

立法會
Legislative Council

LC Paper No. CB(2)934/11-12
(These minutes have been seen
by the Administration)

Ref : CB2/BC/9/10

Bills Committee on Immigration (Amendment) Bill 2011

Minutes of meeting
held on Friday, 18 November 2011, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Hon LAU Kong-wah, JP (Chairman)
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun, JP

Members absent : Dr Hon Margaret NG
Hon WONG Yung-kan, SBS, JP
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan
Dr Hon PAN Pey-chyou

Public Officers attending : Item I
Mr NGAI Wing-chit
Deputy Secretary for Security 3

Mr CHOW Wing-hang
Principal Assistant Secretary for Security D

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 Henry CHAN
Government Counsel
Department of Justice

Mr Billy WOO
Assistant Secretary for Security D1

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

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

Miss Lulu YEUNG
Clerical Assistant (2) 1

Action

I. Meeting with the Administration

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

2. The Administration was requested -

Action

- (a) to provide information on the number of torture claims handled with breakdown on substantiated and non-substantiated claims, the determination of the claims, the claimants' country of origin, and whether petition was lodged against the determination;
- (b) to explain the difference between the proposed section 37ZD(1)(b) and "a failure of not taking advantage of a reasonable opportunity to claim non-refoulement protection in respect of a torture risk State while in a place outside Hong Kong to which the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") applies (other than a torture risk State)"; and the number of handled cases to which the proposed provision had applied;
- (c) to provide information on the non-refoulement protection offered by the Mainland, Macao, Thailand and Bangladesh under CAT and advise whether such protection was applicable to all claimants;
- (d) to consider the suggestion of setting out in the provision the considerations in the determination of the torture claims other than the credibility of the claimants;
- (e) to provide a copy of the report submitted by the Mainland to the United Nations Committee Against Torture on the implementation of CAT;
- (f) to explain with examples the operation of the proposed section 37ZI(5);
- (g) to consider specifying the exceptional circumstances in the proposed section 37ZV;
- (h) to consider allowing claimants whose claims were substantiated to work;
- (i) to provide information on the qualifications of duty lawyers handling torture claims with breakdown on the number of years of post-qualification experience; and

Action

- (j) to provide information on the number of new torture claims received.

II. Date of next meeting

- 3. Members noted that the next meeting would be held on 21 November 2011 to receive the views of the public on the Bill.
- 4. The meeting ended at 12:45 pm.

Council Business Division 2
Legislative Council Secretariat
1 February 2012

**Proceedings of meeting of the
Bills Committee on Immigration (Amendment) Bill 2011
held on Friday, 18 November 2011, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)	Action Required
000000 - 000604	Chairman Admin	Briefing on response by the Administration on paragraphs 2 to 4 of LC Paper No. CB(2)327/11-12(01)	
000605 - 000943	Hon Emily LAU Admin	<p>Request for information on -</p> <p>(a) the actual number of claimants who had travelled to the Mainland, Macao, Thailand, Bangladesh and Singapore before arriving at Hong Kong;</p> <p>(b) the number of claimants whose claims were substantiated or rejected on the basis of the listed criteria;</p> <p>(c) whether the claimants were cooperative to provide the relevant information on the route of travelling to Hong Kong</p> <p>Response of the Administration -</p> <p>(a) of more than 10 000 cumulative cases, about 6 000 claimants travelled through a third country or territory before arriving at Hong Kong. For the first five countries, over 5 000 claimants came from the Mainland, over 600 from Macao, 60 from Thailand and some 30 from Bangladesh and Singapore;</p> <p>(b) information on the route of travelling would be provided by the claimants when completing the torture claim form and also based on their immigration record if they were illegal immigrants</p>	

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000944 - 001400	Chairman Admin	<p>The Chairman asked about the consequence when the claimant's credibility was damaged. He enquired whether consequentially the claimant would be removed to his place of origin.</p> <p>The Administration responded that the credibility of a claimant was an important factor in the determination of the claim. The damage of credibility would have a negative impact on the overall assessment of the claim though consideration would also be given to the reasons presented by the claimant. The claimant would not be removed to his place of origin solely because of damage of credibility.</p>	
001401 - 001933	Hon Emily LAU Admin Chairman	<p>The Administration was requested to provide analysis of the 900 cases which had been handled in the form of a table with breakdown on the number of substantiated and non-substantiated cases and the reasons for their determination.</p> <p>Information was sought on the considerations in the determination of claims.</p> <p>The Administration advised that in the determination of claims the Immigration Department ("ImmD") would take into account the individual merits of each case and base on the facts presented by the claimants with reference to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").</p> <p>Considerations would be given to the following aspects -</p> <ul style="list-style-type: none"> (a) torture risk in compliance with the requirement as specified in CAT; (b) possibility of internal relocation within the torture-risk state; 	Admin to provide information (paragraph 2(a) of the minutes refers)

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		<p>(c) credibility of claimants; and</p> <p>(d) information collected about the torture risk states through different channels</p>	
001934 - 004017	Hon James TO Admin Chairman	<p>Mr TO made the following enquiries -</p> <p>(a) whether it was the existing practice that each claimant was asked if he had taken the advantage of a reasonable opportunity to make a torture claim before arriving at Hong Kong and how many claimants had been asked the question;</p> <p>(b) what were the categories of reasons for claimants not making a claim before arriving at Hong Kong;</p> <p>(c) what was meant by "taking the advantage of a reasonable opportunity to make a torture claim before arriving at Hong Kong"; and</p> <p>(d) whether the credibility issue was confined to the core issue about the existence of torture risk in the claimant's country of origin only.</p> <p>Response of the Administration -</p> <p>(a) it was the existing practice that each claimant was asked if he had travelled to a country or place other than his place of origin before arriving at Hong Kong;</p> <p>(b) "taking the advantage of a reasonable opportunity to make a torture claim before arriving at Hong Kong" was only one of the factors in the assessment of the credibility of a claimant. There were other considerations as specified in the proposed section 37ZD;</p>	

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		<p>Mr TO was of the view that claimants' credibility should be confined to whether there was torture risk in the claimants' country of origin. The Chairman shared a similar view. Mr TO was concerned that it might give rise to judicial review if the focus was not on the credibility of the claimants.</p> <p>The Administration advised that reference had been made to the practice in other countries and the existing practice in Hong Kong. Sometimes, ImmD might not be in possession of the objective information about the existence of torture risk in a state and it would be difficult to verify the information. All other relevant information would be considered in the determination of the claims. The rationale behind was to ensure provision of protection for people with genuine needs and prevention of abuse of the mechanism.</p> <p>Request for information on -</p> <p>(a) the difference between the proposed section 37ZD(1)(b) and "a failure not to take advantage of a reasonable opportunity to claim non-refoulement protection in respect of a torture risk State while in a place outside Hong Kong to which the Convention applied (other than a torture risk State)";</p> <p>(b) in view of wrongful belief of claimants about the consequence of making a torture claim in a certain country, whether the assessment of credibility should be conducted objectively or consideration should be given to trust the claimants' sincerity; and</p> <p>(c) sample cases without personal particulars for illustration purpose.</p>	<p>Admin to provide information (paragraph 2(b) of the minutes refers)</p>

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		<p>The Administration responded that claimants would be provided with detailed reasons for unsuccessful claims and for which the claimants could lodge an appeal if deemed necessary. Whether or not a claimant's credibility in a claim had been damaged would depend on an overall assessment of all the relevant circumstances of the case. Consideration would be given to "reasonable excuse" which included the fact that the claimant was not in possession of the document or evidence at the earlier material time or where the claimant was unaware of the existence of relevant information before the date fixed for the first interview.</p>	
004018 - 005526	Hon Emily LAU Admin Chairman Hon James TO	<p>Referring to the examples on non-existence of reasonable opportunity, Ms LAU asked for the following -</p> <ul style="list-style-type: none"> (a) explanation on "if non-refoulement protection under CAT was not available to him en route to Hong Kong" and (b) other reasonable opportunities that had not been listed. <p>Response of the Administration -</p> <ul style="list-style-type: none"> (a) it might refer to the situation that countries involved were not member states of CAT and therefore could not provide the protection. Singapore was one of the examples; (b) one of the other reasonable opportunities might be the claimant's belief that his claim could not be fairly assessed by other governments and therefore he had not made such claim <p>Ms LAU was of the view that it should be made more explicit to specify that the countries concerned were not</p>	

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		<p>member states of CAT, or they could not offer the protection even though they were member states of CAT.</p> <p>In response, the Administration advised that it would focus on whether protection would be offered by those countries concerned rather than whether they were member states of CAT.</p> <p>Given the high percentage of claimants routing through the Mainland before arriving at Hong Kong, members held the view that it was important to ascertain whether the Mainland could offer the non-refoulement protection to claimants.</p> <p>Request for information -</p> <p>Referring to those handled cases, whether non-refoulement protection under CAT was offered by the Mainland, Macao, Thailand or Bangladesh for claimants and whether their policy on offering protection was consistent across all claimants. If not, what were the reasons.</p> <p>Response of the Administration -</p> <p>It was believed that signatories of CAT would provide protection as required by CAT. Detailed analysis was to be provided.</p>	<p>Admin to provide information (paragraph 2(c) of the minutes refers)</p>
005527 - 005908	SALA1 Hon Emily LAU	<p>In view of members' concern about how the determination of claims could be affected by claimants' credibility, SALA1 referred members to Article 3 of CAT. It was specified in that Article that all relevant considerations, including the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights, should be taken into account in the determination of whether there were substantial grounds for believing that the claimant would be in danger of being subjected to torture if he was returned to the state.</p>	

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		<p>Regarding the factor of the credibility of a claimant, it was originated from the views expressed by the United Nations Committee Against Torture in monitoring the implementation of CAT that certain considerations were relevant to the determination of a torture claim.</p> <p>Apart from the above, there were other relevant considerations in determining a torture claim, including whether there were claims for torture submitted by the claimant in the past; whether there was medical or other independent evidence to support the claimant's claim of torture or maltreatment in the past; whether the claimant had engaged in political or other activity which would make him/her particularly vulnerable to torture.</p> <p>The proposed section 37ZI(3) & (4) only specified the principles involved in the determination of a torture claim, namely, whether there were substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant was removed or surrendered to a torture risk state and the rejection of the torture claim in the absence of such substantial grounds for belief. However, apart from the elaboration on the credibility factor, there was not much coverage on other factors in the Bill. SALA1 asked whether consideration would be given to set out those other factors in the Bill.</p>	<p>Admin to provide written response (paragraph 2(d) of the minutes refers)</p>
005909 - 010120	Admin	<p>The Administration advised that it would be impossible to list all considerations in the Bill. The determination of a torture claim would be based on the overall assessment of all factors. If a torture claim was to be rejected, details would be provided with respect to specific area and the claimant</p>	

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		could proceed with lodging a petition if deemed appropriate.	
010121 - 010725	Hon James TO Admin Chairman	<p>Mr TO enquired about the implementation of the screening mechanism for torture claim in the Mainland; whether all the claims were handled by the central government or by the provincial government; whether the outcome of the determination of claims would be made public, including figures on the torture claims.</p> <p>Response of the Administration -</p> <p>There were communications between the Administration and the relevant authority in the Mainland in this respect. It was understood that not many torture claims had been received by the Mainland authority. Noting that a statutory framework for screening torture claim would be put in place in Hong Kong, the Mainland authority also had discussion on the necessity of establishing a screening mechanism for non-refoulement claims. As a state party of CAT, the Mainland was obliged to submit regular reports to the United Nations on the implementation of CAT.</p> <p>The Administration was requested to provide a copy of the report submitted by the Mainland to the United Nations on the implementation of CAT.</p>	Admin to provide information (paragraph 2(e) of the minutes refers)
010726 - 010748	Hon Emily LAU	The Administration was requested to provide responses to questions raised by the Legal Service Division of the Legislative Council.	Admin to provide written response (paragraph 2(d) of the minutes refers)
010749 - 010849	Admin	Briefing on paragraphs 5 to 6 of LC Paper No. CB(2)327/11-12(01)	
010850 - 011231	Hon Emily LAU Admin	Ms LAU enquired about how the Administration could ensure that a claimant would not be in danger of being subjected to torture in another	

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		<p>region in his country of origin if he was relocated to that region. She sought information on the figures involved.</p> <p>Response of the Administration -</p> <p>(a) consideration would be given to whether a claimant raising a torture claim on the ground of being subject to torture in a city in his country of origin could in fact live safely in another city for a certain period of time before coming to Hong Kong;</p> <p>(b) information on the situation of various countries would be collected by ImmD for reference;</p> <p>(c) claimants whose claims were rejected because of the possibility of internal relocation could lodge an appeal;</p> <p>(d) the concept of internal relocation was upheld by the ruling of the court case mentioned in paragraph 6 of LC Paper No. CB(2)327/11-12(01); and</p> <p>(e) figures involving internal relocation in some 900 cases which had been handled were to be provided.</p>	
011232 - 012331	Hon James TO Admin Chairman	Referring to proposed section 37ZI(5), Mr TO enquired whether consideration would be given to specifying in the provision that there was a reasonable opportunity for a claimant to reach another region in the torture risk state so as to avoid being subjected to torture. He expressed concern about the basis for the rejection of a torture claim and the removal of the claimant to a region that did not have diplomatic relation with the Hong Kong Special Administrative Region.	

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		<p>The Administration confirmed that there had been cases of rejection of torture claim based on consideration of internal relocation. Reference had been made to the cases of the United Nations Committee Against Torture and a local court case in which the concept of internal relocation was upheld.</p> <p>The Administration was requested to provide written response to issues raised above with reference to sample cases.</p>	<p>Admin to provide written response (paragraph 2(f) of the minutes refers)</p>
012332 - 012426	Admin	Briefing on paragraphs 7 to 10 of LC Paper No. CB(2)327/11-12(01)	
012427 - 012829	Hon Emily LAU Admin Chairman	<p>Ms Emily LAU made the following enquiries -</p> <p>(a) whether the three exceptional circumstances had been accepted by the courts and need not be specified in the provisions;</p> <p>(b) whether consideration would be given to list exceptional circumstances other than those set out in the paragraph;</p> <p>(c) given the small number of claimants whose claims had been substantiated, why such claimants who would not leave Hong Kong within a short period of time would not be allowed to work until the prolonged period of enforced unemployment might be detrimental to the claimants' mental health</p> <p>Response of the Administration -</p> <p>(a) Director of Immigration ("D for Imm") would exercise his discretionary power to grant permission to work to the claimant as appropriate;</p>	

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		<p>(b) as the exceptional circumstances would vary and depend on individuals, it was therefore considered unnecessary to list all exceptional circumstances;</p> <p>(c) consideration be given to the merits of individuals with supporting medical document.</p>	
012830 - 013028	Chairman Admin Hon Emily LAU	<p>In response to the enquiry of the Chairman whether claimants could be self-employed, the Administration replied in the positive.</p> <p>Ms LAU further expressed concern about the discretionary power of D for Imm. She was of the view that the exceptional circumstances should be specified in the provisions and consideration should be given to allow the claimants whose claims were substantiated to work.</p> <p>In response, the Administration agreed to consider the views.</p>	Admin to provide written response (paragraphs 2(g) & 2(h) of the minutes refers)
013029 - 013231	Chairman Admin	<p>Referring to the proposed section 37ZW, the Chairman asked whether a claimant whose claim was substantiated would become a Hong Kong permanent resident after 7 years' stay in Hong Kong.</p> <p>The Administration replied in the negative. As specified in the proposed section 37ZW of the Bill, a claimant's stay in Hong Kong must not be treated as ordinary residence in Hong Kong, whether or not the claim was substantiated and whether or not permission to work had been given.</p> <p>In response to the Chairman's enquiry about the future of the claimants whose claims were substantiated, it was noted that arrangements would be made for</p>	

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		resettlement in a third country or place in accordance with the wishes of the claimants.	
013232 - 014029	Hon Emily LAU Admin Chairman	<p>Ms LAU's enquiries -</p> <ul style="list-style-type: none"> (a) number of claimants who had been permitted to work at the discretion of D for Imm and those who had not been permitted to do so; (b) whereabouts of the successful claimants; whether they were now in Hong Kong or resettled in other places; and (c) whether the claimants whose claims were substantiated would be received by the international community. <p>The Administration advised that so far there was only one claimant whose claim was substantiated under the old screening mechanism and the claimant was now in Hong Kong. There was a review mechanism for the substantiated cases. Repatriation would be conducted as appropriate. About 440 claimants had been repatriated and the remaining ones had lodged a petition against the outcome of the screening.</p> <p>It was noted that the international community did not have the responsibility to receive the claimants whose claims were substantiated.</p> <p>Request for information -</p> <p>Noting that claimants of less than half of the handled cases had been repatriated to their country of origin, Ms LAU requested information on the breakdown in terms of their country of origin and also the number of claimants who had lodged a petition against the outcome of screening.</p>	

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		<p>In response to the Chairman's enquiries about the substantiated case, the Administration advised that the claimant was in his mid-forties. His application for work was being processed and permission to work had not yet been granted. Meanwhile, he was provided with humanitarian assistance and was given a recognizance form as proof of his identity. His substantiated claim was subject to review.</p>	
014030 - 014244	Admin	Briefing on paragraphs 15 to 16 of LC Paper No. CB(2)327/11-12(01).	
014245 - 015234	Hon Emily LAU Admin	<p>Noting that the Hong Kong Bar Association and the Hong Kong Law Society had concerns about the difficulty in recruiting experienced lawyers to participate in the Duty Lawyer Service ("DLS") because of the unattractive remuneration, Ms LAU queried about the Administration's claim of the smooth operation of DLS and enquired whether the Administration had continued negotiation with the two professional legal bodies in this respect.</p> <p>In response, the Administration advised that the two professional legal bodies had participated in the negotiation about DLS. The level of remuneration was considered low by the two professional legal bodies but was later accepted by DLS. At present, there were about 260 registered duty lawyers and it was considered sufficient to cope with the current workload. With the expected increasing workload in future, it was hoped that more duty lawyers could take part in the scheme. It was noted that remuneration was not the major concern.</p> <p>Ms LAU enquired about the qualifications of the duty lawyers, the lawyers' fees and their handling of the torture claims. She asked whether the</p>	

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		<p>current number of duty lawyers was sufficient to handle the outstanding cases.</p> <p>Response of the Administration -</p> <p>(a) basically, the duty lawyers of DLS were required to possess three years' post-qualification experience. Most of the duty lawyers in fact possessed five or even ten years' post-qualification experience. Information on the percentage would be supplemented;</p> <p>(b) the flat rate for the lawyers' fees was \$5,600 per day;</p> <p>(c) there was consultation with the two professional legal bodies in respect of training to be provided;</p> <p>(d) currently, each day six cases were referred to DLS by ImmD and it was expected that the number would be further increased to eight or more each day</p> <p>Ms LAU was concerned about the progress of clearing the backlog and requested the Administration to expedite the progress.</p> <p>The Administration advised that a balance needed to be struck between the requirement for a high standard of fairness in the determination of claims as laid down by the courts and the efficiency in handling the cases. Apart from DLS, other resources had been put on each case, including provision of information in response to data access request, collection of information about claimant's country of origin, arrangement for interpreter and provision of justifications for determination of claims. Attempt would be made to enhance the efficiency in handling the cases.</p>	<p>Admin to provide information (paragraph 2(i) of the minutes refers)</p>

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015202 - 015236	Admin	Briefing on paragraphs 17 to 18 of LC Paper No. CB(2)327/11-12(01).	
015237 - 015324	Admin	Briefing on paragraphs 19 to 20 of LC Paper No. CB(2)327/11-12(01).	
015325 - 020217	Hon Emily LAU Admin Chairman	<p>The Administration responded to enquiries about the training on CAT for adjudicators, duty lawyers and staff of ImmD as follows -</p> <p>The training for adjudicators did not involve ImmD. It was conducted by experts and legal advisors from United Nations and appeal authorities of the United Kingdom and New Zealand. There were eight adjudicators who were retired judges or magistrates. All of them had received training on CAT.</p> <p>About 100 staff members of ImmD had received training on CAT and arrangement would be made to train another 40 staff members by the end of 2011 so as to speed up the process for handling the claims. The training was mainly composed of 3-week class and 1-week field work. In addition, a one-week workshop had been organized and overseas experts had been invited to provide training to enhance the ability of the staff to handle the cases.</p> <p>Training had been organized twice and a total of 400 duty lawyers had received training on CAT. The training was organized by the Hong Kong Academy of Law. The lawyers who received training on CAT could opt for joining DLS or not.</p> <p>In response to Ms LAU's enquiry about whether all torture claims would be handled by duty lawyers who had received training on CAT, the Administration advised that it was a basic requirement of a duty lawyer. Yet, special consideration would also be</p>	

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		<p>given to those with experience in handling torture claim cases.</p> <p>In response to the enquiry of the Chairman on whether a claimant could choose the duty lawyer, the Administration advised that cases would be referred to duty lawyers by the secretariat of DLS. Special consideration would be given to requests for specific duty lawyers who had experience in assisting the claimants in the past. Yet, it was DLS who made decision on the arrangement of the services.</p> <p>Ms Emily LAU asked whether more training would be arranged to train the duty lawyers.</p> <p>The Administration advised that it was liaising with the Hong Kong Academy of Law about conducting the next round of training in early 2012.</p> <p>Given the great number of outstanding cases, Ms LAU requested the Administration to review the remuneration given to the duty lawyers so as to attract more lawyers to join the scheme and speed up the process for handling the claims.</p> <p>The Administration responded that it was expected that the progress of handling the cases would be substantially expedited with the reduction in the number of new cases, increase in the number of referrals to DLS and the experience and efficiency gained about two years after the implementation of DLS and the Bill.</p> <p>Ms LAU requested the Administration to provide information on the new cases in each month.</p>	<p>Admin to provide information (paragraph 2(j) of the minutes refers)</p>

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