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HONG KONG HUMAN RIGHTS MONITOR

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Submission to Panel on Security of the Legislation Council Review of the torture claim screening procedure 6 July 2009

Introduction

1. Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) stipulates the principle that “Torture as a ground for refusal to expel, return or extradite”.¹ Hong Kong, as part of China, has the responsibility to fulfill the requirements under the Convention.
2. Hong Kong has long been criticized for its lack of a coherent policy towards refugee and torture claimants and the absence of a fair and comprehensive legal framework to screen such claimants. The UN Committee Against Torture (the Committee) expressed its concerns on Hong Kong in its Concluding Observations in November 2008 that there was no legal regime governing asylum so as to ensure a fair and efficient refugee status determination procedure and recommended that the HKSAR should “consider adopting a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of its obligations under article 3 of the Convention, the merits of each individual case”. The Committee further expressed its concern at the position taken by the Government that there were “no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol.”
3. In response to the concerns of the Committee and court rulings in a number of court cases, the Government has further reviewed the assessment mechanism. However, the Monitor notes with concern that the Government maintains the previous position that the Refugee Convention does not apply to it, and there is no obligation to consider refugee status determination..
4. In the following paragraphs the Monitor will comment on the structure, procedure and the criteria of the proposed torture claim screening mechanism, as well as the Government’s decision not to extend the Refugee Conventions.

Torture claimants screening mechanism

5. The LegCo paper CB(2)2054/08-09(01) provided by the Government highlights the torture claimant screening mechanism. The paper is plainly an overview, and provides no detail of the revised screening mechanism and procedure proposed to be introduced as part of the pilot program. It is plain that the torture screening mechanism should be highly competent, informed and impartial in order to maintain a highly fair procedure to screen the genuine

¹ Article 3 of the Convention: (1) No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; (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.

torture claimant cases. In order to achieve this, the mechanism should contain the following elements.

6. **Independence and appeal mechanism:** It would be the best if the mechanism is independent from the Government. The torture claimants will be still dealt with at first instance by the Immigration Department (ImmD). The officers of ImmD should make every decision solely based on merits of the cases, free from any political or diplomatic pressures and any geographical considerations. To enhance the independence, appeals from negative decisions should go to an independent appeal board specially set up for this purpose. The appeal board should be at a level higher than the ImmD which makes the original decision. All rejected applicants, including those who are rejected under any fast-track procedure should be given the right to appeal, with reasonable time limits to enable proper preparation of such appeals.
7. As the Government has noted, independent persons with formal professional legal background will be appointed to make decisions on those appeal cases. The Monitor is concerned with the criteria and transparency in the process of appointing such persons. The Government has long been criticized for its appointment procedures so that many pro-government individuals were appointed especially into human rights protection institutions such as the Equal Opportunities Commission. The Government should establish a transparent and fair procedure to appoint the members of the appeal board as well as all other quasi-governmental institutions.
8. **Border control:** The border is probably the most critical area in the whole torture claimant procedure. As the United Nations High Commissioner for Refugee (UNHCR) noted, it is the stage which “abuses are most likely to occur” because of the fact that “applicant may be fearful, fatigued, lacking documentation, or unable to articulate clearly a claim”, and “the border authority may be incompetent, insensitive, or biased” or even that “a language barrier may exist between the two”.²
9. To prevent such difficulties, the immigration officers at the border should be competent and sensitive. They should be given a clear instruction to refer all possible torture claimant applicants to the immigration officers who are responsible for the torture claimants for further actions and decisions, and provide all possible information to the immigration officers for torture claimant decision to facilitate their work.
10. **Training of officers:** In accordance with the ruling in *FB*, Immigration officers involved in screening of torture claimants must first receive training so as to enable fair and just decisions to be made, in accord with the high standards of fairness required by *Prabakar*. The Monitor contends that all officers within the Immigration Department, particularly those at the border control points, should receive training in respect of persons who may be seeking protection under CAT. This will ensure that they have the necessary knowledge and understanding of a torture victim’s particular difficulties and needs. There must also be a mechanism for evaluation of the performance of the officers from time to time.
11. **Information sources:** It is important for there to be a comprehensive documentation and information database so as to provide the officers with access to useful and updated information during the decision-making process during or even after the interview has been completed. The information database should include all possible information include balanced country information from the Government and the NGOs, international law and

² Christopher L. Avery, “Refugee Status Decision-Making: The Systems of Ten Countries”, HeinOnline – 19 Stan. J. Int’l L. 235 1983, p. 238.

updated international human rights reports. A capable supporting team should be established to manage the information database and keep its information updated. Naturally, in accordance with the high level of fairness, such material must be accessible to the claimant and his/her advisors.

12. **Legal representation:** To meet the requirements laid down in FB, applicants seeking protection under CAT have the right to be represented by legal representatives at every stage of the application, including during the preparation of the interview, the interview, the hearing and the appeal. The current proposals of the Government are uncertain, and the paper presented is vague and short on details. The Monitor understands that it is the Government's intention to arrange such representation through the Duty Lawyer Scheme. The Monitor is concerned as to whether such an extension of the scheme will retain lawyers currently on the panel, and whether such lawyers are sufficiently experienced to deal with claims of this nature.
13. As to those cases referred to in the paper by the Government to the Panel as "backlog", the Monitor suggests that it is vital those cases be recommenced so that the persons screened under the now disapproved system are afforded a chance to put forward their whole case under a fair system.
14. **Appropriate interpretation:** The provision of appropriate interpretation can minimize the misunderstanding between the administrative tribunal/appeal board and the applicants, and shorten the time for processing. The Government has the responsibility to provide appropriate interpretation by recruiting qualified interpreters and providing them with intensive training. It is also important to ensure the quality of the interpretation service.

Criteria on screening

15. The General Comment No. 1 of the Convention stipulates the implementation of article 3 of the Convention in the context of article 22. It sets out a number of principles under article 3 of the Convention:
 - only cases with substantial grounds for believing that the torture claimant applicants would be in danger of being subjected to torture;
 - it is the responsibility of the applicant to establish a prima facie case and provide factual basis;
 - the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, however, the risk does not have to meet the test of being highly probable.
16. The General Comment No. 1 also sets out the non-exhaustive criteria when assessing each application:
 - Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?
 - Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
 - Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
 - Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
 - Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

- Is there any evidence as to the credibility of the author?
- Are there factual inconsistencies in the claim of the author? If so, are they relevant?

17. The Government paper does not provide anything on the criteria on screening torture claimant applications. The Monitor is of the view that the General Comment No. 1 provides a sound basis for the Government to develop its criteria to screen the torture clamant applications, and urges the Government to disclose relevant information as soon as possible.

Refugee Convention and RSD procedure

18. Despite continuous recommendations from the UN, the Government insists on maintaining the position not to seek the extension of the Refugee Convention to Hong Kong. The Government's explanation is that "Hong Kong is small in size and has a dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the Convention were to be extended to Hong Kong".³ Notwithstanding the fact that the Monitor, Human Rights Lawyers and other NGOs are maintaining the call for the Government to establish a single, integrated mechanism to screen cases under the Refugee Convention and the Convention Against Torture, the Government's position remains intractable.

19. The lack of a fair and open refugee status determination procedure (RSD) is an anomaly which has led to and will continue to engender abuse of the system. As at end of June 2008, there were 105 refugees, 1 671 asylum-seekers and 3 279 torture claimants remaining in Hong Kong. The screening of cases through the UNHCR Hong Kong sub-office is very slow, and, for obvious reasons, entirely outside the control of the Government. This enables non-genuine claimants to perpetuate their stay in Hong Kong, while depriving genuine claimants of the benefits of an efficient and speedy processing of their claims. A number of asylum-seekers also make claims under CAT. Even after a CAT claims is determined, there remains the possibility of the refugee claim being re-raised. The Monitor once again urges the Government to accept the extension of the Refugee Convention to Hong Kong and develop a fair RSD procedure.

Conclusion

20. The HK Government has reached a critical point in its dealing with victims of persecution and those who fear torture. There is a clear opportunity to replace the existing system with one that ensures refugees and those seeking protection under CAT are dealt with fairly, efficiently, and justly. Pending legislative confirmation, the pilot scheme should ensure as far as possible that these standards are met. Such a scheme will send the right signal to the international community, and enable genuine claimants to be protected, while at the same time signaling to those who would seek to abuse the system that they should not apply.

³ Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong (CAT/C/HKG/4).