

For information
1 December 2009

Panel on Security of the Legislative Council

Torture Claim Screening Mechanism: Enhanced Mechanism and Way Forward

Purpose

This paper aims to report to Members the latest progress of the enhancements to the torture claim screening mechanism put forth by the Administration, and to brief Members on the proposed legislative framework for a statutory screening mechanism.

Background

2. The number of torture claims has continued to increase. From 2005 to 2008, there were 186, 541, 1,583 and 2,198 claims received in the respective years. From January to October 2009, there were 2,761 claims received. The screening of torture claims has been suspended after the ruling on *FB and Others*¹ was handed down last December. As at the end of October 2009, there were 6,203 claims pending screening.

3. At the meetings of the Panel on Security held on 6 July and 29 September, Members were briefed on enhancements to the torture claim screening mechanism to be implemented by the Administration, including:

- (i) Training and support for screening officers be strengthened;

¹ The Court of First Instance of the High Court ruled in this case that the previous screening procedures put in place by the Administration did not meet high standards of fairness, for reasons including (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 claimant; and (iii) the Administration had not provided for oral hearings of the petitions lodged by claimants who were dissatisfied with the result of the screening.

- (ii) Screening procedures be revised including that immigration officers responsible for conducting screening interviews would decide whether the claims are substantiated;
- (iii) Petitions against the result of screening will be decided by independent persons with a legal background, and hearings will be conducted in the petition process if required; and
- (iv) Legal assistance will be provided to claimants who lack economic means.

At the above meetings, Members were also informed that the Administration planned to introduce legislation on the screening procedures of torture claims, such that the procedures will be based on clear statutory provisions.

Enhancing the Screening Mechanism

4. The Administration and the Duty Lawyer Service (DLS) have reached agreement on launching a pilot scheme in December to provide publicly-funded legal assistance to torture claimants who meet the means-test requirements. Duty lawyers will provide legal advice in the screening process in respect of the grounds of claims and petitions as appropriate, and will represent eligible claimants at petition hearings. The remuneration for duty lawyers will be based on current payment rates under the Duty Lawyer Scheme. DLS has started the recruitment of qualified lawyers for the pilot scheme. As at 20 November, about 400 duty lawyers have enrolled for the scheme. Separately, with funding from the Administration's Professional Services Development Assistance Scheme, the Law Academy (set up by the Law Society) is organising a training programme in mid-December for lawyers interested in joining the scheme.

5. The screening of torture claims will resume before the end of the year. The screening mechanism will be reviewed with experience gained in practice.

Legislative proposals

6. We propose to put in place a statutory regime for handling torture claims lodged under Article 3 of the United Nations' Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)³. Through legislation, the screening procedures will be based on clear statutory provisions. We also believe that the deliberations of the Legislative Council will be conducive to the building of community consensus on the handling of torture claims.

7. Our preliminary proposal for the legislative framework covers the following:

- (a) to provide that a claimant whose claim has not been screened will not be repatriated to his place of origin where there is a claimed torture risk;
- (b) to provide for the procedures of making a claim, including the time limits for lodging a claim or an appeal, the onus of proof, etc.;
- (c) to provide that torture claims are to be assessed by immigration officers, and to establish an independent tribunal, for appeals lodged against the result of screening to be handled by non-officials with a legal background and relevant experience;
- (d) to provide for the provision of publicly-funded legal assistance to eligible claimants in the screening process;
- (e) to provide for the handling of situations where claimants abscond or procrastinate or refuse to attend screening interviews without reasonable excuse, and the detention power exercisable by the relevant authority;
- (f) to provide for the authority to effect removal/deportation against those torture claimants who have failed to substantiate their claims;
- (g) to provide that a claimant will not be repatriated to his place of origin where there is a substantiated claim of torture risk, until such risk has dissipated. During the transitional period when removal/deportation is suspended, the claimant will not be

³ The Article provides that 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.

regarded as ordinarily resident in Hong Kong, and will not automatically become a permanent resident of Hong Kong; and

- (h) to provide for the offence of aiding and abetting the making of false claims.

8. The above legislative proposals aim to ensure effective and fair screening procedures and deter abuse of torture claims, so that Hong Kong will be able to maintain effective immigration control while fulfilling our Convention obligations.

9. In formulating the legislative proposals, we have made reference to the relevant systems in other common law jurisdictions (summary table at Annex). We also note some comments that the United Nations' 1951 Convention relating to the Status of Refugees should apply to Hong Kong, and that the Administration should process applications for refugee status in addition to screening torture claims. In this regard, we reiterate that our position on the Refugee Convention remains unchanged, i.e., the Convention does not apply to Hong Kong and the Administration has no obligation to handle applications for refugee status.

Advice Sought

- 10. Members are invited to note the content of this paper.

Security Bureau
November 2009

Mechanism for Screening Torture Claims/Refugees
in some State Parties to the Convention Against Torture¹

Country		United States	Canada	United Kingdom	New Zealand
Number of applications ² (in 2008)		About 47,500	About 37,000	About 26,000	About 250
Setting time limits	Lodging claims after arrival	Within 1 year of arrival, with supporting evidence	Soonest available opportunity or else adverse inference	Soonest available opportunity or else adverse inference	Soonest available opportunity or else adverse inference
	Submitting evidence	(As above)	File specified form and supporting evidence within 28 days of the application	Soonest possible or at screening interview (normally takes place within 2 weeks of the application)	Soonest available opportunity; evidence submitted after determination will not be considered
	Lodging appeals	30 days	15 days	10 working days (5 working days for claimants under detention)	10 working days (5 working days for claimants under detention)
Provisions for detention power		Yes	Yes	Yes	Yes
Offences for misrepresentation/abetting misrepresentation		Yes	Yes	Yes	Yes

¹ These countries are signatories to the Convention Against Torture as well as the 1951 Convention relating to the Status of Refugees and/or the 1967 Protocol of the Refugee Convention.

² Figures tabulated refer to all asylum applications. (There are no separate figures for torture claims.)