Chapter 1

Non-Refoulement Law in Hong Kong

Pre-USM: The Development of Non-refoulement Law in Hong Kong

1.1 Prior to 2012, the law in Hong Kong with regard to non-refoulement was fragmented, discordant and lacking in any statutory underpinning. The years between 2004 and 2014 were a time of genesis as the HKSAR Government attempted to meet its obligations under international and domestic laws, stemmed almost exclusively from the instigation of the courts. This chapter will provide an overview of the development of non-refoulement law in Hong Kong – from challenges through the courts and the development of the common law, to the adoption of the Immigration (Amendment) Ordinance in 2012, culminating in the establishment of the Unified Screening Mechanism ('USM') in 2014.

1.2 The principle of non-refoulement imposes an obligation on the state to desist from returning a person to a jurisdiction where he or she may face serious human rights violations. It is separate from refugee determinations and does not accord the individual with refugee status or asylum. Hong Kong is not a signatory to the 1951 Convention Relating to the Status of Refugees ('RC') (despite China having acceded to both the RC and the 1967 Protocol Relating to the Status of Refugees) and the Hong Kong Government maintains a firm policy of not granting asylum or refugee status. Refugee Status Determinations ('RSD') are effectively outsourced by the HKSAR Government to the United Nations High Commissioner for Refugees ('UNHCR') and the ultimate decision on an individual's refugee status is not amenable to judicial scrutiny by Hong Kong courts.

1.3 Non-refoulement must be therefore be understood in the context of immigration control in Hong Kong – the Director of Immigration has wide discretionary powers under the Immigration Ordinance (Cap 115) ('the Ordinance') to refuse permission to land, to give permission to land subject to a limit of stay and conditions, to remove persons who have been refused permission to land[1] and to authorise a person who has landed illegally in Hong Kong to remain in Hong Kong, subject to such conditions of stay as he thinks fit.[2]

1 Immigration Ordinance (Cap 115), s 11.
2 Immigration Ordinance, s 13.

1.4 However, Hong Kong has acceded to a number of international instruments that impose the duty of non-refoulement upon the territory, including the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ('CAT') and the 1966 International Covenant on Civil and Political Rights ('ICCPR').[3]

1.5 Article 3 of CAT (which was extended to Hong Kong in 1992) prohibits refoulement of a person to another state 'where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture'[4] and the ICCPR includes an implied right to non-refoulement where there is a 'real risk of irreparable harm such as that contemplated by articles 6 or 7 of the Covenant,[5] either in the country to which removal is to be effected or to any country to which the person may subsequently be removed'.[6] The provisions of the ICCPR have been implemented in Hong Kong via the Basic Law and Part II of the 1991 Hong Kong Bill of Rights Ordinance (Cap 383) ('HKBORO'). Further, the principle of non-refoulement has attained customary international law status.

1.6 In 1999, the HKSAR Government assured the United Nations Committee Against Torture that torture claims:

> ... would be carefully assessed, by both the Director of Immigration and the Secretary for Security or, where the subject has appealed to the Chief Executive, by the Chief Executive in Council [and that] where such a claim was found to be well-founded, the subject's return would not be ordered. [Further, in] considering such a claim, the Government would take into account all relevant considerations, including the human rights situation in the State concerned, as required by article 3.2 of the Convention.[7]

3 Other international instruments to which Hong Kong is a signatory and which may impinge on issues of non-refoulement include: The 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 International Covenant on Economic, Social and Cultural Rights; the 1979 Convention on the Elimination of all Forms of Discrimination Against Women; the 1989 Convention on the Rights of the Child; and the 2006 Convention on the Rights of persons with Disabilities.

4 CAT, Art 3:
(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.
(2) 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.

5 ICCPR, Art 6(1): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
Art 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his consent to medical or scientific experimentation.

6 General Comment No 31, 'The Nature of the General Obligation Imposed on State Parties to the Covenant,' UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 12.

7 UN Committee Against Torture 'Consideration of Reports Submitted by State Parties under Article 19 of the Convention' Third Periodic report of States parties due in 1997, China, CAT/C/39/Add.2, 4 May 2000, para 122.

1.7 However, the reality was that until 2004, the Government's policy was to follow the UNHCR's RSD to determine whether a CAT claim in Hong Kong was established. In practice, if the UNHCR rejected an individual's claim for refugee status then the Government relied solely upon this determination to reject that individual's torture claim. There was no independent assessment of the torture claim nor was the UNHCR's decision subject to the jurisdiction of the Hong Kong courts.

1.8 The inherent deficiency in this process was exposed in a judicial review against the Secretary for Security which subsequently went up to the Court of Final Appeal in the case of *Secretary for Security v Sakthevel Prabakar*.[8] The appellant was an ethnic Tamil asylum seeker from Sri Lanka who was arrested for the possession of a forged Canadian passport whilst transiting through Hong Kong in January 1999. He claimed to have been tortured in Sri Lanka and intended to claim asylum in Canada. After his arrest, he lodged a refugee claim at the UNHCR in Hong Kong and was eventually granted refugee status after an initial rejection and a failed appeal. He challenged both the Hong Kong Government's refusal to rescind a deportation order pursuant to his arrest and the Government's reliance on the UNHCR's RSDs in considering torture claims under Article 3 of the CAT.

For the purposes of the appeal, the court assumed (without deciding) that the Secretary was under a legal duty to follow the policy to not deport a person to a country where that person's claim that he would be subjected to torture was considered to be well-founded. The court held that an independent screening of CAT claims by the Government was required and due to its momentous importance to the individual, 'high standards of fairness' were to be applied. This required:

(a) the claimant, who had the burden of establishing his torture claim, be given every reasonable opportunity to establish that claim;
(b) the Secretary to properly assess that claim;
(c) where the claim was rejected, reasons to be given.

The court also made further observations to assist the Secretary in assessing such a claim, namely that the Secretary should consider all relevant matters, including:

(d) the conditions in the country concerned;
(e) whether the potential deportee had been tortured in the past and if so, how recently;
(f) whether there was medical or other independent evidence to support the claim of past torture;
(g) whether the potential deportee had engaged in political or other activity which would make him vulnerable.

In its reasoning, the court recognised that whilst there was some common ground between refugee claims and torture claims, the definitions and legal criteria to be considered were not the same; therefore there were circumstances in which a person would be entitled to non-refoulement on the ground that it would put

8 (2004) 7 HKCFAR 187, [2005] 1 HKLRD 289, [2004] HKCU 638 (CFA).

him in danger of being tortured even if his claim had not met the criteria for persecution under the RC[9] or vice versa.

1.9 Whilst these findings would subsequently galvanise change, they did not firmly ground a legal duty of non-refoulement in Hong Kong law.

1.10 Needless to say, the Government could no longer afford to simply rely on UNHCR decisions to determine torture claims under CAT and from late 2004 onwards, a separate and independent administrative (non-statutory) mechanism for the screening of CAT claims by the Immigration Department was introduced.

Under the first stage of this mechanism, the Director of Immigration ('DOI') first had to identify that a CAT claim had been made. Subsequently, the claimant would be required to complete a questionnaire on his own. Then followed interviews by an immigration officer who considered and assessed the claim and made a recommendation based on the questionnaire, interviews and any other available materials. One or more senior immigration officers would then review the claim and endorse agreement or disagreement. At this juncture, an Assistant Director of Immigration would make a provisional determination, which if negative, was notified to the claimant by a 'minded to refuse' letter. Following any written representations in response by the claimant, officers would then consider the matter and recommend a decision to the Assistant Director of Immigration who then made a final determination.

Under the second stage of the mechanism, a claimant could appeal against an adverse decision by petition to the Chief Executive, and the Secretary (under authority delegated from the Chief Executive) then decided the petition on the advice of subordinate officers of the Security Bureau. There was no oral hearing at the second stage nor were reasons given for the rejection of the petition to the Chief Executive.

1.11 In 2008, perhaps inevitably, the Court of First Instance heard an application for judicial review of the Secretary's decisions to reject six claims between the end of April 2008 and 26 September 2008. The applicants challenged the legality of the screening process of the applicants' claims for protection under Article 3 of CAT. The case of *FB v Director of Immigration*[10] built upon the foundations laid by *Prabakar* to usher in further changes to the non-refoulement regime. Central to the decision was the finding that the blanket policy of denying legal representation to torture claimants was unlawful and failed to meet 'high standards of fairness'. Such standards required that the Immigration Department conduct assessments with torture claimants in the presence of publicly-funded legal representatives and with the assistance of interpreters. The court also held that:

(a) the decision to not afford an oral hearing with regard to the petition was procedurally unfair; that to insist on a particular formula to be expressed by a person making a torture claim was contrary to the high standards of fairness;

9 See Chapters 2 and 5 for the definition of torture and persecution respectively.

10 [2009] 2 HKLRD 346, [2009] 1 HKC 133 (CFI).

(b) a system where the interviewing officer and the decision-maker were different persons was inherently unfair; that there was no evidence that the DOI's decision-makers, the Secretary or executive officers who advised such petitions had received appropriate and specific CAT assessment and determination training, which made the procedure demonstrably unfair;

(c) the failure to allow the claimant to seek legal advice on his claim to the Secretary rendered the petition's procedure systematically unfair;

(d) there was no procedural safeguard against any the potential self-incrimination with regard to subsequent prosecution of immigration offences;

(e) examining immigration officers and decision-makers needed to take great care in separating their roles;

(f) both the high standards of fairness and natural justice required the Secretary to give reasons for a decision in respect of a petition; and

(g) the Director of Immigration should disclose relevant policy documents at an early stage.

1.12 After the *FB* judgment was handed down, the Immigration Department suspended screenings from December 2008 to reformulate assessment procedures in order to comply with the rulings of the court. The result of this reformulation was launching of the 'Enhanced Screening Mechanism' on 24 December 2009. The enhancements included:

(a) the strengthening of training and support for screening officers;

(b) the revision of screening procedures so that the immigration officers responsible for conducting interviews would also determine whether the claim is substantiated;

(c) petitions to be decided by independent persons with legal background via oral hearings as required; and

(d) legal assistance for torture claimants meeting the means-test requirements.

1.13 The Duty Lawyer Service ('DLS') launched a pilot scheme in December 2009 to provide publicly-funded assistance to torture claimants by providing legal advice during the screening process in respect of grounds of claims and petitions, as well as at petition hearings.[11] In the same LegCo paper that announced this pilot scheme, proposals were made for a statutory regime for the handling of Article 3 CAT claims, indicating further change was on the horizon.

1.14 The Immigration (Amendment) Ordinance 2012 duly came into force on 3 December 2012, providing, for the first time, a statutory regime governing torture claims. Part VIIC, Division 2 was introduced to the Ordinance and governs the entire procedure relating to the process of making a torture claim,

11 Panel on Security of the Legislative Council, Torture Claim Screening Mechanism: Enhanced Mechanism and Way Forward, 1 December 2009, LC Paper No. CB(2)370/09-10(03).

whilst Part VIIC, Division 3 of the Ordinance establishes the Torture Claims Appeal Board ('TCAB').[12]

1.15 Very shortly after the Immigration (Amendment) Ordinance came into effect, the case of *Ubamaka Edward Wilson v Secretary for Security*[13] was heard in the Court of Final Appeal ('CFA'). The appellant was a Nigerian national who had been convicted and sentenced for drug trafficking in Hong Kong. He was subject to a deportation order after release from prison. The appellant challenged the deportation order by way of judicial review on the basis that that such deportation would expose him to double jeopardy which was prohibited by the HKBORO, s 8 art 11(6), and that deportation to Nigeria, would, in itself amount to CIDTP contrary to HKBORO, s 8, art 3 ('BOR 3'). In the courts below, the Court of First Instance had set aside the deportation order[14] but the Court of Appeal reinstated it.[15] In addition to the said grounds, the appellant further argued in the CFA that there existed a customary international law ('CIL') norm prohibiting refoulement where it would give rise to CIDTP.

Whilst the appeal was unanimously dismissed, some principles emerged which were to further shape non-refoulement law in Hong Kong. The question was whether the legislature could have intended that s 11[16] of the HKBORO should be allowed to preclude reliance on BOR 3[17] providing in s 5[18] that there could be no derogation from BOR 3 even in a time of a proclaimed public emergency which threatened the life of the nation. It was held that construed purposively, s 11 must be read as qualified by s 5 and understood to exclude the application of HKBORO in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and

12 See the following section on the USM for a detailed outline of the Ordinance as it relates to torture claims.

13 (2012) 15 HKCFAR 743, [2013] 2 HKC 75, (2013) 18 HKPLR 189 (CFA).

14 [2009] 3 HKC 461, (2009) 14 HKPLR 380 (CFI).

15 [2011] 1 HKLRD 359, [2011] 1 HKC 508 (CA).

16 HKBORO, s 11: As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

17 HKBORO, s 8, Art 3: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation (cf ICCPR, Art 7).

18 HKBORO, s 5:
(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with the law.
(2) No measure shall be taken under subsection (1) that –
(a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);
(b) involves discrimination solely on the ground of race, colour, sex, language, religion or social origin; or (c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15.

remain in Hong Kong except insofar as the non-derogable and absolute rights of BOR 3 were engaged. However, in order to bring himself within BOR 3, the claimant had to show that the ill-treatment he would face if expelled attained a 'minimum level of severity' and that he faces a 'genuine and substantial risk' of being subjected to such treatment. The practical effect of this was that persons without the right to enter and remain in Hong Kong would be able to invoke BOR 3, and Hong Kong could no longer deport a person if that person faced a genuine and substantial risk of being subjected to torture or CIDTP which has attained a minimum level of severity. This principle, it was held, would apply regardless of how objectionable the conduct or character of the claimant requiring his removal or deportation.

1.16 The case of *C, KMF, BF v Director of Immigration and Secretary for Security*[19] was the next landmark case and the CFA heard the appellants (with the UNHCR as interveners) who mounted challenges on two grounds. Whilst the appellants accepted that the RC had not been extended to the HKSAR and Article 33[20] therefore had no direct application, they contended that the principle of non-refoulement had become a rule of CIL (as well as a peremptory norm[21]) and had become a part of the common law of the HKSAR. Related to this ground, they asserted that, to give effect to CIL, the Government should make its own RSDs (not merely relying on those of the UNHCR) and that the DOI must not return any refugee claimant without appropriate enquiry into their non-refoulement claims. Under the second ground, given the gravity and importance of the decision, the appellants argued that the DOI's decision to return a refugee claimant is subject to judicial review and must satisfy the high standards of fairness.

It was held that given that it was the practice (policy) of the DOI when deciding whether or not to exercise his powers under the Immigration Ordinance to remove a refugee claimant to the country of putative persecution, to have regard to humanitarian considerations, and as the question of whether such claim is well-founded is a relevant humanitarian consideration, the DOI must therefore determine whether the claim is well-founded. Further, any such determination must satisfy the high standards of fairness required.

1.17 In short, as long as the DOI maintained the practice of giving weight to any determination previously conducted by the UNHCR, he would be required to independently determine whether the alleged fear of persecution was well-founded before executing a claimant's deportation. The practical effect of this brings

19 (2013) 16 HKCFAR 280, [2013] HKCU 666 (with UNHCR as intervener)

20 RC, Art 33(1):
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.

21 Both Hartmann J (at first instance) and the Court of Appeal were satisfied that the non-refoulement as expressed in Art 33 had become a rule of customary international law, but not a peremptory norm. However, the CFA declined to express a view on this matter on the basis of their decision on the second ground of appeal.

persecution (with reference to the non-refoulement principle under Art 33 of the RC) within the remit of the non-refoulement law framework, notwithstanding the RC being inapplicable in Hong Kong.

1.18 On 2 July 2013, the Secretary for Security announced that the Government would be assessing claims for non-refoulement protection under a Unified Screening Mechanism ('USM') that would be inclusive of torture, CIDTP and/or persecution. On 7 February 2014, the Government announced that the USM would commence on 3 March 2014.

1.19 Since the commencement of the USM, the Government has indicated that 'all applicable grounds' for non-refoulement protection would be screened in one go.[22] Whilst it was accepted that 'all applicable grounds' included torture, CIDTP and persecution, there have been lingering questions as to what 'all applicable grounds' entails and whether there are further available grounds outside of the established three.

1.20 On 12 September 2016, it was announced that the Immigration Department would extend the grounds for non-refoulement protection to HKBORO s 8, art 2 ('BOR 2'), namely the 'right to life'.[23] What triggered this somewhat sudden change in policy more than 3 years after the commencement of the USM is unclear. However, it is evident that the legal basis for screening claimants under BOR 2 is the same as BOR 3, namely the case of *Ubamaka,* in that the right to life is an absolute and non-derogable right. As such, where there are substantial grounds to believe that there is a genuine and substantial risk of a person's right to life being

22 Paragraphs 6 and 9 of the Administration's paper to the Panel on Security of the Legislative Council on 'implementation of the Unified Screening mechanism' (LC Paper No CB(2)1621/13-14(06)).

23 HKBORO s 8, art 2:

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) Sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of this Bill of Rights and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, nothing in this article shall authorize the derogation in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment in Hong Kong.

violated in another country, that constitutes a ground for restraining the HKSAR Government from proceeding to remove or deport that person to that country.

1.21 This announcement raised questions amongst the legal community as to whether other rights in the HKBORO which are considered non-derogable by virtue of HKBORO s 5(2)(c) could be argued to be applicable grounds under the same rationale.[24] However, it would appear that the position for now, at least, is that only the rights considered absolute *and* non-derogable as opposed to merely non-derogable will be considered 'applicable grounds' by the Government and further, that s 11 reservations[25] of the HKBORO apply to to derogable and non-absolute rights for the purposes of non-refoulement.[26]

The USM: An Overview of the USM

1.22 In summary, there are four applicable grounds for claiming non-refoulement protection, stemming from three different sources; namely the Ordinance, s 37U(1) (torture), the HKBORO (CIDTP and Right to Life) and the common law (persecution). The practitioner should be aware that each of these sources is in turn based upon other international law instruments as this has an impact on available jurisprudence for each ground.

1.23 Whilst the sources for each ground differ, all four grounds are screened under the USM which is governed solely by the Ordinance, Part VIIC.

24 HKBORO s 5:

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.

(2) No measure shall be taken under subsection (1) that–

(a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);

(b) involves discrimination solely on the ground of race, colour, sex, language, religion or social origin; or

(c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15.

25 HKBORO s 11: As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

26 See *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, [2013] 2 HKC 75, (2013) 18 HKPLR 189 (CFA), paras [115], [134]–[140].

Chapter 5

Persecution

Persecution as Part of the USM

5.1 The 1951 Convention Relating to the Status of Refugees ('RC') and or its 1967 Protocol have never been extended to Hong Kong. However, in March 2013, the Court of Final Appeal in *C & Ors v Director of Immigration and Anor*[1] affirmed that:

> [98] It is no answer to the Director's failure to make an independent assessment to say that the power of removal is broad and unqualified and that it imposes upon him no duty to make an RSD. The fact is that the Director has, under statutory authority, adopted a policy the object of which is to exercise his power of removal according to a determination of the refugee status of a claimant to that status. Indeed, the HKSARG asserts publicly that, although not bound by the Convention, it nonetheless voluntarily complies with its requirements. Having adopted that policy in these circumstances, no doubt by reason of the powerful humanitarian considerations which are involved in RSD determinations and the consequences they may entail, the requirement of fairness, arising from the adoption by the Director of a policy under the authority of the statute, calls for him to make an independent assessment of the UNHCR determination, especially in those cases where the UNHCR determination is adverse to the claimant. In making that assessment, the Director must observe high standards of fairness.

Paragraph 6 of the Notice to Persons Making a Non-refoulement Claim (the 'Notice') cites *C & Ors*:

> 6. … in exercising the powers to execute the removal or deportation of a person to a State of putative persecution, on the basis of the practice of the Director of Immigration ("the Director") of taking into account humanitarian considerations and taking a well-founded fear of persecution as a relevant humanitarian consideration, the ImmD [Immigration Department] has to assess (independently of the United Nations High Commissioner for Refugees ("UNHCR") and giving weight to any determination by the UNHCR) whether a person has established a well-founded fear of persecution before the removal or deportation of the person to that State of putative persecution.[2]

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1 (2013) 16 HKCFAR 280, [2013] 4 HKC 563, (2013) 18 HKPLR 416 (CFA).

2 Notice to Persons Making a Non-refoulement Claim, 12 September 2016 at para [6], citing *C & Ors*. The Notice is available at http://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf.

5.2 Paragraph 13 of the Notice sets out the test for establishing persecution in Hong Kong:

> 13. Drawing reference from relevant instruments and case law, a person should be considered as having a persecution risk for the purpose of his non-refoulement claim if:
>
> (a) he, owing to well-founded fear of being persecuted on account of one or more of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; and
> (b) his life of freedom would be threatened on account of his race. religion, nationality, membership of a particular social group or political opinion should he be expelled or returned to the frontiers of the Risk State.

Paragraph 13 is an amalgamation of Article 33 of the RC, which is the non-refoulement principle and states:

> 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.

and Article 1(A)(2) of the RC which contains the definition of a refugee (as amended by the 1967 Protocol):

> For the purposes of the present Convention, the term "refugee" shall apply to any person who:
> …
> (2) … owing to a well-founded fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his formal habitual residence, is unwilling to return to it.

5.3 On the basis of the reasoning in *R v Secretary of State for the Home Department, ex p Sivakumaran,*[3] the Immigration Department clarified in January 2017 that the reference to 'life or freedom' as stated in paragraph 13(b) of the Notice, whilst being an express term used in Article 33 of the RC, is not intended to engage an additional assessment of persecution risk over and above that conducted under Article 1 of the RC. Accordingly, the second limb of the test is not applicable and a claimant is not subject to any additional assessment over and above that conducted in paragraph 13(a).

5.4 It should be noted that it is only the non-refoulement principle and the assessment of persecution risk as contained in Paragraph 13 of the Notice that apply in Hong Kong. The Government has consistently maintained that the RC and its 1967 Protocol do not apply to Hong Kong, that they do not grant asylum to any person nor determine the refugee status of anyone. A non-refoulement claimant will not be treated as an asylum seeker or a refugee even if he or she is assessed to have a well-founded fear of persecution per Article 1 of the RC.

3 [1988] AC 958 (HL), at 1001.

Definition of a Refugee

5.5 Notwithstanding the fact that the RC does not apply in Hong Kong, it is necessary to refer to RC jurisprudence in order to understand what constitutes 'persecution' under the USM.

5.6 Recognition of a claimant's refugee status is declaratory rather than constitutive in the sense that a person is refugee as soon as he or she fulfils the criteria contained in the definition, not when his or her refugee status is determined – he or she does not become a refugee because of recognition but is recognised because he or she is a refugee.[4]

Well-founded fear

Fear

5.7 The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the 'UNHCR Handbook')[5] supports an interpretation of the term 'well-founded fear' to contain both subjective and objective elements:

> 38. To the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determine whether well-founded fear exists, both elements must be taken into consideration.

5.8 The UNHCR Handbook goes on to state:

> 41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, has own interpretation of his situation, and his personal experiences - in other words, everything that may serve to indicate that the predominant notice for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such state of mind can be regarded as justified.
>
> 42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on the conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. …

4 UNHCR Handbook at [28].
5 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3.

5.9 In contrast, Professor Hathaway takes the position that there is no subjective element in the 'well-founded fear' standard. He states:

> The Convention definition's reference to "fear" was intended simply to mandate an individuated, forward-looking appraisal of actual risk, "not to require an examination of the emotional reaction of the claimant." Rather than predicating access to protection on the existence of "fear" in the sense of trepidation, the Convention refugee definition requires only the demonstration of "fear" in the sense of a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it fails to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded.[6]

5.10 The indefinite language of the relevant article lends itself to multiple interpretations and uncertainty. Whilst the UNHCR Handbook understands 'fear' in the sense of 'trepidation' (as do most jurisdictions), Hathaway construes 'fear' in the context of persecution to be 'an apprehension of evil' or 'expectation of impending persecution', amounting to a forward-looking expectation of risk.[7]

5.11 Hathaway's approach in excluding the subjective element does not mean that the claimant's testimony and other individuated evidence are irrelevant. All evidence supporting a claimant's actual risk of being persecuted, including his or her personal testimony, is admissible for the purpose of establishing a 'well-founded fear'. But he posits that this evidence should be assigned weight according to its probative worth (not given categorical priority over all other evidence of risk) and an applicant's particular physical or psychological vulnerabilities should be considered as part of the overall analysis as to whether the anticipated harm rises to the level of 'being persecuted'.[8] Consideration of the applicant's emotional state is not necessary to undertake such an analysis.

5.12 Hathaway argues that over-reliance on 'trepidation' and the subjective element can lead to denial of refugee status to at-risk applicants who do not demonstrate the requisite amount of fear to decision-makers or applicants who are unable to do so, such as children or mentally disabled persons. Diversity amongst claimants in terms of culture and temperament may also make it difficult to detect such trepidation, as it cannot be said all people from all cultures express fear in the same way.[9] Therein lies the risk. where there are two essential elements – the objective and subjective – it necessarily follows that refugee status must be denied where an applicant fails to establish that he or she is subjectively fearful, despite a finding that he or she objectively faces a real chance of being persecuted if

6 James C Hathaway & William S Hicks "Is there a subjective element in the refugee convention's requirement of "well-founded fear?" (2005) 25 Nich. J/Intl' L 505 pp 507–508.
7 ibid at pp 506, 507, 508.
8 ibid at p 510.
9 ibid at p 512.

returned to the Risk State.[10] Further, there are problems with consistency once the subjective element is engaged – as Hathaway puts it:

> [g]iven the Convention's risk-orientated focus, it would be anomalous indeed to ascribe to "fear" a meaning that encourages states to distinguish between applicant's identically stated with respect to risk, and solely on the basis of individual temperament. Yet when subjective fear is deemed an essential qualification for refugee status, and even when it is used as a "plus factor", the result is to advantage the claims of applicants whose trepidation can be readily identified by decision makers and to disadvantage individuals who, for whatever reason, do not project fearfulness.[11]

5.13 It would appear that most common law jurisdictions continue, ostensibly, to use both the subjective and objective elements as set out in the UNHCR Handbook – or as Hathaway labels it, the 'bipartite approach' which requires an applicant to demonstrate a significant, actual risk of being persecuted ('objective element') as well as an emotional state of trepidation with respect to that risk ('subjective element'). The House of Lords adopted this approach in *R v Secretary of State for the Home Department ex p Sivakumaran,*[12] where it stated:

> [T]he expression 'well-founded'…cannot be read simply as 'qualifying' the subjective fear of the applicant – it must, in my opinion require that an inquiry should be made whether the subjective fear of the applicant is objectively justified'.

The United States Supreme Court has clearly indicated that the standard is comprised of both objective and subjective elements – whilst the Court noted that an actual risk of persecution is required:

> the reference to 'fear'… obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien.[13]

In Australia, the High Court has noted that the well-founded fear standard:

> has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts relating to the conditions in the country of his or her nationality.[14]

The Supreme Court of Canada has maintained that:

> [b]oth the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities.[15]

5.14 Notwithstanding the resistance to dispensing of the subjective test altogether, it would appear that in recent decades there has been an increasing awareness of the difficulties associated with enquiring into an applicant's state of mind or emotional state and the inconsistencies and risk of unwarranted denials of

10 ibid at p 514.
11 Ibid at p 536.
12 [1988] AC 958 (HL).
13 *INS v Cardoza-Fonseca* 480 US 421 at 430–31.
14 *Re Minister for Immigration and Multicultural Affairs, ex p Miah* [2001] HCA 22 at para [62].
15 *Chan v Canada (Minister for Employment and Immigration)* [1995] SCJ No 78, [1995] 3 SCR 593 at para [120].

protection that the subjective test may entail. For example, in *Adan v Secretary of State for the Home Department*[16] the House of Lords observed that:

> [t]he use of there term 'fear' was intended to emphasise the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind.

5.15 Whilst a majority of courts have not gone as far as the New Zealand Refugee Status Appeals Authority in holding that the bipartite test 'may have outlived its usefulness. It might even on occasion lead to a material misdirection as to the nature of the objective component of the refugee definition',[17] there is evidence that some courts have adopted mechanisms which significantly lessen the role played by the subjective element by inferring, whenever it is determined that an applicant faces a significant risk of being persecuted, the existence of trepidation,[18] simply declining to perform an analysis of the applicant's emotional state,[19] or applying a 'reasonable person' test (ie an applicant possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution ifs she were to be returned to her native country).[20]

16 [1999] AC 293 (HL), at 307 per Lord Lloyd quoting James C Hathaway, The Law of Refugee Status 69 (1991).

17 *Refugee Appeal No. 70074/96 Re ELLM*, No. 70074/96, New Zealand: Refugee Status Appeals Authority, 17 September 1996 per Haines, Deputy Chair (NZ).

18 *Adjei v Minister of Employment and Immigration* [1989] 2 FC 680, 4 (Fed Ct App 1989) (Can) per MacGuigan J:

> In the light of the uncontradicted evidence … as to [the] objective basis for such fear, the Board's reluctance to acknowledge even the applicant's subjective fear reads strangely.

Al-Harbi v Immigration and Naturalization Service, 242 F.3d 882, 890-91 (9th Cir.2001) at [20]:

> Because the strong evidence as to the objective component of a "well-founded fear of persecution" claim is therefore relevant in establishing petitioner's subjective fear, "to the extent that any question exists with respect to the genuineness of the petitioner's fear, it is answered by our decision regarding the objective component".

19 *Yusuf v Canada (Minister for Employment and Immigration)* [1992] 1 FC 629 (Fed Ct App 1992) (Can):

> 5. I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience.

However, it should be noted that in *Maqdassy, Joyce Ruth v Minister of Citizenship and Immigration* [2002] FCJ No 238, 2002 FCT 182 (FCTD no IMM-2992-00), 19 February 2002 (Can) where the applicant relied on *Yusuf* to argue that it might not be necessary to establish a subjective fear of persecution where an objective fear had been shown to exist. Justice Tremblay-Lamer disagreed, noting that *Yusuf* had been decided before *Canada (A-G) v Ward* [1993] 2 SCR 689, 103 DLR (4th) 1 20 Imm LR (2d) 85, at 723 in which the Supreme Court had made it clear that both elements of the test were required.

20 *Guevara v INS,* 786 F.2d 1242 (5th Cir.1986) per Brown J at 1249; *Matter of Mogharrabi* 19 I & N Dec. 439, 445 (BIA 1987).

Sivakumaran, Cardoza-Fonesca and *Chan v Canada (Minister for Employment and Immigration)*, whilst all maintaining the existence of a subjective element, suggest the primacy of the objective standard over that of the subjective.

5.16 In practice, as Hathaway points out,[21] the subjective element of fear is often, in his opinion, unfairly inferred from the applicant's pre-application conduct. For example, courts have inferred a lack of fear from:

(a) delay in claiming refugee status;[22]
(b) failure to claim asylum in an intermediate country;[23]
(c) delay in fleeing the Risk State;[24]
(d) pre-flight behaviour which increased the applicant's risk of being persecuted;[25] and
(e) treating evidence of return travel to the Risk State as evidence that he or she does not fear being persecuted there.[26]

5.17 This approach is readily seen in Decisions by the Immigration Department in Hong Kong and is explicitly found in the Ordinance under s 37ZD which concerns credibility. For example, the failure to take advantage of a reasonable opportunity to claim non-refoulement protection in respect of torture Risk State while in a place outside Hong Kong to which the Convention applies (s 37ZD(1)(b)) and a failure to make a claim as soon as the claimant becomes liable to removal (s 37ZD(1)(c)), liable to surrender proceedings (s 37ZD(1)(d)) or before the claimant is arrested or detained (s 37ZD(1)(d)) are all deemed as damaging the claimant's credibility. During Screening Interviews, claimants are often questioned along these lines.

As Hathaway notes, there is a growing practice of equating any lack of credibility with an absence of subjective fear.[27] In Canada, for example, when the Board concludes that a claimant's alleged fear is not credible concerning the existence of a subjective fear, it almost always does so on the basis of some behaviour of the claimant which it considered to be inconsistent with that allegation. Case law confirms that there are certain ways that persons fearful of serious harm can be normally expected to act, and staying longer than necessary in a country where a claimant fears persecution, voluntarily returning to that country, passing through other countries without asking for protection or failing to make a

21 Hathaway, pp 525–531.

22 *Re Minister for Immigration and Multicultural Affairs, ex p PT*, 178 ALR 497 (Aust 2001); *Cruz v Canada (Minister of Employment and Immigration)* IMM 3848-93 (Fed Ct Trial Div 1994) (Can) per Simpson J.

23 *JS v Secretary of State for the Home Department* [1996] EWCA Civ 832, [1996] Lexis Citation 4005 (CA, Eng).

24 *Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543, [2002] FCA 480 (Fed Ct 2002) (Aust); *Mejia v Canada (Minister of Citizenship and Immigration)* 160 FTR 288 (Fed Ct Teal Div 1996).

25 *Singh v Moschorak* 53 F.3d 1031 (9th Cir 1995).

26 *Thurasisamy v Minister for Immigration and Multicultural Affairs* [199] FCA 1632 (Full Fed Ct 1999) (Aust); *Maqdassy, Joyce Ruth v Minister of Citizenship and Immigration* [2002] FCJ No 238, 2002 FCT 182 (FCTD no IMM-2992-00), 19 February 2002 (Can).

27 Hathaway, p 531.

claim for protection immediately upon arrival in Canada are all behaviours, which in numerous cases, have been found to indicative of a lack of subjective fear.[28] The Ordinance and the practice of the Hong Kong Immigration Department readily illustrate this approach in USM claims.

5.18 The shortcomings of the subjective test aside, it is evident that Hong Kong follows the jurisprudence of other common law jurisdictions in adopting the bipartite approach. In *Luu The Truong v Chairman of the Refugee Status Review Board & Anor,*[29] it was held:

> [t]he phrase 'well-founded' imports an objective element into the determination. Fear is, of course, subjective and the determination of refugee status will therefore require an evaluation of whether an applicant is, in fact, in fear. But proof of fear is not itself sufficient. That fear must be objectively well-founded.

The Court went on to apply *Sivakumaran*.

Suffice to say, that whilst Hong Kong still requires an evaluation of whether an applicant satisfies the subjective element, the objectivity test appears to have primacy. It is useful to be aware of the shortcomings of the subjectivity element especially in the context of conducting USM appeals.

'Well-founded'

5.19 The burden of proof lies on the claimant to adduce evidence of his or her claim and he or she must be given adequate opportunity to present such evidence. However, as is the case in other applicable grounds under the USM and in accordance with *Prabakar*,[30] the relevant authorities should draw attention to issues that require clarification, conduct investigation and obtain relevant information and materials on general country conditions as the high standards of fairness require without reversing the burden of proof. The exercise for determining the claim should be a 'joint endeavour'.

5.20 The standard of proof for establishing a well-founded fear has developed in the jurisprudence of common law jurisdictions. In the United States, it has been defined as 'a reasonable possibility';[31] in the United Kingdom, 'a reasonable likelihood';[32] in Canada 'a reasonable chance/good grounds';[33] and 'a real chance' in both Australia[34] and New Zealand.[35]

28 Immigration and Refugee Board of Canada, Act, Rules and Regulations, Chapter 5 – Well-Founded Fear, available at www.irb-cisr.gc.ca.

29 [2002] 2 HKLRD 351, [2002] HKCU 1455 (CFI) at [52].

30 *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, [2005] 1 HKLRD 289, [2004] HKCU 638 (CFA).

31 *INS v Cardoza-Fonseca* 480 US 421.

32 *R v Secretary of State for the Home Department ex p Sivakumaran* [1988] AC 958 (HL).

33 *Adjei v Minister of Employment and Immigration* [1989] 2 FC 680, 4 (Fed Ct App 1989) (Can).

34 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, (1989) 87 ALR 412 (HCA).

35 *Refugee Appeal No 70074/96 Re ELLM*, No 70074/96, New Zealand: Refugee Status Appeals Authority, 17 September 1996.

5.21 In *Kacaj (Article 3 – Standard of proof – Non-State Actors) Albania v Secretary of State for the Home Department*[36] it was stated:

> Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in *R v Governor of Pentonville Prison ex p Fernandez* [1971] 2 All E.R. 691 at p 697, cited by Lord Keith in *Sivakumaran* at [1988] 1 All E.R. 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution.

Contrast *Refugee Appeal No 70074/96*,[37] where it was stated:

> We are of the view that the *Sivakumaran* decision should be followed in New Zealand on the issue of the objective component of the refugee definition. … The only qualification we need add is that on the issue of the standard of proof of the well-founded fear, we have preferred the 'real chance' test adopted by the High Court of Australia in *Chan* to the 'reasonable possibility' test of *Cardoza-Fonseca* and the 'reasonable likelihood' test of *Sivakumaran*.

This suggests there is a slight difference between the jurisdictions as to standard of proof.

5.22 In *Luu The Truong* (which is the established authority with regard to the standard of proof in persecution in Hong Kong) Hartmann J referred to Lord Goff in *Sivakumaran* and the expression of the standard of proof in the following terms:

> The objects of the Convention will surely be fulfilled if refugee status is afforded in cases where there is a real and substantial risk of persecution for a Convention reason.

Hartmann J went on to state:

> [56] No authority has been placed before me to suggest that any different standard has been adopted by our courts in Hong Kong. That being the case, in my view, the statement by the RSRB in its ruling that its task was to assess whether the applicant faced 'a real chance' of persecution cannot be faulted. A 'real chance' of persecution is no different in essence from a 'real and substantial risk' nor a 'reasonable chance' nor a 'serious possibility' of persecution …
>
> [57] On behalf of the applicant, Mr Pun submitted that the true standard should be one of a 'reasonable possibility' (as adopted by the United States Supreme Court in Immigration and Naturalization Service v Cardoza-Fonseca supra) and that this standard was lower than that of a 'real chance'. I do not accept that to be the case. I see no real difference between 'a reasonable chance', for example, and 'a reasonable possibility'. They express the same thing. A 'reasonable' chance of prosecution cannot be a 'real' chance. Equally, if there is a 'chance' that chance must amount to a 'possibility'.

5.23 Whilst the formulations or wording of the standard of proof varies slightly between jurisdictions, it is agreed that the standard required is less than the

36 [2001] UKIAT 00018, United Kingdom: Asylum and Immigration Tribunal/ Immigration Appellate Authority, 19 July 2001 at [12].

37 *Refugee Appeal No 70074/96 Re ELLM*, No 70074/96, New Zealand: Refugee Status Appeals Authority, 17 September 1996.

balance of probabilities. Accordingly, the correct threshold is not that of a 'high probability', or even a matter of probability. As long as a real risk exists, the claimant is entitled to non-refoulement protection once other criteria are fulfilled. As stated in *Chan v Minister for Immigration and Ethnic Affairs*:[38]

> an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be ... persecuted. Obviously, a far-fetched possibility of persecution must be excluded.

In short, the standard of proof bears no relationship to either the criminal or civil standard, but is one that is not remote, regardless of whether it is less or more than a 50 percent chance.

5.24 The time for assessing whether there is a well-founded fear is at the date of determination. Past persecution is not required to prove that a fear is well-founded but it can be helpful in assessing the risk of future harm. In order to satisfy the objective test, the examining authorities must look at what is happening to people similarly situated to the claimant, therefore accurate, up-to-date COI is very important.

Persecution

5.25 The RC does not specify who the agent of persecution must be and likewise, paragraph 13 of the Notice is silent as to the perpetrator of persecution. From the wording of both Article 1A(2) of the RC and Paragraph 13 of the Notice, it would appear that there is no limitation as to the source of persecution and consequently, applies to persecution committed by the Risk State and/or persecution condoned or acquiesced to by the Risk State and/or persecution neither condoned or acquiesced to by the Risk State but present because the Risk State is either unwilling or unable to offer the claimant adequate protection. Case law provides some guidance on what does and does not constitute 'persecution'.

5.26 In *Luu The Truong v Chairman of the Refugee Status Review Board & Anor*[39] it was held:

> Persecution is something graver than discrimination although, often by definition, discrimination is enclosed within persecution. As was said in *R v Immigration Appeal Tribunal, ex p Jonah* [1985] Imm AR 7 (cited with approval in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489) the test of persecution' is and must be kept at a high and demanding level'.
>
> During the course of its ruling, the RSRB specifically considered the nature of persecution under the Convention and how it must be distinguished from other forms of ill-treatment that offend the dignity and rights of a person. In this regard, the following was said:
>
> > 'It is important to bear in mind that discrimination per se is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution. Not every breach of a claimant's human rights constitutes persecution: UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, para 54:

38 (1989) 169 CLR 379, (1989) 87 ALR 412 at 446 (HCA).
39 [2003] 2 HKLRD 351, [2002] HKCU 1455 (CFI), at [64]–[65].

> > "Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, eg, serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."

5.27 In *Ram v Minister for Immigration and Ethnic Affairs*:[40]

> Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution.

5.28 In *Sepet (FC) and Anor (FC) v Secretary of State for the Home Department*[41] it was held:

> But [persecution] is a strong word. Its dictionary definitions (save in their emphasis on religious persecution) accord with popular usage:
> 'the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it;'
>
> 'A particular course or period of systematic infliction of punishment directed against the professors of a (religious) belief . . .': *Oxford English Dictionary*, 2nd ed, (1989).
>
> Valuable guidance is given by Professor Hathaway (The Law of Refugee Status (1991), p 112) in a passage relied on by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495:
>
> > 'In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community'.

5.29 In *Senathirajah Ravichandran v Secretary of State for the Home Department*:[42]

> I cannot think that the loss of freedom involved would properly be held insufficient to constitute persecution. Equally, if there remained a practice of torturing those detained, I very much doubt whether a finding of persecution on Convention grounds would be precluded merely because the torture was intended to discourage terrorism or to persuade detainees to inform on their associates rather than inflicted for purposes of oppression.

The court added the following factors in considering detention as possible persecution:

(i) The frequency of round-ups and the length of the detentions resulting;
(ii) The situation prevailing in Colombo at the material time and the Sri Lankan government's undoubted need to combat Tamil terrorism;
(iii) The true purpose of the round-ups and the efforts made to arrest and detain only those realistically suspected of involvement in the disturbances.

40 (1995) 57 FCR 565, (1995) 130 ALR 314 (FCA).
41 [2003] UKHL 15 (HL: Judicial Committee) at [7].
42 United Kingdom: Court of Appeal (England and Wales), 11 October 1995 (unreported).

5.36 Indeed, there are a number of cases which consider the causal link aspect of persecution. In *Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Anor, ex p Shah,*[50] the 'but for' test often used to establish causality in torts, for example, was rejected in favour of the application of 'common sense notions':

> Having concluded on a two-fold basis that the appellants are within the scope of the words "particular social group", it is necessary to consider whether they have a well founded fear of being persecuted "for reasons of" their membership of the group in question. … I think that [adopting the "but for" test] goes from overcomplication to oversimplification. Once one has established the context in which a causal question is being asked, the answer involves the application of common sense notions rather than mechanical rules. I can think of cases in which a "but for" test would be satisfied but common sense would reject the conclusion that the persecution was for reasons of sex.

5.37 Similarly, in *Chen Shi Hai (an infant) by his next friend Chen Ren Bing v Minister for Immigration and Multicultural Affairs,*[51] it was stated:

> Causation bedevils the law in many of its aspects. The phrase in the Convention "for reasons of" obviously imports certain notions of causation. There must be some relevant causal link between the postulated ground (membership of a "particular social group") and the entitling condition ("well-founded fear of being persecuted"). The one must provide the reason for the other. Coincidence in time and circumstance will not alone be sufficient. …
>
> The meaning of any statutory notion of causation depends upon the precise context in which the issue is presented. Providing that meaning will usually involve the decision-maker in introducing considerations of policy which cannot be reduced to a strictly logical deduction from words. Thus, in the field of torts law, the matter cannot be expressed as a simple formula. The "but for" test, which was formerly much favoured by the common law, needs to be tempered by "the infusion of policy considerations". In the context of the expression "for reasons of" in the Convention, it is neither practicable nor desirable to attempt to formulate "rules" or "principles" which can be substituted for the Convention language.

5.38 The *Michigan Guidelines on Nexus to a Convention Ground* warn against applying the standards of causation developed on other branches of international or domestic law. As refugee status determination is protection-orientated and forward-looking, standards of causation relevant to civil or criminal liability or any analysis directed solely at past events is unlikely to be helpful.[52]

5.39 In *SB (PSG – Protection Regulations – Reg 6) Moldova v Secretary of State for the Home Department*, doubts were expressed about semantics that would allow for more remote causality:[53]

> We note that regulation 5(3) employs the words "for at least one of the reasons ….." and, although we would not directly apply the Qualification Directive especially as it has not been suggested that there are any errors of transposition, we note also that

50 [1999] 2 AC 629 (HL) at 654.
51 [2000] HCA 19 at [67]–[68].
52 JC Hathaway, 'International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground', Mich J Int'l L 23, no 2 (2002): 210-21 at [11].
53 CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal/ Immigration Appellate Authority, 26 November 2007, at [78].

> Article 9.3 of the Qualification Directive uses the words "there must be a connection between the [Geneva Convention reasons] and the acts of persecution ….." We do not consider that there is any material difference between the two. In the Geneva Convention, the causative element is provided for by the words "for reasons of…." in the phrase "owing to well-founded fear of being persecuted for reasons of……." in Article 1A(2). At paragraph 102 of the judgment in *ex parte Hoxha*, Baroness Hale quotes the phrase "for reasons which are related to one of the Convention grounds…" which appears in paragraph 21 of the UNHCR's PSG Guidelines. We have concerns about moving from the words "for reasons of…." in the Geneva Convention to the words "for reasons which are related to…"

5.40 Whilst in *Vitalis Ananze Okere v Minister for Immigration and Multicultural Affairs*[54] the Court disapproved of an approach that would limit causality to a direct cause:

> It follows from the above analysis that I reject the contention made on behalf of the respondent that Article 1A(2) of the Refugees Convention is to be construed as excluding from the protection afforded by the Refugees Convention persons who have a well-founded fear of persecution which is motivated not directly for reason, for example, of their religion, but only "indirectly" for reason of their religion. According to this contention, for example, persons who have a well-founded fear of persecution for reason of their refusal to work on the Sabbath could not be found to have a well-founded fear of persecution for reason of their religion; the persecution feared by them would be related to their refusal to work and not to their religion.

5.41 In *Sepet (FC) and Anor (FC) v Secretary of State for the Home Department*:[55]

> However difficult the application of the test to the facts of particular cases, I do not think that the test to be applied should itself be problematical. The decision-maker will begin by considering the reason in the mind of the persecutor for inflicting the persecutory treatment. That reason would, in this case, be the applicants' refusal to serve in the army. But the decision-maker does not stop there. He asks if that is the real reason, or whether there is some other effective reason. The victims' belief that the treatment is inflicted because of their political opinions is beside the point unless the decision-maker concludes that the holding of such opinions was the, or a, real reason for the persecutory treatment.

5.42 In *Omoruyi v Secretary of State for the Home Department*[56] there was support for the analysis by Hathaway & Foster which framed causality by asking the question 'why is the applicant in the predicament he is in?' rather than, 'why does the persecutor wish the harm the applicant or the state refrain from protecting him?'[57]:

> The Nigerian State Authorities in the present case were not unable or unwilling to protect the appellant because of his being a Christian but rather because he was at risk for having crossed this particular cult. … And he was not being discriminated against by the Ogboni because of his Christian beliefs but rather because he had dared to defy them; the cult would have been wholly indifferent to his underlying reasoning or beliefs.

54 NG 154 of 1998 (Australia: Federal Court, 21 September 1998).
55 [2003] UKHL 15 (HL: Judicial Committee), at [23].
56 [2000] EWCA Civ 258, [2000] All ER (D) 1367 (12 October 2000).
57 JC Hathaway & M Foster, 'The Causal Connection ("Nexus") To A Convention Ground', July 2003, International Journal of Refugee Law Vol 15, pp 461–476.

Chapter 9

Stage 4 of the USM

Statutory and Administrative Schemes for Appeal/Petition

9.1 The statutory framework for appeal (applying only to torture claims) is found at Part VIIC, Division 3 of the Ordinance. Further informing the appeal regime is the 'Principles, Procedures and Practice Directions of the Torture Claims Appeal Board' (the 'PPP') issued pursuant to section 16 of Schedule 1A to the Ordinance. The PPP is intended primarily to provide guidance and does not substitute the law as contained in the Ordinance.

9.2 Running parallel to the statutory torture claims mechanism is an administrative petition mechanism. For the purposes of the USM, the Chief Executive delegated his powers under BL 48(13) to members of the TCAB (which was established by s 37ZQ of the Ordinance) to hear and determine petitions in relation to claims made on all applicable grounds other than torture risk. Resultantly, appeals/petitions against unsubstantiated claims are dealt with together and at once by the TCAB. The 'Practice and Procedural Guide of the Administrative Non-Refoulement Claims Petition Scheme' (the 'Petition Guide') is the administrative equivalent of the PPP and is very similar in content. For the avoidance of doubt, all references to the Ordinance and to appeals will also apply to petitions and the administrative mechanism and the 'TCAB' will refer to both the Appeal Board and the Petition Office.

Filing an Appeal/Petition

9.3 Under s 37ZR, a claimant aggrieved by a decision of an immigration officer to:

(a) not re-open non-refoulement claim,[1]
(b) to reject a non-refoulement claim,[2] or
(c) to revoke a substantiated claim[3] may petition/appeal to the TCAB.[4]

1 Section 37ZE(4) or 37ZG(5).
2 Section 37ZI(1)(b).
3 Section 37ZL(1).
4 Paragraph 8.1 of the Petition Guide; Paragraph 5.1 of the PPP.

9.4 With regard to (a), a decision by an immigration officer to not re-open a withdrawn claim under s 37ZE or 37ZG of the Ordinance can be appealed to the TCAB within 14 days after the notice of decision is given to the claimant. In this situation, the DOI must provide a copy of the NCF, any transcripts from the SI, a copy of the claimant's notice withdrawing the claim (if applicable) and a copy of any evidence filed under s 37ZE(2) requesting that the DOI re-open the claim. An appeal/petition on this ground will be limited to the facts relating to the withdrawal and not the substantive claim.[5]

9.5 With regard to (c), a decision by an immigration officer to revoke a substantiated claim under s 37ZL of the Ordinance may be appealed to the TCAB within 14 days of the written notice for revocation. The DOI must then provide to the TCAB and the claimant a copy of the NCF, a copy of any transcripts form the SI, a copy of the substantiated Decision, a notice of the proposed revocation and a copy of the claimant's objection notice (if applicable). Again, an appeal/petition on this ground will be limited to the facts relating to the revocation and not the substantive claim.

9.6 With regard to (b), rejection of a non-refoulement claim, by far the most common reason for appeal/petition and to which the remainder of this chapter will refer, the claimant must file a Notice of Appeal/Petition within 14 days of the date that the Decision is given to the claimant. This must be done on the specified form and be accompanied by a copy of the Decision being appealed against.[6] The legal representative need only draft the grounds of appeal and the Notice of Appeal/Petition will be dealt with by the CLO.

9.7 Where an appeal/petition is filed after the 14 day time limit – for example, if the DLS has trouble locating the claimant or if the services of an interpreter cannot be secured in time, under s 37ZT the Notice of Appeal/Petition must include an application for late filing of the notice which includes a statement of the reasons for failing to file the notice in time and any documentary evidence in support. The TCAB will decide as a preliminary decision, and without a hearing, whether to allow the late filing of the Notice of Appeal/Petition. If the TCAB is satisfied that by reason of special circumstances, it would be unjust not to allow the late filing of the Notice of Appeal, it will allow the late filing of the appeal/petition and inform the claimant of its decision. If the TCAB does not allow the late filing of the appeal/petition, the TCAB must likewise provide the claimant with written notice of its decision.[7] In making this decision, the TCAB may only consider the reasons given by the appellant and any other 'relevant matters of fact within the knowledge of the TCAB'. The Ordinance is silent on what constitutes 'special circumstances', 'factors to be considered' and 'relevant matters of fact within the

5 Paragraphs 23 and 24 of the Petition Guide; Paragraph 18.1 of the PPP.
6 Section 37ZS; Paragraphs 8.1–8.3 of the Petition Guide; Paragraphs 5.1–5.2 of the PPP.
7 Section 37ZT; Paragraph 9 of the Petition Guide; Paragraph 6 of the PPP.

knowledge of the TCAB'. Some guidance can be sought from *Re Asghar Ibrar*[8] where it was held:

> 47. For the meaning of special circumstances, it is understandable that the Immigration Ordinance leaves it to the discretion of the TCAB. Any attempt to define this term may cause more problems.
>
> 48. As to relevant factors, it is difficult to be exhaustive. I venture to suggest some subject to s 37ZT(2): the importance of expedient disposal of appeals; the reasons for the late filing; the length by which the applicant is out of time; whether the application for late filing is promptly made; whether an applicant is in custody; other relevant personal circumstances of the applicant etc.
>
> 49. Section 37ZT(2)(b) allows the TCAB to consider any other relevant matters of fact known to them. I do not think this subsection meant that the TCAB should sit back and limit its mind to the documents before them. While this subsection does not create a positive duty to inquire, high standard of fairness may warrant some inquiry to clarify ambiguities apparent to the TCAB. The nature and extent of this kind of inquiry depend on individual cases. I anticipate that it would only be necessary in very limited circumstances. That said, I must stress that it is always the burden of the applicant to explain the late filing with supporting evidence.
>
> 50. In my view, in the exercise of the discretion whether to allow late filing under s 37ZT(3), the TCAB should look at all relevant matters subject to s 37ZT(2)(b) and consider the overall justice of the case. A rigid mechanistic approach is not appropriate. An expeditious disposal of a case has to be considered together with the equally salutary objective of ensuring fairness.

There have been a number of judicial reviews of a refusal by the TCAB to allow late filing of an appeal/petition. It is worth looking at these if the legal representative has a would-be appellant in this position.[9]

9.8 An appeal/petition conference will be held and the legal representative should read and explain to the claimant the grounds of appeal that they have prepared on their behalf. The process of appeal should be explained, including the fact that the TCAB may decide the appeal/petition on the papers without an oral hearing. The claimant should also be advised that if their appeal/petition is unsuccessful, there is no further avenue of appeal but that if their case warrants it, judicial review would be the next step.

Directions Hearings

9.9 Some adjudicators require the parties to attend a Directions Hearing prior to the substantive appeal/petition hearing[10] for the purpose of giving directions or determining any matters incidental to the appeal/petition. If such a hearing

8 [2017] HKCU 230 (unreported, HCAL 9/2016, 26 January 2017).
9 See annex to Chapter 10 on judicial review.
10 Section 16 of Schedule 1A to the Ordinance.

is ordered, the DLS will be informed by the Secretariat to the TCAB/the Petition Office.[11]

9.10 The Directions Hearing, if so ordered, must be attended by the claimant and/or the legal representative. If an unrepresented claimant fails to attend the hearing without having given a reason for being absent, the TCAB may make any orders or directions it sees fit in their absence.

9.11 The Directions Hearing takes place at the TCAB and is presided over by the same adjudicator who will hear the substantive appeal/petition. Normally, the claimant is not called upon and the legal representatives for the claimant and for the DOI will assist the adjudicator in setting down directions and orders. This may include matters such as the production of original copies of supporting documents, the availability of further evidence, the narrowing of live issues, the contents of the hearing bundle and time management issues. The adjudicator will set down a date(s) for the substantive hearing and make a number of orders that will later be sent to the legal representatives. This hearing is usually fairly short and straightforward and can be very helpful to the legal representative as it can give a good indication of the areas troubling the adjudicator and the issues likely to be pertinent at the substantive hearing. Likely issues in terms of credibility may become apparent, allowing the legal representative to make further enquiries from the claimant, seek more evidence and to tailor skeleton submissions.

Oral Hearing or Decision on the Papers?

9.12 In *FB v Director of Immigration*[12] it was stated that in light of the importance of the decision to the petitioner's liberty or welfare, in most cases of a petition, the relevant factors will favour the view that an oral hearing should be permitted as an aspect of procedural fairness. In that case, it was held that by establishing a system in which a petitioner is denied both an oral hearing and the right to legal representation in that hearing, the system did not reach the high standards of fairness required. However, the court did not go so far as to hold that every petition required an oral hearing, instead, it was stated that it was necessary for the Secretary in each case to have regard to the appropriate relevant considerations and to make an appropriate determination.

9.13 In *ST v Betty Kwan & Director of Immigration*[13] the adjudicator's decision not to allow an oral hearing and/or give notice of her intention not to so afford an oral hearing was challenged by way of judicial review. It was confirmed by the court that a claimant does not enjoy an absolute right to an oral hearing and whether an oral hearing is required as a matter of fairness must be dependent on the individual circumstances of the case. It was further held that the high standards of fairness did not require the adjudicator to give notice of his intention to decide the petition on the papers, to give reasons for such a decision, or to give a claimant a chance to make representations on why an oral hearing should be given. Whilst

11 Paragraph 10.5 of the Petition Guide; Paragraph 7.5 of the PPP.
12 [2009] 2 HKLRD 346, [2009] 1 HKC 133 at [206]–[217].
13 [2013] 3 HKC 87, (2013) 18 HKPLR 308 (CFI).

the court rejected the contention that there was a systemic procedural unfairness in the practice of disposing of selected petitions on the papers without notice or reasons, it held that whether the procedure itself has caused any risk of prejudice to a particular petitioner by reason of procedural fairness must be decided on a case-by-case basis depending on the individual circumstances and facts of that case.

9.14 The fact that an oral hearing is not an absolute right is reflected in paragraph 12 of Schedule 1A to the Ordinance which states:

> The Appeal 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.

9.15 Both the PPP and the Petition Guide discuss at length whether an oral hearing is indicated. They state:

> 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 male worthwhile or effective representation.[14]

9.16 It is evident that the TCAB should bear in mind the potential consequences of the Decision where life and limb are at stake[15] and that it may be appropriate to draw the appellant's attention to matters that obviously require clarification or elaboration so that they can address those issues. Where it is reasonably clear that the appellant has already produced everything he or she wanted to show, then an oral hearing may not be indicated.[16] The Adjudicator should consider overall, whether there is any advantage in holding an oral hearing as opposed to merely deciding the petition/appeal on paper, bearing in mind that written submission do not afford the flexibility of oral presentations – accordingly, the nature of the issues or arguments involved need to be considered.[17]

9.17 The PPP and Petition Guide give a number of examples where an oral hearing (or further written representations) would be indicated:

(a) If there is any point, factual or legal, of which the Board is not sure, an oral hearing or further submissions from the appellant would help.
(b) The Adjudicator is of the view that a 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 that an important authority on a material point has been omitted or only touched on superficially in the Notice of Appeal/Petition.

14 Paragraph 11.3 of the Petition Guide; Paragraph 8.3 of the PPP.
15 Paragraph 11.5(a)(i) of the Petition Guide; Paragraph 8.5(a)(i) of the PPP.
16 Paragraph 11.5(a)(ii) of the Petition Guide; Paragraph 8.5(a)(ii) of the PPP.
17 Paragraph 11.5(c) of the Petition Guide; Paragraph 8.5(c) of the PPP.

(c) 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.

Where the issue concerns the drawing of inference, the application of common sense, the giving of weight, or the assessment of risk, that is, for matters essentially involving evaluation and judgment, oral arguments may well be a better means of representation than written submissions.

9.18 In *Taizul Islam v Winston Leung*,[18] the position of the courts with regard to oral hearings was summarised thus:

> 46. An oral hearing should normally be given, amongst others, in the following situations:
>
> (1) Where any point, factual or legal, is troubling the adjudicator, or where relevant factual or legal points have not been dealt with adequately or at all in the petition: *ST v Betty Kwan*, §§40 and 42; *Shafqat, Ali v Betty Kwan*, at §36.
> (2) Where credibility issues crucial to the adjudicator's decision are involved, and/or new matters are raised before the TCAB: *Marcelo De Vera Centeno v Director of Immigration*, unreported, HCAL 50/2012, 9 May 2012 per Lam J (as he then was) at §13;
> (3) Even if no new matters are raised, an applicant is entitled to say in an appeal or petition that inappropriate weight has been accorded to some aspect of the evidence: *FB v Director of Immigration & anor* [2009] 2 HKLRD 346 per Saunders J at §212.
>
> 47. The assumption must always be that an oral hearing has the potential to make a difference. See *R (Osborn) v Parole Board* [2013] 3 WLR 1020, at §81, per Lord Reed JSC.

Matters Prior to the Hearing

9.19 If the TCAB decides to hold a hearing, it must give no less than 28 days' notice of the date of hearing to all parties.[19] However, in practice, the legal representative tends to be informed of an appeal/petition date far in advance of this. It currently takes an overburdened TCAB several months before an appeal date is set down. Further the Chairperson of the TCAB may decide the order in which appeals are to be heard and determined.[20]

9.20 The conduct of an appeal/petition differs somewhat from the first stages of the USM in that the legal representative will be more in control of the process. The CLO does not play as significant a role as they do in Stages 1 to 3 and it will be up to the legal representative to confer with the representative for the DOI in preparing the appeal.

18 [2016] HKCU 2375 (unreported, HCAL 66/2015, 3 October 2016).
19 Section 13 of Schedule 1A of the Ordinance.
20 Section 7 of Schedule 1A of the Ordinance; Paragraph 10.2 of the Petition Guide; Paragraph 7.2 of the PPP.

9.21 Under ss 9 and 14 of Schedule 1A of the Ordinance, the responsibility for preparing the appeal bundle falls on the DOI. It will include all the documents and submissions that were relied upon by the DOI in arriving at the Decision (including the NCF, the transcripts from the SI, any legal submissions made by the legal representative, the relevant COI, any supporting documents and expert evidence and/or medical reports).

9.22 Also to be included in the hearing bundle are the updated COI in the event that a period of time has passed between the Decision and the appeal/petition hearing. The legal representative and the representative for the DOI should work together to comply with the requirement under paragraphs 9.8(f) of the PPP/12.8(f) of the Petition Guide that relevant parts of the updated COI be identified by highlighting. In practice, usually the representative for the DOI and the legal representative will collate the additional COI on which they each are relying and the DOI will paginate the same. Once paginated, the legal representative will highlight in one colour the parts of the COI to which they will refer at the appeal hearing and the DOI will do the same with another colour. This means that the legal representative will need to have skeleton submissions prepared by this point or at least have a very clear idea what his or her submissions will be. Whilst the hearing bundle does not need to be served on the TCAB until 5 days before the hearing date, the updated COI and skeleton submissions for the appellant will likely need to be prepared at least two weeks before the hearing date to allow the DOI sufficient time to properly prepare and paginate the bundle. This is, however, not set in stone and the legal representative can confer and cooperate with the representative for the DOI to ensure that the parties comply with the requirements of the TCAB in time.

9.23 Paragraphs 9.1 of the PPP/12.1 of the Petition Guide state that the legal representative and the representative for the DOI should also confer to produce a list of agreed issues to assist the TCAB. Whilst this can be undoubtedly helpful in narrowing the issues in terms of preparing skeleton submissions, it can also be dangerous. Where the DOI concedes a number of points by agreeing or failing to dispute certain matters (especially those relating to credibility) the legal representative may, understandably, decline to make legal submissions on those points especially as the PPP and Petition Guide state that skeleton submissions should be directed at the live issues only.[21] If the adjudicator (who is entitled to hear the case afresh and is not prohibited from going behind DOI concessions) then takes issue with those conceded points, the legal representative may not have sufficient time or be sufficiently prepared to address those points on the day. Or worse, if having conducted the hearing on the basis of the live issues only, the adjudicator later disputes the agreed issues that the legal representative believed to be conceded in making his or her findings, the appellant may not be heard on those issues at all. It is therefore strongly recommended that where a list of agreed issues has been prepared, the legal representative should enquire of the adjudicator at the hearing whether he or she has any concerns with regard to the

21 Paragraph 12.3 of the Petition Guide; Paragraph 9.3 of the PPP.

agreed issues and either make submissions at that time or request leave to make further written submissions to be filed with the TCAB at a later date.

9.24 It is uncommon, but there may be occasions where an appellant wishes to adduce new evidence that was not before the immigration officer in Stages 1 and 2 of the USM. This may relate to matters that have arisen after the Decision (excluding updated COI) or evidence that was not reasonably available before the Decision.[22] In these circumstances, the appellant must file a written notice indicating the nature of the evidence and an explanation as to why the evidence was not put before an immigration officer before the Decision. Such notice should also be served on the other side.[23]

Skeleton Submissions

9.25 If the legal representative has previously prepared legal submissions at Stage 1, then there will be less to cover in the skeleton submissions for appeal. The legal submissions should have already applied the thresholds and relevant law to the facts of the case and presented all relevant COI up to the date of filing the NCF. These previous legal submissions will be included automatically by the DOI into the hearing bundle and need not be repeated.

9.26 As the appeal/petition is a fresh re-hearing of the case[24] in that the TCAB has the power to review the merits of the case and may consider the same evidence that was before an immigration officer and also evidence that was not,[25] preparing skeleton submissions for an appeal/petition differs from a criminal appeal. The TCAB is generally disinterested in lengthy arguments on where the DOI went wrong in its reasoning and more interested in the credibility of the claimant and the updated COI. That said, the legal representative should deal with any matters in dispute between the parties, especially those concerning credibility. It may be worth outlining where the DOI erred in its reasoning in the body of the skeleton (without belabouring the point in oral argument) to assist the TCAB in avoiding making the same errors, but the reasoning of the decision-maker should not dominate the skeleton submissions as it might a criminal appeal. It must be borne in mind that the burden remains on the claimant to establish his or her claim and this should inform the approach taken by the legal representative even at the appeal stage.

9.27 Whilst the relevant COI in the bundle should be highlighted to show the exact passages that the legal representative will rely upon, it can be useful to

22 Section 18(2) of Schedule 1A of the Ordinance; Paragraph 18 of the Petition Guide; Paragraph 15 of the PPP.

23 Section 19 of Schedule 1A of the Ordinance; Paragraph 19 of the Petition Guide; Paragraph 16 of the PPP.

24 *AM v Director of Immigration* [2014] 1 HKC 416, (2014) 19 HKPLR 89 (CFI) at [28]: '…in legal terms, a determination of a petition … involves a rehearing of the matter determined by the Assessor and not an appeal from the Assessor's decision'. See also *X v Torture Claims Appeal Board* [2014] HKCU 2068 (unreported, HCAL 143/2013, 4 September 2014).

25 Section 18 of Schedule 1A of the Ordinance.

replicate the relevant paragraphs (if they are not too voluminous) in the body of the skeleton for ease of reference during the appeal.

9.28 It goes without saying that the skeleton submissions should refer to the relevant paragraphs and pages in the paginated bundle and take the adjudicator directly to the sources of COI even if the relevant paragraphs have been replicated in the body of the skeleton.

The Hearing

9.29 Before the hearing, the legal representative will have an opportunity to speak to the appellant with the assistance of an interpreter provided by the DLS. They should advise the appellant that he or she will be asked questions by the legal representative, the representative for the DOI and the adjudicator, and that they should remain consistent and not guess at any answers.

9.30 The hearing is held in private and only the adjudicator, the appellant, an interpreter and the legal representatives may be present. However, custody officers (if the appellant is on remand at the time of the appeal/petition) and other observers such as representatives from the Immigration Department and the CLO, will be permitted to attend although they may not take part in the proceedings.[26]

9.31 As long as there is proof that a party has been served a notice of the hearing, the TCAB may proceed to hear the appeal/petition in the absence of the appellant if he or she fails to attend. However, before proceeding to determine an appeal after hearing the appeal in the absence of party, the TCAB must give the appellant written notice of the TCAB's intention to do so and give the appellant 7 working days to submit an explanation for his or her failure to attend. If such an explanation is not forthcoming or the TCAB is not satisfied with the explanation given, the TCAB can proceed to making a decision notwithstanding the appellant's absence.[27]

9.32 Interestingly, the attendance of the DOI's representative may be excused from attending a hearing unless his or her attendance has been specifically requested by the TCAB.[28] This situation can be somewhat unnerving for the legal representative who is no doubt used to an adversarial process and it can be uncomfortable having the adjudicator almost fill the role of the other side. However, this happens rarely and it would appear, only in the simplest of cases.

9.33 The adjudicator should be referred to as 'Sir' or 'Madam' and aside from rising when the adjudicator enters the room, the legal representatives may remain seated through the proceedings. The TCAB has a wide discretion to determine its own procedure in hearing an appeal/petition[29] and therefore the rules of procedure

26 Section 10 of Schedule 1A of the Ordinance; Paragraph 13 of the Petition Guide; Paragraph 10 of the PPP.

27 Section 15 of Schedule 1A of the Ordinance; Paragraph 11.12 of the Petition Guide; Paragraph 8.12 of the PPP.

28 Paragraph 11.13 of the Petition Guide; Paragraph 8.13 of the PPP.

29 Section 17 of Schedule 1A of the Ordinance.

and evidence that apply to courts do not apply. Generally, the adjudicator will want to hear evidence from the appellant first. The appellant may choose to give evidence or not and this will be subject to the legal representative's advice. Legal representatives with a criminal law background may be particularly hesitant about an appellant giving evidence (especially where the case is looking strong) but as the burden is on the appellant to make their case, it is advisable to disregard such reservations. What must be considered is what the appellant stands to gain or lose by giving evidence. If the appellant has said everything he or she needs to say prior to the Decision *and* his or her credibility has not been challenged in any way by that Decision (and there have been no issues on credibility in the agreed list of issues) then it may be tempting to insulate the appellant from questions that might expose inconsistencies or weaknesses in the claim. However, as the appeal is a fresh re-hearing of the case and the adjudicator will assess the case independently of the Decision, this is a risky strategy as the appellant will not be given the opportunity to address any issues troubling the adjudicator or to dispel any doubts that he or she might have. If, despite this, the legal representative is still of the view that the appellant giving evidence would do more harm than good, it is advisable that they explain to the adjudicator at the outset that the appellant is minded not to give evidence as they have said everything they want to say and credibility is not in issue (as is evident from both the Decision and the agreed list of issues) then re-assess whether the appellant should give evidence subject to what the adjudicator has to say, ie, whether they have any concerns of their own on credibility or are troubled by any other matters requiring input from the appellant. Needless to say, if credibility is in issue, the appellant should give evidence. Generally, regardless of whether credibility is in issue or not, it is safer for the appellant to give evidence as the adjudicator is not prohibited from going behind DOI concessions by the Ordinance and has wide powers to re-assess the case anew.

9.34 If there are material facts missing from the evidence, the legal representative should, prior to the Decision, take the appellant through any evidence he or she wishes to adduce. This is unlikely, but may occur if the legal representative has taken on the case after giving a second opinion and did not conduct Stages 1 to 3 of the USM or more rarely, if something new has come to light since the Decision. Likewise, if there are any unaddressed discrepancies that were not dealt with by the previous legal representative, the legal representative can use this opportunity to address them. Whilst there are no formal rules of evidence, the legal representative should avoid leading the appellant.

9.35 If everything that the appellant needs or wants to say has already been canvassed in the NCF and SI, the legal representative should tender the appellant for questions by the legal representative for the DOI. The adjudicator will have a number of questions of their own and these may arise at any time during the appellant's evidence. In light of the somewhat informal proceedings, the legal representative may see fit to interject with clarifications throughout the appellant's evidence but they should bear in mind that there will be an opportunity for re-examination when both the adjudicator and the legal representative for the DOI have concluded their questions.

9.36 The legal representative should ensure that cross-examination is as fair as possible. Intervention may be necessary if new issues are raised without notice, if the appellant is asked to explain the actions of third parties, if questions are unclear, ambiguous or convoluted or the appellant is subjected to irrelevant questioning. Again, whilst no formal rules of evidence apply, the legal representative for the DOI should not be given a free rein to conduct cross-examination in a prejudicial manner.

9.37 The adjudicator must adopt an active role in hearing the appeal/petition. The fact that the burden of proof is on the appellant and even if the appellant has not presented any new information in addition to what was before the DOI, this does not absolve the TCAB of joint endeavour and to raise with the appellant issues which are of concern and which may affect the appellant's credibility.[30] However, the asking of questions should be geared towards gathering information and not take the form of cross-examining the appellant.

9.38 The legal representative should take note of any problem areas regarding credibility during the appellant's evidence and prepare to make submissions on the same if these have not been anticipated and included in the skeleton submissions. The TCAB may take into account the same matters that an immigration officer may consider as behaviour damaging credibility under s 37ZD of the Ordinance.[31]

9.39 The legal representative should not communicate with the appellant during any breaks or the lunch adjournment whilst the appellant is still giving evidence.

9.40 It is incredibly rare in practice, but witnesses may be called by either the DOI or the appellant upon an application to the TCAB, or the TCAB may call witnesses on its own motion.[32]

9.41 Once the appellant's evidence is concluded, the DOI's representative will make their submissions followed by the legal representative. Some adjudicators are more engaged than others but the legal representative should endeavour to be heard on all pertinent points. How submissions are set out is a matter for the legal representative but it is suggested that the legal representative, at a minimum, covers a summary of the appellant's evidence, including any corroborating evidence; a summary of factors establishing present and future risk; a summary of COI in the appellant's favour; and how the claim engages the obligations of the HKSAR government. The legal representative may also see fit to rebut the findings of the DOI in the Decision if it would be helpful.

9.42 Re-iterating paragraph 9.23 above, if the hearing has been conducted according to an agreed list of issues and the DOI has conceded any important points with regard to credibility, it is worth enquiring of the adjudicator if there are any matters that are on list and which have not been addressed for which they require further clarification.

30 *Shafqat, Ali v Betty Kwan* [2014] 3 HKC 496, (2014) 19 HKPLR 205 at [36].
31 Paragraph 17 of the Petition Guide; Paragraph 14 of the PPP.
32 Section 22 of Schedule 1A of the Ordinance; Paragraph 20 of the Petition Guide; Paragraph 17 of the PPP.