to be held in private unless the Adjudicator directs that it be held in public. [*cf. s.10 of Schedule 1A*]

11.9 Save for the circumstances set out in paragraph 11.10 below, a single Adjudicator selected by the Chairperson will preside at a hearing of a petition.

11.10 Having regard to the circumstances of a particular petition, the Chairperson may select 3 Adjudicators to hear and determine the petition. [*cf. s.6(2) of Schedule 1A*]

11.11 The Petition Office will inform both the Director and the petitioner 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 Petition Office 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).

11.12 Save for the circumstances specified in paragraph 11.13, all parties must appear either in person¹⁶ and/or by a legal representative at the hearing. If a party to a petition fails to attend a hearing, either in person or by a legal representative, the Adjudicator, on proof that the party has been served a notice of the hearing, may proceed to hear the petition in the absence of the party and determine the petition. [*cf. s.15(1) of Schedule 1A*]

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

11.14 If the petitioner fails to appear at the hearing, the Adjudicator may still determine his petition, but before doing so, the Adjudicator must -

- (a) give the party written notice of the Adjudicator's intention to do so; and
 - (b) state that the party may submit to the Adjudicator, 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.
- [*cf. s.15(2) of Schedule 1A*]

11.15 If the Adjudicator 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

¹⁶ In the context of the Director, "in person" refers to an immigration officer who is authorised by the Director to attend the hearing.

Adjudicator may proceed to determine the petition. [*cf. s.15(3) of Schedule 1A*]

11.16 If the Adjudicator 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 Adjudicator may re-fix the hearing of the petition to a new date, time and place. [*cf. s.15(4) of Schedule 1A*]

12 Matters to be Attended to Before a Hearing

121 If the petitioner 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 Adjudicator by producing a list of agreed issues.

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

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

124 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 12.3) relied upon by the Director and the petitioner and information as specified by the Adjudicator. [*cf. s.14(1) of Schedule 1A*]

125 The Adjudicator may require the petitioner to file with the Petition Office and serve on the Director a list of the witnesses the petitioner intends to call and statements of their evidence. [*cf. s.14(2) of Schedule 1A*]

126 The documents and submissions referred to in paragraphs 12.4 and 12.5 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 Adjudicator and to the petitioner no later than 5 working days prior to the date of the hearing.

127 The hearing bundle should include all the documents¹⁷ and submissions relied upon by the Director and the petitioner. As the Director must send copies of the hearing bundle to the Petition Office and the petitioner no later than 5 working days prior to the date of the hearing, in order to comply with aforesaid requirement, it is

¹⁷ It will only be necessary to insert the relevant parts of any document relied upon, together with the internet link.

the petitioner's responsibility to ensure that all his documents¹⁸ are sent to the Director in sufficient time for inclusion in the hearing bundle.

128 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 Adjudicator. 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"¹⁹. 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 Adjudicator and the other side to peruse the full document;
- (g) as the petitioner 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 Adjudicator 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.

¹⁸It will only be necessary to insert the relevant parts of any document relied upon, together with the internet link.

¹⁹ 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.

13. Observers

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

- (a) custody officers escorting a petitioner in custody may be present during the hearing but will not be allowed to take part in the proceedings;
- (b) staff members of the Petition Office may be present during the hearing to assist the Adjudicator in administrative matters but will not be allowed to take part in the proceedings;
- (c) persons who have been given permission by the Adjudicator 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 hearing as and when requested by the Adjudicator.

14. Adjournments

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

14.2 If an adjournment is sought by a petitioner on medical grounds, a medical certificate/report must be presented to the Adjudicator as soon as practicable as the basis for an adjournment. If the Adjudicator 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.

14.3 If a petitioner 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.

15. Determination of Petition Without a Hearing

15.1 After having taken into consideration the general principles and considerations stated in paragraphs 11.1 to 11.6 above, the Adjudicator may determine a petition without a hearing if, having regard to the material before him and the nature of the issues raised, the Adjudicator is satisfied that the petition can be justly determined without a hearing. [*cf. s.12 of Schedule 1A*]

16. Medical Examination

161 If the physical or mental condition of the petitioner is in dispute and is relevant to the consideration of a non-refoulement claim -

- (a) upon a petition, the Adjudicator may require the petitioner 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 petitioner, arrange for a medical examination of the petitioner to be conducted by a medical practitioner.
[*cf. s.37ZC (1)*]

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

162 If a medical examination is arranged, the petitioner must attend the examination. [*cf. s.37ZC (2)*]

163 The petitioner must disclose to the immigration officer and (on a petition) the Adjudicator the medical report of any examination arranged for the petitioner.
[*cf. s.37ZC (3)*]

17. Credibility of Petitioner

17.1 In considering a non-refoulement claim, the Adjudicator may take into account, as damaging the petitioner's credibility, the following behaviour of the petitioner -

- (a) any behaviour that the Adjudicator 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 petitioner's 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 ICCPR and/or RC apply (other than a Risk State);
- (c) if the petitioner 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 petitioner 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 petitioner 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 petitioner'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 petitioner 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.
- [*cf. s.37ZD (1)*]

172 Furthermore, without limiting paragraph 17.1(a) above, any behaviour described in any of the following paragraphs is behaviour within the meaning of paragraph 17.1(a) above -

- (a) the production of a false document as proof of the petitioner's identity;
- (b) a failure, without reasonable excuse, to produce a document as proof of the petitioner'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 petitioner's travel to Hong Kong;
- (d) a failure, without reasonable excuse, to provide the information or documentary evidence required by an immigration officer;
- (e) a failure, without reasonable excuse, to -
 - (i) attend an interview scheduled by an immigration officer; 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 non-refoulement claim, including any document supporting those facts, before the date fixed for the first interview scheduled by an immigration officer;
- (g) a failure, without reasonable excuse, to -
 - (i) attend an arranged medical examination; or

- (ii) disclose the medical report of the examination;
 - (h) a failure, without reasonable excuse, to comply with any requirement or procedure (including any time limit) -
 - (i) prescribed by this Petition Guide; or
 - (ii) required or specified by an immigration officer or the Adjudicator.
- [*cf. s.37ZD (2)*]

173 Notwithstanding paragraphs 17.1 and 17.2 above, the Adjudicator may take into account any other behaviour of the petitioner as damaging the petitioner's credibility. [*cf. s.37ZD (3)*]

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

18 Evidence Considered by the Adjudicator

181 When the Adjudicator reviews the merits of a case in a petition, he may consider the same evidence that was before an immigration officer or evidence that was not before an immigration officer. [*cf. s.18(1) of Schedule 1A*]

182 The Adjudicator may consider evidence that was not before an immigration officer if -

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

[*cf. s.18(2) of Schedule 1A*]

183 In an application from an immigration officer to the Adjudicator for a revocation decision (i.e. ImmD's application to the Adjudicator for revoking the Adjudicator's previous Decision which reversed the ImmD's first-tier decision), the Adjudicator has the power to review the merits of the case and may consider any evidence that he considers relevant. [*cf. s.20 of Schedule 1A*]

19. Notice of New Evidence

19.1 A petitioner who wishes to present any evidence that was not before an immigration officer (see paragraph 18.2 above) must file with the Adjudicator a written notice to that effect and serve a copy of the notice on the other party. [*cf. s.19(1) of Schedule 1A*]

19.2 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 petitioned against was made. [*cf. s.19(2) of Schedule 1A*]

19.3 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 12.7 above and Procedural Note No. 1 in Part 3). Otherwise, the Adjudicator may refuse the application. The Adjudicator may also refuse to adjourn the hearing for the purpose of dealing with new evidence that is not adduced in sufficient time.

20. Witnesses

20.1 The Adjudicator may, on an application by a party to a petition, or on his own motion, direct a person to attend as a witness at the hearing of the petition at the time and place the Adjudicator specifies, and answer any questions, give evidence, or produce any document in the person's possession, custody or power that may relate to any issue in the petition. [*cf. s.22(1) of Schedule 1A*]

21. Substantiated Non-refoulement Claims made on Applicable Grounds

21.1 In determining whether a claim is substantiated and hence non-refoulement protection is to be granted to the petitioner, the Adjudicator must, having regard to the individual circumstances of each case, take into account all relevant considerations, including relevant country information and whether there is any region within the Risk State(s) in which the petitioner would not be subjected to a risk under any applicable grounds (other than torture risk). [*cf. s.37ZI (5)*]

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

21.3 A non-refoulement claim should be accepted as substantiated on the ground of persecution risk if the petitioner has a well-founded fear of being persecuted in the

manner explained in paragraph 6.4 above if the petitioner were removed or surrendered to the Risk State, and he does not fall within any exceptions to persecution non-refoulement protection taking into account relevant considerations including those set out in paragraph 6.5 above.

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

22 Decision of the Adjudicator

221 On a petition against an immigration officer's decision (i) not to re-open a non-refoulement claim; (ii) rejecting a non-refoulement claim; or (iii) revoking an immigration officer's previous decision, the Adjudicator may confirm or reverse that decision. [*cf. s.23(1) of Schedule 1A*]

222 On an application from an immigration officer to the Adjudicator for a revocation decision (i.e. ImmD's application to the Adjudicator for revoking the Adjudicator's previous Decision which reversed the ImmD's first-tier decision), the Adjudicator may allow or refuse the application. [*cf. s.23(2) of Schedule 1A*]

223 The Adjudicator must give his Decision with reasons in writing. [*cf. s.23(3) of Schedule 1A*]

224 The Adjudicator's Decision is final. [*cf. s.23(4) of Schedule 1A*]

225 The Decision will be sent by post to the petitioner'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 Adjudicator, the Decision may also be served on the petitioner personally. A copy of the Decision will be sent to the Director.

23 Petition against ImmD's Refusal Decision not to Re-open a Withdrawn Claim

231 A non-refoulement claim that has been withdrawn by a claimant (by the claimant's written notification to an immigration officer) may be re-opened if the person who made the claim provides 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 him when he 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. [*cf. s.37ZE(2)*]

232 If the immigration officer decides not to re-open the claim, he must inform the person of his decision in writing, the reason for his decision and the person's right to file a petition against the refusal decision. If the person is aggrieved by the refusal decision, he must file a Notice of Appeal/Petition within 14 days after notice of the decision is given to him unless late filing of the notice is allowed by the Adjudicator. [*cf. ss.37ZE (4) & 37ZR(a)*]

233 Upon receipt of a copy of the Notice of Appeal/Petition from the Petition Office, the Director must, as soon as practicable, provide to the Petition Office and the petitioner (i) a copy of any completed non-refoulement claim form relating to the non-refoulement claim; (ii) a copy of the written record of any interview of the person conducted by an immigration officer in considering the non-refoulement claim; (iii) a copy of the person's notice withdrawing the claim; and (iv) a copy of any evidence in writing provided by the person referred to in paragraph 23.1 above. [*cf. s.9(1)(c) of Schedule 1A*]

24 Petition against ImmD's Refusal Decision not to Re-open a Claim that has been deemed Withdrawn on Failure to Return Non-refoulement Claim Form

241 A non-refoulement claim will be treated as withdrawn if the person who made the claim fails to return the completed non-refoulement claim form within the prescribed 28-day period or any further period as may be allowed by an immigration officer. A non-refoulement claim treated as withdrawn on such circumstances may be re-opened if the person who made the claim provides sufficient evidence in writing to satisfy the immigration officer that he had not been able to return the completed non-refoulement claim form as required due to circumstances beyond his control. [*cf. s.37ZG (1) & (3)*]

242 If the immigration officer decides not to re-open the claim, he must inform the person of his decision in writing, the reason for his decision and the person's right to file a petition against the refusal decision. If the person is aggrieved by the refusal decision, he must file a Notice of Appeal/Petition within 14 days after notice of the decision is given to him unless late filing of the notice is allowed by the Adjudicator. [*cf. ss.37ZG (5) & 37ZR(a)*]

243 Upon receipt of a copy of the Notice of Appeal/Petition from the Petition Office, the Director must, as soon as practicable, provide to the Petition Office and the petitioner (i) a copy of the written notice informing the person that the claim is treated as withdrawn; and (ii) a copy of any evidence in writing provided by the person referred to in paragraph 24.1 above. [*cf. s.9(1)(d) of Schedule 1A*]

25. Deemed Withdrawal of a Non-refoulement Claim on the Claimant/Petitioner's Departure

25.1 A non-refoulement claim (whether a claim pending final determination or a substantiated claim) made by a claimant/petitioner who is subject or liable to removal must be treated as withdrawn if he (for whatever reason) leaves Hong Kong. A non-refoulement claim that is treated as withdrawn under such circumstances must not be re-opened. [*cf. s.37ZF (1) & (2)*]

25.2 If a person leaves Hong Kong after he has given notice of withdrawal of his non-refoulement claim, the claim must be treated as having been withdrawn and must not be re-opened. [*cf. ss.37ZE (1) & 37ZF (3)*]

26. Withdrawal of a Non-refoulement Claim Petition

26.1 A petition that has been made under this Petition Scheme may be withdrawn by the petitioner by his filing of a written notification with the Petition Office. The Adjudicator will, upon consideration of the written notification, direct the Petition Office to confirm with the petitioner in writing that the petition has been withdrawn and to inform him that no further action will be taken on his case under the Petition Scheme. For the avoidance of doubt, where a petition is withdrawn (including by the petitioner'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 USM.

27. Revocation

27.1 A non-refoulement claim which has been accepted as substantiated by an immigration officer or by an Adjudicator may be revoked by an immigration officer or an Adjudicator respectively under specified circumstances.

27.2 The grounds for revocation 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 a petition) the Adjudicator and the undisclosed information would undermine, to a material extent, the merits of the claim; and/or
- (c) the risk on which the non-refoulement protection claim was substantiated has ceased to exist due to changes in circumstances of the claimant or the Risk State(s).

[*cf. s.37ZN*]

For claims that are substantiated on the ground of persecution risk alone -

- (a) the person should not have been granted protection in the first place because the person falls within an exception to protection upon taking into account all relevant considerations including those set out in paragraph 6.3 above; and/or
- (b) after the non-refoulement claim has been substantiated on the ground of persecution risk, such an exception has become applicable to him.

Revocation by an immigration officer

273 If an immigration officer considers that grounds referred to in paragraph 272 above exist for revoking a decision made by ImmD that substantiated a non-refoulement claim, 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. The immigration officer may proceed to make a revocation decision -

- (a) if the claimant fails to give an objection notice; or
- (b) after having considered the claimant's objection notice.

If the immigration officer makes a revocation decision, 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 to petition against the revocation decision under BL48(13). If the claimant is aggrieved by the decision, he must file a Notice of Appeal/Petition within 14 days after notice of the decision is given to him unless late filing of the notice is allowed by the Adjudicator. [*cf. ss.37ZL & 37ZR(c)*]

274 Upon receipt of a copy of the Notice of Appeal/Petition from the Petition Office, the Director must, as soon as practicable, provide to the Petition Office and the petitioner (i) a copy of the relevant completed non-refoulement claim form; (ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the non-refoulement claim; (iii) a copy of the notice of the decision accepting the non-refoulement claim as substantiated; (iv) a copy of the notice of proposed revocation of the non-refoulement claim; and (v) a copy of the claimant's objection notice (if any). [*cf. s.9(1)(b) of Schedule 1A*]

Revocation by the Adjudicator

275 If an Adjudicator has made a Decision that reversed the decision of an immigration officer, an immigration officer may apply to the Adjudicator to revoke that Decision on the basis of any of the grounds specified in paragraph 27.2 above.

However, before the immigration officer applies to the Adjudicator to exercise the latter's 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. The immigration officer will consider the representations made in the objection notice (if any) by the claimant together with all relevant information before deciding whether or not to make a revocation application to the Adjudicator. He may proceed to make an application to the Adjudicator if the claimant fails to give an objection notice; or after having considered the claimant's objection notice. In his application to the Adjudicator, the immigration officer must use the application form at **Appendix B** of this Petition Guide²⁰, which will be referred to as the "Notice of Application for Revocation of the Decision of the Torture Claims Appeal Board/Adjudicator". [*cf. s.37ZM*]

276 A copy of the notice of application must also be served on the claimant as soon as practicable after the submission of the notice of application to the Petition Office. The Director must, as soon as practicable after filing the notice of application, provide to the Petition Office and the claimant: (i) a copy of the relevant completed non-refoulement claim form; (ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the non-refoulement claim; (iii) a copy of the written notice informing the claimant of an immigration officer's decision rejecting the non-refoulement claim; (iv) a copy of the Decision; (v) a copy of the written notice informing the claimant of an intended application to the Adjudicator for a revocation decision; (vi) a copy of the claimant's objection notice (if any). [*cf. s.9(2) of Schedule 1A*]

28. Record of Proceedings

28.1 The Petition Office must keep a record or summary of proceedings and of the Decisions in such form as the Chairperson may determine. [*cf. s.24 of Schedule 1A*]

28.2 All hearings will be audio recorded. The master copy of the record of hearing will be kept by the Petition Office for record purposes.

29. Correction of Errors

29.1 The Adjudicator may correct a Decision made by him to the extent necessary to rectify an error of translation or transcription or a clerical error. [*cf. s.25 of Schedule 1A*]

²⁰ The same form will be used for making an application to TCAB to revoke TCAB's previous decision that reversed the immigration officer's decision rejecting a torture claim based on a torture risk.

30. Miscellaneous

Special Needs of Petitioners

301 Petitioners are required to indicate their special needs, if any, in Section 1(K) of the Notice of Appeal/Petition. The Adjudicator and the Petition Office will take steps to accommodate such special needs as far as practicable.

Petitioners in Custody

302 As a general rule, a petitioner should attend the hearing. If a petitioner is in custody, the Director's representative must inform the Adjudicator and the Adjudicator may request the Director, the Commissioner of Correctional Services and/or other relevant authorities to bring the Petitioner to the hearing.

Confidentiality

303 Unless the petitioner himself gives an express consent for such disclosure, the Adjudicator and the Petition Office must treat information provided by a petitioner in the course of a petition as confidential. The Adjudicator can only use such information for arriving at a Decision. The Adjudicator or the Petition Office must not release any information indicating that the petitioner has made a non-refoulement claim to a third party.

304 Notwithstanding paragraph 30.3 above, the Petition Office may disclose a petitioner'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 petition fail.

Typhoons and Rainstorm Warnings

305 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 Adjudicator. The Petition Office will notify the parties of the details of the adjourned hearing as soon as practicable.

Documents Served by Post

306 In relation to documents served by post by the petitioner, 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
PROCEDURAL NOTES

PROCEDURAL NOTE No.1
ADDUCING NEW EVIDENCE

1.1 For the avoidance of doubt, this Procedural Note only relates to new evidence that should have been submitted together with the petitioner's Notice of Appeal/Petition. (The petitioner should have previously disclosed all the material facts and documents in the substantiation of his non-refoulement claims on all applicable grounds.)

1.2 An application to adduce new evidence by way of a written notice must be made and filed with the Adjudicator in sufficient time for the application to be dealt with properly.

1.3 The written notice must indicate the nature of the evidence and explain why the evidence was not before an immigration officer before the decision being petitioned against was made.

1.4 After the notice has been filed with the Petition Office, 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 petitioner does not allow sufficient time for the other side to respond to the application, the Adjudicator may disallow the application or refuse to adjourn the hearing.

PROCEDURAL NOTE No.1

PROCEDURAL NOTE 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 petitioner must inform the Adjudicator at least 5 working days before the hearing is held of any change of legal representative or witness(es).

1.3 If the petitioner 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 Adjudicator, 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 Petitioner

2. The petitioner 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 petitioner's case.

Contents of the hearing bundle

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

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

43 If the parties cannot agree upon the documents to be included in the hearing bundle, a written application can be made to the Adjudicator for directions to be given generally. Normally only those documents and materials relating to the live issues or relevant to the petitioner's case need be placed in the hearing bundle.

44 Copies of the hearing bundle shall be sent to the Adjudicator and to the petitioner no later than 5 working days prior to the date of the hearing.

PROCEDURAL NOTE No. 2

PROCEDURAL NOTE No. 3
WORK AND HEARING ARRANGEMENTS
UNDER INCLEMENT WEATHER CONDITIONS

1.1 The work arrangements of the Petition Office 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 Petition Office 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 Petition Office 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 Petition Office will follow the advice accordingly. If the “extreme condition” is cancelled not less than 2 hours before the end of office hours, the Petition Office 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 Petition Office 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 Petition Office will re-open within 2 hours after the signal or the “extreme condition” is lowered or cancelled.
- (c) In any event, the Petition Office 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 Adjudicator will give directions for the resumed hearing of the petition.
- (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 petition 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 petition scheduled for the morning session only will be adjourned and postponed to a date and time to be fixed by the Adjudicator;
 - (ii) the hearing of the petition scheduled for the afternoon session only will commence as scheduled; or
 - (iii) the hearing of the petition 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 Adjudicator.

PROCEDURAL NOTE No. 3