

For information
6 July 2009

Panel on Security of the Legislative Council

Torture Claim Screening Mechanism

Purpose

This paper aims to brief Members on the review of the torture claim screening mechanism undertaken by the Administration and the enhancement measures to be put in place in due course.

Background

2. The United Nations' *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* has been applied to Hong Kong since 1992. Under Article 3 of the Convention, no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Only a small number of torture claims were lodged pursuant to this Article in the past: from 1992 to 2004, we received only 44 claims in total.

3. In June 2004, the Court of Final Appeal ruled in a judicial review case that the procedures for screening torture claims should meet high standards of fairness and allow every reasonable opportunity for the claimant to establish his claim. Thereafter, the number of torture claims has surged: the number of claims received were 186, 541, 1,583 and 2,198 respectively from 2005 to 2008; and 1,212 claims were received in the first five months of 2009. The majority of claimants are South Asians, mostly from Pakistan, India, Bangladesh and Sri Lanka. About half of the claimants are illegal immigrants and the other half over-stayers. According to available figures, about 90% of the claimants lodged their claims upon arrest or when facing repatriation by the law enforcement

agencies, and their claims were lodged after they have arrived Hong Kong for more than a year on average.

4. We have been reviewing the torture claim screening mechanism from time to time with a view to achieving effective screening, ensuring procedural fairness and preventing abuse. Nevertheless, the Court of First Instance of the High Court handed down a ruling in December 2008 concerning a judicial review case on the screening procedures and ruled that the procedures put in place by the Administration were not able to meet the high standards of fairness, for reasons including the following –

- (i) the Administration had not provided publicly-funded legal assistance to needy claimants;
- (ii) the officer who decided whether a claim was substantiated was not the one who interviewed the claimant¹; and
- (iii) the Administration had not arranged for oral hearings² of the petitions lodged by claimants who were dissatisfied with the result of the screening.

The screening process was suspended since the handing down of the judgment. As at mid-June this year, there are 5,053 claims pending screening.

Enhancing the Screening Mechanism

5. Since the handing down of the judgment, we have strengthened the training and support for the officers responsible for the screening. We have also further reviewed the torture claim screening mechanism, having regard to the experiences of other common law jurisdictions (in particular the United Kingdom and Canada).

¹ Under the previous procedures, officers of the Immigration Department (“ImmD”) would conduct screening interviews and consider the grounds of claims, before making recommendations to the Assistant Director who would decide whether the claims were substantiated.

² Claimants could lodge a petition to appeal the result of the screening if they were dissatisfied with such. Under the previous procedures, the Secretary for Security would make final decision on petitions under delegated authority from the Chief Executive and no hearings were conducted in the process.

Training and Support

6. The Immigration Department (ImmD) has entered into a Memorandum of Understanding with the United Nations High Commissioner for Refugees (UNHCR) to enhance cooperation. Under the arrangement, a number of ImmD officers are seconded to the Hong Kong Sub-office of UNHCR to further cooperation and experience sharing.

7. All officers responsible for screening would have attended a seven-week course conducted by legal and other relevant professionals within this year, including a one-week course provided by the Office of the United Nation's High Commissioner for Human Rights and UNHCR. A number of ImmD officers will also be sent abroad, to attend training on screening at relevant government bodies.

8. Furthermore, the relevant departments will also strengthen the research and database support to enable the officers responsible for screening to be informed of the latest country situation and the precedent cases.

Screening Procedures

9. Having regard to the court ruling (see paragraph 4 above), we would authorise immigration officers responsible for conducting screening interviews to decide whether the claims are substantiated.

10. Petitions lodged by claimants against the result of the screening will be handled and decided by independent persons with a legal background instead of the Secretary for Security, and hearings will be conducted in the petition process if deemed required.

Legal Assistance

11. As pointed out in the court ruling, having regard to the possible grave consequence of claims not established, i.e. the claimant might face torture after repatriation, the screening of torture claims are different from other administrative procedures. The Administration should thus allow legal representatives of torture claimants to be present at screening

interviews. Besides, the court ruling also pointed out that the Administration should make available publicly-funded legal assistance to the claimants who lack economic means. We accept those viewpoints of the court.

12. We would revise the relevant procedures and guidelines to allow legal representatives of claimants to be present at screening interviews. We would also allow attendance of legal representatives at petition hearings. Besides, the Administration is actively exploring the provision of publicly-funded legal assistance to the claimants who do not have such means. We are discussing with relevant service providers on possible provision of such services. If an agreement is reached, we would, though subvention to the relevant service providers under a pilot scheme, provide legal assistance to those claimants who have such an economic need during the screening process, including the provision of legal advice on the grounds for the claim and the petition, as well as legal representation of the claimants in petition hearings.

Resumption of Screening

13. To deal with the backlog of claims, we need to resume screening as soon as possible. We aim to implement the enhanced screening procedures in September or October this year. Besides, we also plan to introduce legislation on the screening procedures of torture claims, such that the procedures will be based on clear statutory provisions. Through the deliberations of the Legislative Council, it would also be conducive to the building of consensus of the community on the matters. We aim to brief the Panel on Security on the legislative proposals by the end of the year.

Views of Groups

14. There are a number of organisations which have provided views to the Administration on the issue of torture claims in the past³. We have

³ For example, there were submissions made by non-government organisations to the United Nations' Committee Against Torture during the Committee's examination of Hong Kong's report on the implementation of the Convention.

also exchanged views with the relevant bodies on the enhancements to the screening mechanism. They generally supported that fair and effective screening procedures for the claims should be set out as soon as practicable. However, there are also views which consider that the 1951 Refugee Convention should be extended to the HKSAR. There are also views that the Administration should also handle refugee status determination. In this regard, we reiterate that our established position regarding the Refugee Convention remains unchanged, that is, the Convention does not apply to the HKSAR and the Administration does not have the obligation to handle refugee status determination.

Advice Sought

15. Members are invited to note the content of this paper.

Security Bureau
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