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Torture claim screening system and
the Immigration (Amendment) Bill 2011

1. Introduction

Today Society for Community Organization (SoCO) together with torture claimants will petition the Legislative Council regarding the Immigration (Amendment) Bill 2011.

SoCO is concerned that the Immigration (Amendment) Bill 2011 does not enhance torture claimants' human rights. We are also very disappointed that the government's approach is short term. It has failed to consider the fates of the individuals with genuine claims.

Statistics

There are currently 6,600 outstanding claims, and 1800 claims processed. 870 decisions have been served, of which only one has been positive¹.

2. Setting up a single screening mechanism

SoCO has repeatedly urged the government to sign the Refugee Convention and set up a single mechanism to screen cases under the Refugee Convention and the Convention Against Torture. However, the legislative proposal only deals with CAT claimants but not asylum seekers. The government has repeatedly stated that it has no plans to extend the Refugee Convention to Hong Kong or to take up its responsibility of screening asylum seekers' claims. This is despite the fact that in its concluding observations of November 2008² the United Nations Committee Against Torture has expressed concern that "there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure."

¹ As at 16 Oct 2011 (LC Paper No. CB(2) 146/11-12(01))

² Concluding observations of the Committee against Torture, Hong Kong Special Administrative Region (CAT/C/HKG/CO/4)

The fact that a separate system under the United Nations High Commissioner for Refugees (UNHCR) exists in Hong Kong is ineffective. Research by the Legislative Council has shown that in most other countries there is just a single system to deal with both types of cases.

The proposed mechanism is ineffective as claimants who want to abuse the system may make claims under both mechanisms thus prolonging the time that a claimant may stay in Hong Kong. For genuine cases, this is highly frustrating. The current system also makes it easy for illegal immigrants without any genuine case to abuse the system to stay longer time in Hong Kong, which goes against the government official policy of combating abuse of the CAT system.

Lastly it would be of interest to Hong Kong to have legislation governing not only claims under CAT but also those under the Refugee Convention. Under the proposed bill, the rights of asylum seekers are not protected at all.

It is recommended that the two systems be combined into one single mechanism so that one single independent body makes screenings of cases.

3. Right to work and future of claimants

In the proposed bill persons are not allowed to work unless they are permitted to do so on an exceptional basis. This goes against the Convention relating to the Status of Refugees ('Refugee Convention' article 17 (3) where "[the] Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals".

In Australia asylum applicants are allowed to work after 6 months, in United Kingdom after 12 months, and in USA after 150 days of stay, if the processing of the claim has not been finalized.

Recognized refugees and successful CAT claimants may have to stay in Hong Kong for several years before they can be resettled to another country. It is important that they fully develop their skills while they are awaiting resettlement.

We suggest that the government allows claimants and asylum seekers to work after 1 year of stay if the claim is still in process.

Secondly, the bill has not taken into account the futures lives of people whose claims have been substantiated. All it does is to guarantee that a person will not be sent back to his home country if his life is in danger. It does not provide for residence or work and also it doesn't include any arrangements for resettlement to another country.

4. Criminal offences under the proposed bill

Clause 9 amends section 42 of the Ordinance and provides that a person who makes a false statement of representation to an immigration officer in the screening process of a CAT claim commits an offence. The maximum penalty is a fine of \$150,000 and 14 years' imprisonment.

Criminalizing false statements should be done with great caution, given the fact that people who have undergone trauma may only be able to recall things that have happened in fragments. Mental health specialists have emphasized that people who have experienced trauma, and most refugees have, may recall the same situation in different ways, depending on their memory is triggered.

Specific provisions in the amendment should ensure that claimants are not prosecuted if false statements are made because of trauma.

Clause 10 of the Bill provides for a new offence if the person disturbs or otherwise interferes with the proceedings with the Appeal Board. SoCO believes that this clause is too vague, as *disturbing* or *interfering* could cover a very wide range of actions that should not lead to criminal prosecution.

Recommendations

1. The Bill should set up a statutory framework that includes both claims under the Convention Against Torture and the Refugee Convention.
2. The Bill should allow claimants to work after 1 year if their claims are still under process. All claimants whose claims have been substantiated should be allowed to work.
3. The Bill should include provision for claimants with substantiated claims to take up residence in Hong Kong or be resettled to other countries.
4. It should not be a criminal offence to disturb or interfere with the proceedings of the Appeal Board.
5. Specific provisions in the Bill should ensure that people are not prosecuted for false statements made because of trauma.