

Policy for detention pending final determination of the claimant's torture claim

Under section 37ZK of the Immigration Ordinance (“the Ordinance”), Chapter 115 of the Laws of Hong Kong, a claimant may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration and any assistant director of immigration (collectively referred to as the “Director”) pending final determination of the claimant’s torture claim, including any appeal. Detention must be justified with sufficient reasons and for a period which is reasonable in all circumstances. Reasonable alternatives will be considered before detention is authorized. No one shall be subject to arbitrary detention. The power to detain must only be used for the specific purpose for which it is authorized and its exercise must be justified on proper grounds. Each case is to be considered on its own facts and merits. Detention will be kept under regular review and will be reviewed when there is a material change of circumstances. The factors listed below are factors which the Director will generally take into account in determining whether a person should be detained or released, and are not meant to be exhaustive (in that each case will be considered on its individual merits and there may be other facts and circumstances relevant to any particular individual case) or in any order of priority / weight. The mere presence of a particular factor does not automatically lead to detention or release. The factors will be considered in the context of all the circumstances of the case. The Director will give due consideration to any representation made against detention.

In determining whether a person should be released or detained, the Director will take into consideration all the relevant circumstances of the case, including: (i) whether the person’s torture claim may be decided within a reasonable time in the foreseeable future; (ii) whether the process of the person’s torture claim is likely to be delayed on ground of non-cooperation of the person; (iii) whether that person poses, or is likely to pose, a threat or security risk to the community; (iv) whether there is any risk of that person absconding and/or (re)committing an offence which is punishable with a term of imprisonment; (v) whether that person’s identity is resolved or satisfied to be genuine; (vi) whether the person has expressed that he / she is not able to take care of himself / herself if released from detention; and (vii) whether there are other justifying circumstances in favour of release.

It should be noted that the detention of a person pending final determination of his / her torture claim shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances that justify its length, including circumstances stipulated in Section 37ZK(2) of the Ordinance¹.

Within the above criteria, the following matters are or may be relevant in deciding if a person should be detained or released in the particular circumstances of the case:

For detention

- (a) On preliminary vetting of available information, it appears that the person's torture claim may be one which can be decided within a reasonable time in the foreseeable future.
- (b) The person, without reasonable excuse, had failed to notify the Director the change of his / her correspondence address or residential address in Hong Kong.
- (c) The person, without reasonable excuse, had failed to comply with the prescribed procedures and time limits in relation to determination of the claim.
- (d) The person, without reasonable excuse, had failed to attend scheduled interview(s) for the purpose of assessing the person's torture claim.

¹ The circumstances stipulated in Section 37ZK(2) of the Ordinance include:

- (a) whether the number of other torture claims pending final determination is such that it is reasonable to take the time it is taking, or has taken, to have the claimant's torture claim finally determined;
- (b) whether the manpower and financial resources allocated for carrying out the work involved in making such final determinations are such that it is reasonable to take the time it is taking, or has taken, to have the claimant's torture claim finally determined;
- (c) whether the making of—
 - (i) a decision by an immigration officer under section 37ZI;
 - (ii) a revocation decision; or
 - (iii) a decision by the Appeal Board in relation to an appeal made under section 37ZR, is directly or indirectly prevented or delayed by any action or lack of action of the claimant;
- (d) whether the claimant poses, or is likely to pose, a threat or security risk to the community; and
- (e) factors that are not within the control of the Director.

- (e) The person poses, or is likely to pose, a threat or security risk to the community.
- (f) The person has conviction(s) associated with crime(s) of serious or violent nature.
- (g) The person has records of violent behaviour during previous detention / imprisonment.
- (h) The person had previously absconded, escaped from custody or has a record of jumping bail.
- (i) The person had failed to comply with the terms / conditions of recognizance previously entered into by the person.
- (j) The person failed to attend appointment(s) / scheduled interview(s) without reasonable excuse, in response to call-up by the immigration offices / sections e.g. investigation sections / Extension Section etc. in relation to immigration matter or decision on previous occasion(s).
- (k) The person has a record of repeatedly breaching the immigration law or any condition of stay (including limit of stay) imposed on the person on previous occasions.
- (l) The person has previous conviction(s) of immigration and / or other criminal offence(s) or re-committed the same offence in respect of which he had previously been convicted.
- (m) The person, without reasonable excuse, has not produced satisfactory evidence or any proof of identity and relevant documents to establish his / her identity / nationality.

(n) The person is non-cooperative or has failed to give satisfactory or reliable answers to an immigration officer's enquiries / investigation on his / her identity.

(o) The person does not have fixed abode or close connection (e.g. family or friends) in Hong Kong to make it likely that he / she will be easily located if released.

Against detention

(p) The person is under the age of 18 and whose claimed age is accepted by the Director.

(q) The person is an elderly person requiring close supervision / medical care.

(r) The person is a pregnant woman and there is no clear prospect for her torture claim to be finally determined in the near future.

(s) The person has children who are substantially dependant on him / her for care and supervision.

(t) The person is in serious medical / mentally ill-health condition.

(u) The person is physically disabled requiring constant nursing care.

(v) There is satisfactory evidence that the person had been subjected to serious harm, physical or mental, inflicted by a third party in the past.

**Immigration Department
The Government of the Hong Kong Special Administrative Region**