

立法會
Legislative Council

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Bills Committee on Immigration (Amendment) Bill 2011

Minutes of meeting
held on Monday, 24 October 2011, at 8:30 am
in Conference Room 3 of the Legislative Council Complex

Members present : Hon LAU Kong-wah, JP (Chairman)
Dr Hon Margaret NG
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan
Hon WONG Kwok-kin, BBS
Dr Hon PAN Pey-chyou

Members absent : Hon Abraham SHEK Lai-him, SBS, JP
Hon Paul TSE Wai-chun, JP

Public Officers attending : Item II
Mr CHOW Wing-hang
Deputy Secretary for Security 3 (Acting)

Mr LEUNG Kwok-hung, IMSM
Assistant Director
(Enforcement and Torture Claim Assessment)
Immigration Department

Ms Fanny IP
Senior Assistant Law Draftsman
Department of Justice

Mr Billy WOO
Assistant Secretary for Security

Mr FUNG Ming-keung
Principal Immigration Officer
(Torture Claim Assessment)

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Ms Connie FUNG
Senior Assistant Legal Adviser 1

Ms Rita LAI
Senior Council Secretary (2) 1

Mr Ian CHOW
Council Secretary (2) 1

Ms Kiwi NG
Legislative Assistant (2) 1

Miss Lulu YEUNG
Clerical Assistant (2) 1

I. Election of Chairman

Dr Margaret NG, the member of the highest precedence in the Bills Committee, called for nominations for the chairmanship of the Bills Committee. Mr LAU Kong-wah was nominated by Mr WONG Yung-kan and the nomination was seconded by Dr PAN Pey-chyou and Mr WONG Kwok-kin. Mr LAU Kong-wah accepted the nomination.

2. Dr Margaret NG called for other nominations. Dr Margaret NG was nominated by Ms Emily LAU and the nomination was seconded by Ms Cyd HO. Dr Margaret NG accepted the nomination. Ms Cyd HO took over from Dr Margaret NG to preside over the election.

3. As there was no other nomination, Ms Cyd HO announced that voting be conducted by secret ballot. After all members present had cast their votes, Ms Cyd HO invited Mr WONG Yung-kan and Ms Emily LAU who had nominated the two candidates to monitor the counting of votes.

4. Ms Cyd HO announced that six and three members voted for Mr LAU Kong-wah and Dr Margaret NG respectively. Ms Cyd HO declared Mr LAU Kong-wah elected as the Chairman of the Bills Committee.

II. Meeting with the Administration

5. The Bills Committee deliberated (index of proceedings attached at **Annex**).

6. The Administration was requested -

- (a) to provide detailed information on the training for decision-makers and duty lawyers handling torture claims;
- (b) to provide information on the mechanism for following up the post-removal situation of unsubstantiated torture claimants after return to their place of habitual residence;
- (c) to provide information about a case reported by the media regarding a person from Libya whose torture claim was found not substantiated and was subject to torture after removal from Hong Kong to Libya, including the process and reasons for determination of the case;
- (d) to provide information on claimants who did not arrive Hong Kong from a torture risk state direct, but en route through another place or places outside Hong Kong to which the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") applies, and to provide statistics and information on the mechanism of torture claim screening in such other places;
- (e) to provide information on the time required for the determination of the outstanding torture claims and the projected average time required for determination of the outstanding and new cases after the passage of the Bill;

- (f) to provide a paper explaining from a legal point of view its opinion that a torture claimant who entered Hong Kong legally or illegally would not be regarded as ordinarily resident in Hong Kong while waiting in Hong Kong for a determination on his torture claim;
- (g) to explain the meaning of "exceptional circumstances" in the proposed section 37ZV(2) ;
- (h) to explain why the Bill was confined to the implementation of Article 3 of CAT only and whether there were other local legislation that only implemented part of an international convention;
- (i) to explain the basis for the requirements under the proposed section 37ZI(5), including the views of the United Nations Committee Against Torture as well as the views of the courts on "internal relocation alternative";
- (j) to consider providing expressly in the Bill the provision of publicly-funded legal assistance to torture claimants; and
- (k) to provide information on the views of the courts regarding extension of a claimant's visitor status.

III. Schedule of future meetings

7. Members agreed that the further meetings of the Bills Committee be scheduled as follows -

- (a) 18 November 2011 from 10:45 am to 12:45 pm
- (b) 9 December 2011 from 10:45 am to 12:45 pm
- (c) 16 December 2011 from 10:45 am to 12:45 pm

8. Members also agreed that a meeting would be held on Monday, 21 November 2011, from 4:30 pm to 6:30 pm to receive the views of the public and organizations providing humanitarian assistance to torture claimants on the Bill.

9. The meeting ended at 10:30 am.

Council Business Division 2
Legislative Council Secretariat
2 December 2011

**Proceedings of meeting of the
Bills Committee on Immigration (Amendment) Bill 2011
held on Monday, 24 October 2011, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)	Action Required
000000 - 000700	Dr Hon Margaret NG Hon WONG Yung-kan Hon Emily LAU Hon Cyd HO	Election of Chairman	
000701 - 002759	Chairman Admin	Powerpoint presentation by the Administration on the Immigration (Amendment) Bill	
002800 - 003035	Chairman Hon Emily LAU	Dates of next four meetings; meeting with deputations; invitation of public views on the Bill	
003036 - 004457	Chairman Dr Hon Margaret NG Admin	<p>Dr NG's concerns and enquiries -</p> <p>(a) whether the Administration had any plans for processing refugee claims;</p> <p>(b) how the Administration would ensure fair and independent handling of cases by decision makers and adjudicators;</p> <p>(c) scope of matters subject to appeal; and</p> <p>(d) how and why substantiated claims could be revoked, party responsible for making a decision on revocation; scope of appeal against revocation.</p> <p>Response of the Administration -</p> <p>(a) it was concerned about the impact on immigration control if the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") was to be extended to Hong Kong. At present, the Administration provided support to the United Nations High Commissioner for Refugees ("UNHCR") with respect</p>	

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		<p>to the processing of refugee claims. If a refugee's status was confirmed by UNHCR, arrangement would be made by UNHCR for resettlement of the refugee in a third place or country. Director of Immigration ("D of Imm") would exercise his discretion on humanitarian grounds in the removal of claimants whose claims were not substantiated;</p> <p>(b) to ensure high procedural fairness as required by the court, the trainers would be experienced officers with legal background from other common law jurisdictions, including the United Kingdom, Australia and New Zealand; a legal expert with experience in handling torture claims from the United Nations Human Rights Committee had been invited to give advice on the contents of training courses; consideration was given to the views of the Court of First Instance in a recent judicial review case;</p> <p>(c) the scope of appeal would not be limited to points of law. An appeal could be lodged in respect of the decision on a case based on facts or new circumstances. Apart from revoking the decision on a case or referring a case back to the Immigration Department ("ImmD") for re-consideration, the Torture Claims Appeal Board ("the Appeal Board") could determine whether a case was substantiated;</p> <p>(d) grounds for revocation of a decision to accept a torture claim as substantiated were specified in the proposed section 37ZL(2).</p> <p>Dr NG sought information on -</p> <p>(a) details of training to be provided to decision-makers and duty lawyers</p>	

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		<p>and whether the training would be conducted by an independent organization;</p> <p>(b) case number of the appeal case on which the Court of First Instance delivered its judgment on 21 October 2011;</p> <p>(c) whether a claimant could lodge an appeal on the basis of new information regarding the torture risk state or the facts about his claim;</p> <p>Response of the Administration -</p> <p>(a) it would provide details of training on the handling of torture claims;</p> <p>(b) the relevant case number was HCAL126/2010(TK);</p> <p>(c) claimants would be allowed to present new information regarding the torture risk state which he did not know previously when his claim was screened for the purpose of lodging an appeal</p>	<p>Admin to provide details on training (paragraph 6(a) of the minutes refers)</p>
004458 - 010035	Chairman Hon Emily LAU Admin	<p>Views and concerns of Ms LAU -</p> <p>(a) views of many deputations that the Refugee Convention should be extended to Hong Kong; unconvinced of the economic prosperity of Hong Kong as the ground for the policy as some signatories of the Refugee Convention were also affluent;</p> <p>(b) details on the 170 detained claimants among the outstanding cases;</p> <p>(c) how claimants not allowed to work maintained their livelihood;</p>	

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		<p>(d) there were comments that the duty lawyers providing legal assistance to the torture claimants through the Duty Lawyer Service ("DLS") lacked sufficient experience and training on the handling of the torture claims which were complicated. Given the unattractive remuneration, it had been difficult to recruit experienced duty lawyers;</p> <p>(e) reasons for 5% of the claimants not receiving legal assistance by duty lawyers when 95% of the claimants received legal assistance;</p> <p>(f) criteria for determining the limit of 14 days for lodging an appeal;</p> <p>(g) reasons for withdrawal of claims in about 200 cases;</p> <p>(h) regarding the removal of 477 claimants whose claims were determined as not substantiated, whether there was any mechanism for following up the post-removal situation of the claimants; whether the claimants were subject to torture after returning to their habitual residence;</p> <p>Response of the Administration -</p> <p>(a) the Administration would further consider the views of deputations relating to the Refugee Convention;</p> <p>(b) decisions on detention of torture claimants were determined having regard to the circumstances of each case, including criminal record, likelihood of abscondance, risks to the safety of the community and whether the assessment of the torture claims could be completed within reasonable time. Such</p>	

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		<p>detention would not apply to claimants who were under 18, elderly people and pregnant women;</p> <p>(c) 98% of the claimants were released on recognizance and they were subject to certain reporting conditions. Regarding the daily necessities, the Social Welfare Department ("SWD") had commissioned a non-government organization to provide basic humanitarian assistance for torture claimants, including accommodation, food supply, medicine, and transport allowance for participation in religious activities and meeting with duty lawyers;</p> <p>(d) duty lawyers of DLS were required to possess three years' post-qualification experience and they had to receive three/four-day special training on the handling of torture claims conducted by the Hong Kong Academy of Law. A task force established by the Law Society of Hong Kong and the Hong Kong Bar Association had given views on the training. At present, around 270 duty lawyers had registered for the handling of torture claims and most of them possessed at least five years' post-qualification experience. The current remuneration for the duty lawyers was \$2,930 for a half-day service. If necessary, the level of remuneration would be reviewed. The provision of legal assistance by DLS had been effective and most of the claimants had been assisted by duty lawyers;</p> <p>(e) claimants had been informed of the availability of free legal assistance when they were briefed on their rights and interest. Regarding the</p>	

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		<p>5% of claimants not assisted by duty lawyers, either the claimants had their own voluntary lawyers or the claimants had confirmed that they were not in need of any assistance from duty lawyers;</p> <p>(f) the period for appeal had been determined having regard to the practice in other countries and the practice under the existing administrative screening mechanism. The Administration believed that the period for appeal was appropriate for allowing the submission of new information on significant change of circumstances for the appeal;</p> <p>(g) most cases were withdrawn because the torture risk giving rise to the claim had ceased to exist in the claimants' former habitual residence. There were also cases where the claimants decided to return to their former habitual residence voluntarily;</p> <p>(h) the Administration would ensure fairness of the assessment of the torture claims and would not remove a person to another country if he would face torture on return to his habitual residence. The Administration would provide information on the mechanism for following up the post-removal situation of unsubstantiated torture claimants.</p>	<p>Admin to provide information (paragraph 6(b) of the minutes refers)</p>
010036 - 011515	Chairman Hon Cyd HO Admin	<p>Concerns of Ms HO -</p> <p>(a) the Administration should consider specifying the provision of publicly-funded legal assistance to torture claimants in the Bill;</p> <p>(b) <u>claimants who were minors</u></p>	

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		<p>(i) number of claimants who were minors and whether those born in Hong Kong to torture claimants were permanent residents of Hong Kong;</p> <p>(ii) whether claimants who were minors were arranged to receive education during their stay in Hong Kong pursuant to the United Nations Convention on the Rights of the Child ("UNCRC");</p> <p>(iii) minor claimants' entitlement of some \$400 per month as food subsidy was insufficient; suggestion of inviting relevant social service organizations providing humanitarian assistance to torture claimants to give views on the Bill at the meeting to be held on 21 November 2011;</p> <p>Request for information -</p> <p>(c) details of a case reported by the media regarding a person from Libya whose torture claim was found not substantiated and was subject to torture after removal from Hong Kong to Libya, including the process and reasons for determination of the case; whether the Bill could prevent the recurrence of similar incidents;</p> <p>(d) number of claimants (mostly South Asian or Africans) who went to the Mainland first and stayed there for a period of time before they came to Hong Kong and submit an application for torture claim; whether the Administration could verify these cases with relevant authorities in the Mainland;</p>	<p>Admin to provide written response (paragraph 6(d) of the minutes refers)</p>

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011516 - 013446	Chairman Hon WONG Yung-kan Admin Hon Cyd HO Hon James TO	<p>Referring to the LegCo Brief (File Ref: SBCR 3/2761/09), concerns were raised by Mr WONG on the following -</p> <p><u>Paragraph 4</u> (a) whether it implied that there had been unfairness in the screening mechanism in the past;</p> <p><u>Paragraph 5</u> (b) how the Administration could deal with the scenario of claims for revocation of decision on unsubstantiated cases arising from changes in political situation in the claimant's country of habitual residence;</p> <p><u>Paragraph 7</u> (c) there might be claims for permanent resident status if the claimants of the outstanding cases had resided in Hong Kong for more than seven years; whether a torture claimant was regarded as ordinarily resident in Hong Kong while waiting in Hong Kong for a determination on his torture claim</p> <p>The Administration advised that -</p> <p>(a) requirement for high standards of fairness in the determination of the torture claims was laid down by the Court of Final Appeal ("CFA") in a judicial review case in 2004. Prior to 2004, the Administration relied on UNHCR for torture claims determination. CFA was of the view that the assessment had not met the high standard of fairness and it should be conducted by the Administration. The requirement for high standards of assessment of the torture claims had been followed closely thereafter;</p> <p>(b) the Administration would adhere to the principle that nobody would</p>	

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		<p>face the risk of torture upon removal;</p> <p>(c) at the time of making a torture claim, the claimant was an illegal immigrant or had overstayed in Hong Kong and therefore would not be considered as being "ordinarily resident" in Hong Kong;</p> <p>(d) the Government was committed to speeding up the process of torture claims determination. 400 had been determined in 2010-2011 and it was anticipated that around 1 200 would be determined in 2011-2012 financial years. With the implementation of the Bill, it was expected that the processing of the cases could be streamlined and further expedited. Subject to the manpower of ImmD, the availability of members of the Appeal Board and the training of the duty lawyers, around 2 000 cases could be handled in a year in future. Priority would be given to deal with cases pending for a long period of time.</p> <p>The Chairman requested the Administration to provide information on the time required for the determination of the outstanding torture claims and the projected average time required for determination of the outstanding and new cases after the passage of the Bill;</p> <p>Mr James TO requested the Administration to provide a paper explaining from a legal point of view its opinion that a torture claimant who entered Hong Kong legally or illegally would not be regarded as ordinarily resident in Hong Kong while waiting in Hong Kong for a determination on his torture claim</p>	<p>Admin to provide written response (paragraph 6(e) of the minutes refers)</p> <p>Admin to provide information (paragraph 6(f) of the minutes refers)</p>

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013447 - 015427	Chairman Dr Hon PAN Pey-chyou Admin Hon WONG Yung-kan Hon James TO	<p>Views / concerns were raised on the following -</p> <p>(a) concern about the possibility of judicial review regarding claimants' right of abode in Hong Kong, if the processing of the cases extended beyond seven years;</p> <p>(b) interpretation of "exceptional circumstances" in the proposed section 37ZV(2) and relevant examples;</p> <p>(c) consequences of a claimant found illegally working in Hong Kong, given that a claimant was not permitted to take up employment in Hong Kong</p> <p>Response of the Administration -</p> <p>(a) the permission for a person to stay in Hong Kong would become invalid at the time of submitting a torture claim; views of the courts regarding extension of a claimant's visitor status; the fact that a claimant was not removed from Hong Kong after lodging a torture claim did not imply that the claimant had right of abode in Hong Kong;</p> <p>(b) the "exceptional circumstances" would depend on the circumstances of individual cases, including personal reasons, chances of working in a third country; immigration control and the protection of local labour in Hong Kong. ImmD would only consider whether there were exceptional circumstances in respect of substantiated claims; so far there was one substantiated claim under the old screening mechanism and there was no substantiated claim under the revised screening mechanism;</p>	<p>Admin to provide information (paragraph 6(k) of the minutes refers)</p> <p>Admin to provide written response (paragraph 6(g) of the minutes refer)</p>

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		<p>(c) those who worked illegally in Hong Kong, regardless of whether they were illegal immigrants or visitors, would be subject to prosecution under relevant sections of the Immigration Ordinance regarding prohibition against undertaking employment and breach of conditions of stay for visitors.</p> <p>In response to Mr WONG Yung-kan's enquiry about the number of claimants who took up employment, the Administration confirmed that so far only one torture claim case had been substantiated and there has not been any case of a successful claimant taking up employment in Hong Kong;</p> <p>Whether "exceptional circumstances" covered the situation where a claimant provided translation or counselling service to another claimant</p>	
015428 - 020045	Chairman Hon Cyd HO Admin	<p>Views of Ms Cyd HO -</p> <p>(a) claimants' route of travelling to Hong Kong might reveal whether economic factor was the cause for the claim; request for information on mechanism for verification with relevant authorities on whether a torture claimant entered Hong Kong through the Mainland;</p> <p>(b) whether and why the Bill was confined to the implementation of Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only and whether there were other local legislation that only implemented part of an international convention;</p> <p>(c) queried the basis for the requirements under the proposed section 37ZI(5)</p>	<p>Admin to provide written response (paragraph 6(h) of the minutes refers)</p> <p>Admin to provide written response (paragraph 6(i) of the minutes refers)</p>

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		<p>Response of the Administration -</p> <p>(a) it would provide the requested information;</p> <p>(b) in the drafting of the proposed section 37ZI(5), reference had been made to the views of the United Nations Committee Against Torture as well as the views of the courts on "internal relocation alternative"</p>	<p>Admin to provide written response (paragraph 6(d) of the minutes refers)</p>

Council Business Division 2
Legislative Council Secretariat
2 December 2011