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Legislative Council

LC Paper No. LS32/09-10

Panel on Security

**Provision of free legal assistance to torture claimants under
the Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment (CAT)**

Purpose

At the meeting of the Panel on Security on 1 December 2009, members requested the legal adviser to the Panel to advise whether the free legal assistance scheme provided by the Government would meet the high standards of fairness in the determination of claims under CAT if lawyers of the right calibre and/or experience are not available to CAT claimants under the scheme. This paper seeks to provide an analysis on the issue based on information available.

Requirement for a high standard of fairness in the determination of CAT claims

2. The requirement for a high standard of fairness in the determination of CAT claims is laid down by the Court of Final Appeal in *Secretary for Security v Sakthevel Prabakar (Prabakar)*¹. The Court of Final Appeal held that high standards of fairness must be demanded in the making of such determination which may put a person's life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture. However, it did not decide whether high standards of fairness would require the provision of free legal advice as this issue did not arise in *Prabakar*. In *FB v Director of Immigration and Secretary for Security (FB)*², the Court of First Instance, in considering the fairness of the procedures for dealing with torture claimants, held that the Director of Immigration's blanket policy of denying legal representation to torture claimants was unlawful and failed to meet the high standards of fairness required. It was further held that the Government has a duty to provide free legal assistance to torture claimants given the seriousness and complexity of the issues involved in a torture claim and that vast majority of torture claimants would not be able to pay for their own legal representation.

¹ (2004) 7 HKCFAR 187.

² HCAL 51/2007.

Whether a high standard of fairness would require legal assistance to be provided by lawyers with relevant expertise or experience

4. While it was decided in *FB* that a high standard of fairness would require legal representation to a torture claimant and that free legal assistance, whether it be through the Duty Lawyer Scheme (DLS), or the Legal Aid Department, should be provided to torture claimants, matters relating to the seniority (e.g. the minimum number of years of post-qualification experience required), experience and/or calibre of lawyers required to be made available by the Government to torture claimants were not issues before the Court of First Instance.

5. According to our research, we are not aware of any decisions regarding the quality of legal assistance which State authorities are required to provide to torture claimants who lack the means to pay for their own legal representation. However, since the issue relates to the right to legal assistance, it may be useful to refer to judicial authorities on this subject. There are cases in which the courts have considered the right to legal assistance in the context of Article 14(3)(d) of the International Covenant on Civil and Political Rights³ (ICCPR). The following principles derived from these cases may be relevant:

- (a) While the right to legal assistance protected by Article 14(3)(d) of ICCPR does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that the assigned counsel provide effective representation in the interest of justice⁴;
- (b) the responsibility on the State party in providing legal counsel may not go beyond the responsibility to act in good faith in assigning legal counsel to the accused⁵; and
- (c) the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it is or should have been manifest to the judge that the lawyer's conduct is incompatible with the interests of justice⁶.

³ Article 14 of ICCPR guarantees equality before courts and tribunals and the right to a fair trial. Article 14(3)(d) provides, among others, that everyone charged with a criminal offence shall be entitled to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. Article 14 of ICCPR is implemented in Hong Kong through Articles 10 and 11 of the Hong Kong Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap. 383).

⁴ *Kelly v Jamaica* (253/87), Human Rights Committee, United Nations.

⁵ *Ibid.*

⁶ *Campell v Jamaica* (618/95), Human Rights Committee, United Nations.

6. In the United States, the Supreme Court has defined the right to counsel enjoyed by defendants facing felony charges as the right to the effective assistance of counsel to ensure that the defendants have a fair trial⁷. It has also decided that counsel's obligation to provide effective assistance includes advocating for the defendant's cause, conducting reasonable factual and legal investigations, and applying the necessary skills and knowledge⁸.

7. If the above principles are to apply to the present case, to decide whether the free legal assistance scheme would meet the high standard of fairness in the determination of torture claims, it is necessary to consider whether the Government has acted in good faith in assigning counsel and whether it has taken measures to ensure that effective legal representation or assistance will be provided to torture claimants. It is noted that the Administration has decided to provide free legal assistance to torture claimants through DLS. In making this decision, the Government has considered that DLS should be in a position to provide the legal assistance given that it is an independent legal professional organisation and possesses relevant experience⁹. It is further noted that the Administration and DLS will sign a memorandum of administrative arrangements for the implementation of the free legal assistance scheme. Subject to further information that may be provided by the Administration on these arrangements, it is arguable that the Government is acting in good faith in deciding to entrust DLS with the responsibility of providing legal assistance to torture claimants. Indeed, provision of free legal assistance through DLS is one of the options suggested in *FB*¹⁰.

8. Further, by providing public funding to the Hong Kong Academy of Law, an institute under the Law Society, to organise a four-day training programme for duty lawyers participating in the new scheme¹¹, it can be said that the Government is taking a positive measure to ensure that the lawyers concerned will at least be equipped with some knowledge about CAT claims before they are assigned to advise torture claimants. Whether the training is sufficient to enable lawyers to provide effective assistance or representation to torture claimants should be a question of fact to be decided with reference to matters such as the content and frequency of the training. Indeed, the issue of training given to examining officers and decision-makers in relation to CAT claims has also been considered by the Court of First Instance in *FB*.

⁷ *McMann v Richardson*, 397 U.S. 759, at 771 (1970).

⁸ *Strickland v Washington*, 466 U.S. 668 at 688-91 (1984).

⁹ Refer to paragraph 8 of the paper "Torture Claim Screening Mechanism: Latest Progress" issued by the Security Bureau in September 2009 (LC Paper No. CB(2)2514/08-09(01)).

¹⁰ HCAL 51/2007, para. 161.

¹¹ The four-day training programme covers a range of topics including the procedures for handling refugee and torture claims, the various legal issues involved, technical and procedural aspects of adjudication, practical skills in conducting interviews, assessing the risk of torture, etc.

That the decision-makers concerned were insufficiently trained or instructed is one of the grounds for the Court to hold that the screening process for CAT claims failed to meet the high standards of fairness required by *Prabakar*¹². Based on this decision in *FB*, it is possible that the courts will take into account the adequacy of the training provided to DLS lawyers who have no previous experience in handling torture claims or claims of similar nature in considering the fairness of the screening procedures for torture claims.

Conclusion

9. Based on the decided cases on the provision of free legal assistance by State authorities mentioned above, it is likely that the courts in Hong Kong will consider whether the assistance provided by the lawyers assigned by DLS would constitute effective assistance if they are asked to decide whether the free legal assistance scheme provided to torture claimants would meet the required high standards of fairness. To determine this issue, the courts may find it necessary to look at factors such as the skills and knowledge of the assigned lawyers in handling torture claims, as well as the adequacy of training provided to the lawyers concerned.

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¹² *FB v Director of Immigration and Secretary for Security*, HCAL 51/2007, paras. 176 to 190.