

Proposed Research Outline

Mechanisms for handling torture claims in selected jurisdictions

1. Background

1.1 In Hong Kong, torture claims made under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are handled by the Immigration Department according to a set of administrative procedures. In December 2008, the Court of First Instance decided in a judicial review case that the screening procedures put in place by the Administration were unable to meet the high standards of fairness. The screening process was suspended following this judgment. To deal with the backlog of torture claims, the Administration reviewed the screening mechanism in 2009 so as to resume the screening with an enhanced mechanism.

1.2 On 1 December 2009, the Administration reported to the Panel on Security (the Panel) the proposed enhancements to the administrative screening mechanism for torture claims. It also proposed to put in place a legislative framework for handling torture claims lodged under Article 3 of CAT. The screening of torture claims under the enhanced administrative mechanism resumed on 24 December 2009. The Administration planned to assess the overall effectiveness of the screening mechanism by the end of 2010.

1.3 During the Panel meeting held on 2 November 2010, the Chairman informed members that the Administration had indicated its intention to brief the Panel on its legislative proposal on statutory mechanism for handling torture claims in a later part of the current legislative session. To facilitate the Panel's discussion on the subject matter, members agreed that the Research Division be requested to undertake a research on the mechanisms for handling torture claims in overseas jurisdictions.

2. Proposed places to be studied

2.1 The Research Division proposes to study the following places:

- (a) the United Kingdom (the UK);
- (b) Australia;
- (c) the United States (the US); and
- (d) Switzerland.

2.2 It should be noted that in most of the overseas jurisdictions, torture claims are lodged under the refugee/asylum programme with "risk of torture" being a ground for lodging asylum claims, and there is no separate mechanism for handling torture claims. The 1951 United Nations Convention relating to the Status of Refugees (the Geneva Convention) forms the basis of the international refugee regime. Nevertheless, the Geneva Convention does not apply to Hong Kong. Although there are administrative procedures for assessing torture claims made under CAT in Hong Kong, the Administration has long adopted a firm policy of not granting asylum.

2.3 All the four selected jurisdictions are signatories to CAT as well as the Geneva Convention and/or the 1967 Protocol relating to the Status of Refugees. Among them, the UK, Australia and the US are common law jurisdictions while Switzerland is a continental law jurisdiction.

2.4 There are certain distinctive features in the mechanisms for handling torture claims adopted in the selected jurisdictions. In the UK, since March 2007, all new asylum claims have been processed under the New Asylum Model (NAM) which aims to produce a faster and more streamlined asylum process. Under NAM, the UK Border Agency at the Home Office utilizes the first interview which is known as the "screening interview" to determine the approach adopted to deal with an application. If it is decided that an application can be dealt with quickly, it will be put through a "fast track" procedure. The effectiveness of NAM, especially the "fast track" procedure, in screening asylum claims has been under review.

2.5 In Australia, an asylum seeker may have a second chance if the asylum claim is rejected by the Department of Immigration and Citizenship (DIAC). The asylum seeker has the option to lodge an application for a review by the Refugee Review Tribunal (RRT) which is an independent Commonwealth statutory body. RRT may overturn the original decision and grants refugee status or it may uphold the original decision. Claims rejected by RRT are sent back to the original case manager of DIAC to review once again. If it is considered that there may be compelling humanitarian reasons such as a real risk of torture, the case is referred to the Minister for Immigration to grant residency on humanitarian grounds.

2.6 In the US, the asylum process is relatively complicated, and the decision of the appeal board may be subject to further appeal. Asylum may be obtained in two ways: affirmatively through lodging application with the US Citizenship and Immigration Service (USCIS) or defensively in removal proceedings of the Executive Office for Immigration Review (EOIR) of the Department of Justice. If the asylum application is denied by USCIS, the applicant will be placed in removal proceedings before EOIR. The removal proceedings are conducted in a courtroom-like manner. Decision of immigration judges can be appealed to the Board of Immigration Appeals (BIA). If the individual in proceedings disagrees with the ruling of BIA, he or she may file an appeal with the appropriate federal circuit court of appeals.

2.7 Switzerland has a long history of providing asylum, and it has a specific piece of legislation to regulate the granting of asylum. In particular, by laying down the requirements for refugee status and the asylum procedure, the *Asylum Act* provides a clear legislative framework for the handling of asylum claims. The asylum process is conducted at the local level, i.e. the cantons, and is relatively simple and fast. Asylum seekers will be allotted to a canton which will take care of their basic needs. If the asylum seekers can prove or credibly demonstrate their refugee status during the detailed hearing, they shall be granted asylum without further investigations. If the application is denied, asylum seekers have the right to make an appeal to the Federal Administrative Court which is the court of final instance and whose decision is final.

3. Proposed outline

3.1 The Research Division proposes the following outline for the research:

Chapter 1 — Introduction

Chapter 2 — The UK

Chapter 3 — Australia

Chapter 4 — The US

Chapter 5 — Switzerland

Chapter 6 — Analysis

3.2 Chapter 1 introduces the general background of the research and the relevant international conventions like CAT and the Geneva Convention, and defines some key terms such as "torture claim", "asylum" and "refugee".

3.3 Chapters 2 to 5 examine the mechanisms for handling torture/asylum claims in the four selected overseas jurisdictions respectively in terms of the following aspects:

- (a) Background, which introduces the underlying legislations and the eligibility requirements for asylum application, with particular attention to the lodging of torture claims;
- (b) Procedures, including the procedures for filing asylum applications, screening of applications, asylum interview, application for review/appeal in case of negative decision, and the appeal process;
- (c) Legal and other support, which examines details of legal assistance if publicly-funded legal aid is provided to the claimants, and briefly introduces the provision of other financial and social support to the claimants; and

- (d) Issues and concerns, including concerns and recommendations of the United Nations Committee against Torture (the CAT Committee), issues raised by non-governmental organizations (NGOs) invited by the CAT Committee at its hearing on the periodic reports submitted by the states parties on the implementation of CAT, as well as the recent review and reform of the asylum process which are related to the handling of torture claims.

3.4 Based on the findings in the previous chapters, Chapter 6 compares the mechanisms for handling torture/asylum claims in the four selected overseas jurisdictions and the enhanced administrative screening mechanism for torture claims in Hong Kong.

4. Proposed completion date

4.1 The Research Division proposes to complete the research by April 2011.

Research Division
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