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Mechanisms for handling torture claims in selected jurisdictions

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Executive summary

Hong Kong

1. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") applies to Hong Kong. Nevertheless, the 1951 United Nations Convention relating to the Status of Refugee does not apply to Hong Kong, and the Administration has adopted a firm policy of not granting asylum. Torture claims can be lodged under Article 3 of CAT directly. Such claims are dealt with by the Immigration Department with a set of administrative procedures. In December 2008, following the decision of the Court of First Instance that the screening procedures were unable to meet the high standards of fairness, the screening process was suspended. On 24 December 2009, the screening of torture claims under the enhanced administrative mechanism resumed.

2. Under the enhanced mechanism, appeals of failed torture claimants are handled by the Adjudicators (Torture Petitions) appointed from retired judges and magistrates. Publicly-funded legal assistance under the Duty Lawyer Service is available for applicants who have passed the relevant eligibility test. At the petition stage, publicly-funded legal assistance will also be available for meritorious cases.

The United States

3. In the United States, an individual may directly file a claim for protection under CAT. The procedures for filing and adjudicating torture claims are almost exactly the same as the procedures for asylum claims, except that torture claims can only be lodged defensively in removal proceedings of the Executive Office for Immigration Review ("EOIR") of the Department of Justice. The removal proceedings are conducted in a courtroom-like manner. Decision of immigration judges can be appealed to the Board of Immigration Appeals which conducts paper review of the case.

4. While legal representation is allowed in both the removal proceedings and appeal procedure, such representation should be at no expense to the government. EOIR's Office of the Chief Immigration Judge maintains a current list of free legal service providers who meet the qualifications specified in the regulations. This list is updated quarterly and is provided to applicants in immigration proceedings.

Australia

5. In Australia, torture claims are lodged under the refugee programme. If an asylum claim is rejected but if there are compelling humanitarian reasons such as "a real risk of torture", the case is referred to the Minister for Immigration and Citizenship for determination of granting residency on humanitarian grounds. The government has recently introduced complementary protection legislation under which protection visas will be granted to applicants who are found not to be refugees but cannot be returned to their home countries because there is a real risk of certain types of harm.

6. While legal representation is not allowed in the asylum interview, applicants' friend, relative or migration agent may attend the interview. At the appeal stage, applicants may have a legal adviser present at the hearing to assist them. Free professional migration advice and application assistance are available to all asylum seekers in immigration detention and to the most disadvantaged visa applicants living in the community through the government's Immigration Advice and Application Assistance Scheme.

The United Kingdom

7. In the United Kingdom, although CAT is not incorporated into the domestic law, the *Human Rights Act 1998* covers specific human rights protection of the European Convention of Human Rights ("ECHR"), which provides a prohibition on torture and inhuman or degrading treatment or punishment. Torture claims lodged under ECHR follow the same application procedure for asylum claims. If the applicant does not qualify for recognition as a refugee but there are humanitarian reasons for him to stay in the UK, he may be granted temporary permission to stay.

8. Publicly-funded legal advice and representation is available for asylum cases. Although applicants must respond in person to questions, legal advisers or lawyers may attend all asylum interviews. Nonetheless, representation at asylum interviews is not normally funded under the legal aid scheme. Preparation of evidence, submissions to and participation in hearings before the appellate body are covered by the legal aid system. At the same time, there are non-governmental organizations ("NGOs") to provide free legal assistance and representation to the most vulnerable asylum seekers.

Switzerland

9. The Swiss Constitution prohibits the transfer of any people "to a state in which they face the threat of torture or any other form of cruel or inhuman treatment or punishment". People subject to the risk of torture may seek asylum under the *Asylum Act*. Asylum seekers who can prove or credibly demonstrate their refugee status shall be granted asylum. For those applicants who are found not to be refugees, Switzerland may grant them temporary protection as long as they are exposed to a serious general danger.

10. Lawyers may attend the asylum interviews, but applicants must respond in person to questions. Publicly-funded legal aid is available to those unable to afford counsel. However, free legal aid in general is not granted during the first instance procedure, and at the appeal stage, it will be granted only for cases that may potentially be successful. State-funded legal aid may be granted for legal representation but not provision of legal advice. Meanwhile, there are NGOs in almost all the cantons to provide free legal advice and/or representation for asylum seekers at all stages of the procedure.

Japan

11. Although CAT is not incorporated into the Japanese law, the refugee recognition procedures established by the *Immigration Control and Refugee Recognition Act* is closely related to the implementation of Article 3 of CAT. Refugee status is decided by the Immigration Bureau of the Ministry of Justice both at the first instance and on appeal. The Minister of Justice may exercise his discretionary powers and grant a failed asylum seeker "Special Permission to Stay" on humanitarian grounds. Although the criteria for such permission are not disclosed, Article 3 of CAT may be one of the considerations.

12. Legal representation is allowed only at the appeal stage. Since public legal assistance does not give eligibility to foreigners with non-regular residence or with residence permits of under one year, refugee recognition applicants cannot receive state-sponsored legal aid. Instead, limited legal assistance is provided by the United Nations High Commissioner for Refugees and private foundations. Meanwhile, there are some lawyers working on a *pro bono* basis or for reduced fees or a nominal charge.

Mechanisms for handling torture claims in selected jurisdictions

Chapter 1 – Introduction

1.1 Background

1.1.1 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.[1] Accordingly, the screening process was suspended following this judgment. To deal with the backlog of torture claims, the Administration reviewed the screening mechanism in 2009 with a view to resuming the screening with an enhanced mechanism.

1.1.2 The Law Society of Hong Kong and the Hong Kong Bar Association have submitted their views on the framework of legal representation for CAT claimants and asylum seekers to the Panel on Security ("the Panel") on several occasions. Their concerns are primarily relating to the provision of legal assistance to torture claimants via the Convention Against Torture Scheme of the Duty Lawyer Service, in particular, guidelines on the Scheme and the Interviewing Protocol; training and remuneration of lawyers representing CAT claimants; and the Administration's reluctance to undertake screening of asylum seekers. They urge the Administration to further discuss with the legal profession on these issues.

1.1.3 On 1 December 2009, the Administration briefed 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. Subsequently, the screening of torture claims under the enhanced administrative mechanism resumed on 24 December 2009, with the overall effectiveness of the screening mechanism to be assessed by the end of 2010.

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[1] In *FB v Director of Immigration* [2009] 2HKLRD 346, the Court of First Instance decided that the screening procedures were unable to meet the high standards of fairness based on the following reasons: (a) the Administration had not provided publicly-funded legal assistance to needy claimants; (b) the officer who decided whether a claim was substantiated was not the one who interviewed the claimant; and (c) the Administration had not arranged for oral hearings of the petitions lodged by claimants who were dissatisfied with the result of the screening.

1.1.4 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 the later part of the 2010-2011 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.

1.2 Selected overseas jurisdictions

1.2.1 This research studies the mechanisms for handling torture claims in five selected jurisdictions:

(a) the United States ("the US");

(b) Australia;

(c) the United Kingdom ("the UK");

(d) Switzerland; and

(e) Japan.

1.2.2 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 claims, and there is no separate mechanism for handling torture claims. The 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") forms the basis of the international refugee regime. Nevertheless, the Refugee 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.

1.2.3 All the five selected jurisdictions are signatories to the Refugee Convention and/or the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol"). Meanwhile, the US, Australia, the UK and Switzerland are signatories and Japan is a party acceding to CAT.[2] Among the selected jurisdictions, the US, Australia and the UK are common law jurisdictions while Switzerland and Japan are civil law jurisdictions. In addition to the Refugee Convention, the UK and Switzerland are also subject to the relevant conventions of the Council of Europe, especially the European Convention of Human Rights ("ECHR").

1.2.4 There are certain distinctive features in the mechanisms for handling torture claims adopted in the selected jurisdictions. In the US, an individual may directly make a claim for protection under CAT. The procedures for filing and adjudicating torture claims are almost the same as the procedures for asylum claims. An important procedural difference is that while asylum may be obtained either affirmatively through lodging application with the US Citizenship and Immigration Services or defensively in removal proceedings of the Executive Office for Immigration Review of the Department of Justice, an individual cannot apply affirmatively for relief under CAT. Applicable to both asylum seekers and torture claimants, the removal proceedings, presided by immigration judges, are conducted in a courtroom-like manner. Decision of immigration judges can be appealed to the Board of Immigration Appeals ("BIA"), which conducts paper review of the case. If the applicant disagrees with the ruling of BIA, he may seek judicial review with the appropriate federal court of appeals.

1.2.5 In Australia, no claim can be made under CAT directly. Torture claims are lodged under the refugee programme. If the asylum claim is rejected by the Department of Immigration and Citizenship ("DIAC"), the applicant may ask for a review by the Refugee Review Tribunal ("RRT") which is an independent statutory body. If the claim is rejected by RRT but it is considered that there may be compelling humanitarian reasons such as "a real risk of torture", the case will be sent back to the original case manager of DIAC to review. In turn, the case manager may refer the case to the Minister for Immigration to grant residency on humanitarian grounds. The government has recently introduced complementary protection legislation to ensure Australia complies with its non-refoulement obligations under CAT.

[2] According to the United Nations, a state may generally express its consent to be bound by a treaty by depositing an instrument of accession with the depositary. Accession has the same legal effect as ratification. However, unlike ratification, which must be preceded by signature to create binding legal obligations, accession requires only one step, namely, the deposit of an instrument of accession.

1.2.6 In the UK, although CAT is not incorporated into the domestic law, the *Human Rights Act 1998* covers specific ECHR human rights protection. ECHR provides a prohibition on torture and inhuman or degrading treatment or punishment, which is similar to that of CAT. Torture claims are considered as asylum claims. 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. The effectiveness of NAM has been under review.

1.2.7 Like the UK, Switzerland is a signatory to ECHR which prohibits torture and inhuman or degrading treatment or punishment. The Swiss Constitution provides absolute prohibition of a transfer of persons "to a state in which they face the threat of torture or any other form of cruel or inhuman treatment or punishment" (Article 25(3)). People suffering from the risk of torture may seek asylum in Switzerland under the *Asylum Act* which 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. If the asylum seekers can prove or credibly demonstrate their refugee status during the asylum interview, they shall be granted asylum. 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 its decision is final.

1.2.8 As an Asian country, Japan is a late-comer in the international refugee regime. Although CAT is not incorporated into the Japanese law, the refugee recognition procedures established by the *Immigration Control and Refugee Recognition Act* ("ICRRA") constitute a system that is closely related to the implementation of Article 3 of CAT. In 2004, ICRRA was revised and a number of new measures were introduced to address in part the shortcomings of the refugee system. Refugee status is decided by the Immigration Bureau of the Ministry of Justice at first instance and on appeal. The Minister of Justice may exercise his discretionary powers and grant a failed asylum seeker "Special Permission to Stay" in Japan on humanitarian grounds. Although the criteria for such permission are not disclosed, Article 3 of CAT may be one of the considerations during such process.

1.3 Scope of research

1.3.1 This research covers the mechanisms for handling torture/asylum claims in five selected jurisdictions. Particular emphasis is placed on:

(a) Background, which introduces the major relevant legislations and the asylum system, with particular attention being paid to the lodging of torture claims;

(b) Procedures, including the procedures for filing applications, screening of applications, asylum interview, application for review/appeal in case of negative decision, and the appeal process;

(c) Legal aid and other support, which examines details of legal assistance if publicly-funded legal aid is provided to the claimants, and 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 related to the handling of torture claims.

1.4 Relevant international conventions

Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees

1.4.1 The Refugee Convention was adopted on 28 July 1951 and entered into force on 22 April 1954. It consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees yet attempted at international level. While earlier international instruments only applied to specific groups of refugees, the definition of the term "refugee" of the Refugee Convention is couched in general terms. Nevertheless, the scope of the Refugee Convention is limited to persons who became refugees as a result of events occurring before 1 January 1951 as the Refugee Convention was negotiated in the aftermath of World War II, and was originally intended to deal with the European problem of 1.25 million refugees arising out of the post-war chaos.

1.4.2 With the passage of time, new refugee situations have arisen and such refugees may not fall within the scope of the Refugee Convention. In view of this proviso, the Refugee Protocol was prepared and submitted to the United Nations General Assembly in 1966. The Refugee Protocol was signed by the President of the General Assembly and the Secretary-General of the United Nations in New York on 31 January 1967, and entered into force on 4 October 1967. By accession to the Refugee Protocol, states parties undertake to apply the substantive provisions of the Refugee Convention to all refugees covered by the Refugee Convention definition, but without the limitation of date. The Refugee Convention and the Refugee Protocol are the principal international instruments established for the protection of refugees. As at January 2011, there were 147 states parties to one or both of these instruments.

1.4.3 Under the Refugee Protocol, a "refugee" is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

1.4.4 The fundamental protection provided by the Refugee Convention and the Refugee Protocol is the prohibition on returning refugees to countries where they would face persecution. Article 33 of the Refugee Convention sets forth this principle of "non-refoulement" as follows: "No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Nevertheless, the non-refoulement principle may not apply to refugees "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

1.4.5 While the Refugee Convention is an international agreement, its implementation is at domestic level. There is no international refugee court or tribunal to oversee the interpretation of relevant treaties. Hence, protection of refugees through the Refugee Convention is dependent on domestic legislation and national judges.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention against Torture

1.4.6 The prohibition against torture is one of the most fundamental principles in international law, and this principle is embedded in numerous treaties. In 1984, the United Nations adopted CAT, which entered into force on 26 June 1987. In its preamble, CAT declares its aim is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". As of January 2011, there were 147 states parties to CAT.

1.4.7 Article 3 of CAT prohibits return of a person to a country where he is likely to be subjected to torture. It provides that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture, according to article 1 of CAT, is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

1.4.8 The non-refoulement principle is also affirmed in CAT, which contains an absolute prohibition against torture. That is to say, unlike the non-refoulement provision of the Refugee Convention, the CAT prohibition on refoulement is not subject to any exceptions for criminality or national security, and thus may provide greater protection. Compared with the Refugee Convention, the CAT protection is broader in a sense that it requires no nexus to race, religion, nationality, political opinion, or social group membership. On the other hand, it is narrower in another sense as it does not protect against all harms but only against harms which meet the definition of "torture".

1.4.9 The CAT Committee was established to monitor compliance with CAT. The CAT Committee is made up of 10 members, nominated and elected every four years by the states that have ratified CAT. Despite the state background of the members, once they sit on the CAT Committee, they are supposed to act independently. As with the other human rights committees under the United Nations, the CAT Committee lacks the means of enforcement. Instead, it reviews reports from states, information from NGOs and other international bodies, and issues non-binding recommendations. The CAT Committee holds two sessions every year, for three and two weeks respectively. To comply with their obligations under CAT, states parties must submit an initial report one year after ratification and a periodic report every four years thereafter. State reports are meant to describe new measures and developments that relate to the implementation of CAT since the previous report. Prior to the session, NGOs also normally submit "shadow reports".

1.4.10 An Optional Protocol to the Convention against Torture ("the Optional Protocol") was adopted by the General Assembly of the United Nations on 18 December 2002. The Optional Protocol, effective on 22 June 2006, establishes a system of regular visits by international and national bodies to places of detention in order to monitor the prevention of torture and other cruel, inhuman or degrading treatment or punishment. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been set up to carry out such visits and to support states parties and national institutions in performing similar functions at national level.

European Convention of Human Rights

1.4.11 ECHR (also known as the Convention for the Protection of Human Rights and Fundamental Freedoms) was adopted on 4 November 1950 and entered into force on 3 September 1953. All member states of the Council of Europe are party to ECHR and new member states are expected to ratify it at the earliest opportunity. As at January 2011, there were 47 states parties to ECHR.

1.4.12 Article 3 of ECHR is on the prohibition of torture, which states that, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Unlike the non-refoulement protection of Article 33 of the Refugee Convention, Article 3 of ECHR, similar to Article 3 of CAT, is not subject to any exception.

1.4.13 CAT is sometimes criticized for failing to include the risk of cruel, inhuman or degrading treatment as it only makes reference to the instance of torture. While not universally applicable, ECHR offers more protection from refoulement than CAT, as it covers refoulement to those who face cruel, inhuman or degrading treatment in violation of Article 3.

1.5 Research method

1.5.1 This research adopts a desk research method, which involves literature review, documentation analysis, Internet research and correspondence with relevant authorities.

Chapter 2 – The United States

2.1 Background

2.1.1 The United States ("the US") is not among the countries which ratified the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention"). Nevertheless, it did ratify the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol") in 1968, pledging to treat refugees in accordance with the substantive provisions of the Refugee Convention. It also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1994.

2.1.2 The US regards CAT as non-self-executing, which means that domestic law should be enacted in order to implement the provisions of CAT. Prior to its adoption of formal regulations in 1998, the Immigration and Naturalization Service ("INS") within the Department of Justice ("DOJ") employed an informal administrative process to assess the applicability of Article 3 of CAT to individual cases. Under this process, if an alien requested protection under Article 3 or expressed a fear of torture at any time before removal, INS would assess the case subject to the provisions of Article 3. A specially trained asylum officer would conduct an interview with the alien regarding the possibility that the latter might be tortured if deported to the country of removal. The results of the interview were forwarded to the Department of State for comment on the applicability of Article 3 in light of the conditions in the country concerned. After evaluating all the evidence collected, if INS determined that the alien should not be removed to that country, it would exercise its discretionary authority to ensure that the alien was not removed.[3]

2.1.3 In 1998, the Congress enacted the *Foreign Affairs Reform and Restructuring Act of 1998* ("FARRA"), which required INS and other government agencies to promulgate regulations to implement obligations under Article 3 of CAT. Regulations were issued on 19 February 1999, setting forth procedures for applying for relief under CAT. The aforementioned informal process ended when the regulations took effect on 22 March 1999.

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[3] *Committee against Torture Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Initial reports of States parties due in 1995: United States of America (15 October 1999),* pp.38-39.

Major relevant legislations

2.1.4 In the US, the refugee protection system has been incorporated into the general scheme for regulating immigration, and therefore the constitutional basis for refugee protection is the same as that for immigration control. The Supreme Court has long made clear that the US Constitution assigns the regulation of immigration exclusively to the federal government. The reasons for this federal exclusivity stem from both the need for uniformity in admission criteria and the foreign relations problems that would arise if each of the states were able to formulate its own immigration policies unilaterally.[4]

2.1.5 The *Refugee Act of 1980* was passed to incorporate the US obligations under the Refugee Protocol into the US domestic law. It amended the *Immigration and Nationality Act* ("INA"), which had previously been the primary legislation relating to refugee matters, in several important ways. It laid out the first US statutory definition of "refugee", which generally tracked the definition contained in the Refugee Convention as expanded by the Refugee Protocol. It created a programme for the permanent resettlement of refugees from overseas. A specific provision was added for granting asylum to refugees who arrived at US shores on their own. It also introduced a non-refoulement provision, as required by both the Refugee Convention and Refugee Protocol.

2.1.6 This study focuses on non-refoulement and protection under Article 3 of CAT, and thus will not include all regulations and practices related to refugee protection. The US currently implements Article 33 of the Refugee Convention (non-refoulement) through the "withholding of removal" provision in INA §241(b)(3). This provision requires that the Attorney General withholds an alien's removal to a country where it is more likely than not that an alien's life or freedom would be threatened on account of one of the five grounds as specified by the Refugee Protocol. It provides temporary relief for those aliens who fail to receive asylum. Unlike granted asylum that the person is allowed to remain in the US and to adjust to permanent resident status one year later, withholding of removal only avoids return to the country of persecution but does not result in permanent admission to the US, and forced removal to a third country remains possible. In addition, unlike granted asylum where the applicant's spouse and children under 21 who are in the US may be included on the application, there is no provision for family reunion in the withholding of removal.

[4] Legomsky (2009) pp. 123-124.

2.1.7 On 21 October 1998, Article 3 of CAT was incorporated into the US domestic law when the Congress passed and the President signed FARRA. FARRA §2242(a) provides that "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." The related regulations concerning the removal of aliens from the US are primarily covered under Parts 208 and 1208 of Title 8 of the Code of Federal Regulations ("CFR").[5]

2.1.8 While there are criminal and security-related bars[6] in both asylum and withholding of removal, there are no bars to relief under CAT. If the applicant demonstrates that there are substantial grounds for believing that he would be in danger of being subjected to torture in a particular country, the individual should not be returned there. In interpreting this provision, the Congress determines that "substantial grounds" means an individual must demonstrate that it is "more likely than not that he would be tortured".[7]

2.1.9 Although there should be no bars to relief under CAT, there are two separate forms of CAT protection in the US context. The first one is "withholding of removal", which is similar in many ways to the withholding under INA §241(b)(3) mentioned above, including the bars to relief. The second protection is "deferral of removal", a more temporary form of protection. It has no bars, and is to be granted to aliens who would more likely than not face torture, but who are ineligible for withholding of removal (e.g. certain criminals, terrorists and persecutors). Deferral of removal is more easily and quickly terminated than withholding if the individual is no longer likely to be tortured in the country of removal. A deferral order would not alter the government's authority to detain an individual subject to detention. Neither provision alters the government's ability to remove the individual to a third country where he would not be tortured.

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5 Congressional Research Service (2004) p.8.

6 INA §241(b)(3)(B) bars persecutors of other persons, persons convicted of particularly serious crimes, persons believed to have committed serious non-political crimes, and individuals who are a danger to national security, or who fall within the US provisions related to terrorism from obtaining asylum and withholding of removal.

7 Germain (2007) p.273.

2.1.10 In many respects, the protection CAT provides is similar to withholding of removal under INA. It prohibits the removal of an individual to a country where he would be tortured, but does not confer the possibility of adjustment of status to permanent residency. Nor does it confer derivative status on a spouse or minor children. Nonetheless, it is a valuable form of relief for individuals who may be barred from asylum or withholding of removal because of a criminal conviction or other reasons. It is also valuable to individuals who are unable to establish that the persecution they fear is on account of their race, religion, nationality, membership in a particular social group, or political opinion (i.e. the grounds specified by the Refugee Protocol).

Asylum system

2.1.11 The Department of Homeland Security ("DHS") has the primary day-to-day authority to enforce the aforementioned regulations, while DOJ, through the Executive Office of Immigration Review ("EOIR"), has adjudicative authority over detention and removal. Previously, INS under DOJ was responsible for ensuring compliance in the context of removal of aliens illegally present in the US, and the Department of State was responsible for ensuring compliance in the extradition context.[8] Subsequent to the terrorist attacks on 11 September 2001, the US Government restructured several agencies within the Executive Branch, and created DHS. As part of this restructuring, INS was abolished and its functions were transferred to DHS. While the functions implemented by INS are now performed by DHS, EOIR where immigration judges preside over removal proceedings and adjudicate CAT claims, continues to execute such functions within DOJ.

[8] CAT Article 3 has implications upon the extradition policy of the US. Pursuant to sections 3 184 and 3 186 of the United States Criminal Code, the Secretary of State is responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. Decisions on extradition are presented to the Secretary of State following a fugitive being found extraditable by a United States judicial officer. In cases where torture allegations are made or otherwise brought to the attention of the Department of State, appropriate Department officers are required to review relevant information and prepare for the Secretary a recommendation as to whether or not to extradite and whether to surrender the fugitive subject to certain conditions, such as an assurance from the requesting country that the person will not be tortured. See Congressional Research Service (2004) p.12. This study does not go into details on extradition.

2.1.12 Asylum may be obtained either affirmatively through lodging application to an asylum office of the US Citizenship and Immigration Services ("USCIS") under DHS or defensively in removal proceedings before an immigration judge of EOIR under DOJ. If the asylum application is denied by USCIS in the first place, the applicant will be automatically placed in removal proceedings before EOIR.

2.1.13 The procedures for applications for asylum and withholding of removal are the same. Indeed, an application for asylum is automatically treated as encompassing an alternative application for withholding in the event that asylum is denied. The procedures for filing and adjudicating torture claims under CAT are almost the same as the procedures for asylum and withholding of removal claims. An important procedural difference is that the individual cannot apply affirmatively for relief under CAT.

2.2 Asylum procedures

Lodging of torture claims

2.2.1 Regulations implementing Article 3 of CAT permit aliens to raise Article 3 claims during the course of immigration removal proceedings. In light of the similarities between the harm feared by asylum and torture applicants, the same application form (Form I-589, Application for Asylum and Withholding of Removal) is used to request these two protections and most individuals who assert torture claims simultaneously assert asylum claims.[9] If an individual is eligible for asylum, the immigration judge may grant asylum and the torture claim will not be considered.

2.2.2 Unlike asylum claims which must be filed within one year after the applicant's arrival in the US, torture claims may be lodged at any point in the removal process. An individual may initiate a claim for CAT relief by either requesting such relief before an immigration judge during the removal proceeding or by presenting evidence, including his testimony or information contained on the Form I-589 to the Immigration Court, to indicate that he may be tortured in the country of removal.

[9] *Committee against Torture Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Second periodic reports of States parties due in 1999: United States of America (6 May 2005)*, p.13.

2.2.3 The same eligibility criterion applies to withholding of removal and deferral of removal under CAT in that an individual must establish that it is more likely than not that he would be subject to torture if removed to his home country or other proposed country of removal. Bars to withholding of removal under CAT are identical to the bars to traditional withholding. Unlike traditional withholding and withholding under CAT, there are no bars to deferral of removal under CAT.

Hearing to determine torture/asylum claims

Removal hearing

2.2.4 Implementation of CAT has not caused significant changes to the ongoing removal proceedings. In addition to granting asylum, it adds a form of protection from removal (i.e. protection under CAT), resulting in additional considerations (whether the applicant is more likely than not that he would be subject to torture if removed to his home country or other proposed country of removal, and if so, whether he is subject to criminal and national security-related bars) for immigration judges.[10] Applicants having a credible fear of persecution or torture are permitted to proceed to a full removal hearing in front of an immigration judge where they can request asylum, withholding of removal and relief under CAT.

2.2.5 If the asylum application has been filed affirmatively but is denied by USCIS, the applicant will be automatically placed in removal proceedings before EOIR. In addition, individuals entering the US without proper documentation may also be placed in removal proceedings upon apprehension by immigration authorities. To initiate the removal proceedings, DHS will serve the alien with a charging document, i.e. a "Notice to Appear", and file it with one of EOIR's immigration courts. The Notice to Appear orders the alien to appear before an immigration judge and provides notice of the removal proceedings, the alleged immigration law violations, the right to seek legal representation at no expense to the government, and the consequences of failing to appear at scheduled hearings.[11] An individual served with a Notice to Appear or other charging documents that have been filed with the immigration court may apply defensively for asylum and withholding of removal before an immigration judge.

[10] Germain (2007) p.283.
[11] US Citizenship and Immigration Services (2011).

2.2.6 Removal proceedings are adversarial (courtroom-like) in nature, and are presided over by an immigration judge who is appointed by the Attorney General. The immigration judge will hear arguments from both parties: the alien (and his attorney, if represented), and the US government, which is represented by an attorney from Immigration and Customs Enforcement ("ICE") of DHS. The immigration judge must advise the alien of his right to representation, the availability of free legal services, and his rights to examine, object to, and present evidence, as well as to cross-examine witnesses.[12]

2.2.7 During the hearing, both parties present the merits of the case to the immigration judge. The DHS attorney seeks to prove that the alien should be removed from the US,[13] and he may cross-examine the alien and witnesses. It is not uncommon for the immigration judge to also question the alien and witnesses. Interpretation is provided at government expense. All testimony is given under oath, and is tape-recorded for the purpose of producing a written transcript.[14]

2.2.8 The US regulations implementing CAT contain a provision on "diplomatic assurances", which may terminate deliberation of a claim for non-removal. Pursuant to this provision, the Secretary of State is permitted to "forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country." If such assurances are forwarded to the Attorney General or the DHS Secretary for consideration, the official to whom this information is forwarded shall determine, in consultation with the Secretary of State, whether such assurances are "sufficiently reliable" to permit the alien's removal to the country concerned without violating the US obligations under Article 3 of CAT. If such assurances are provided, a claim for protection under Article 3 "shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer" and the alien may be removed.[15]

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12 Germain (2007) pp.159-160.
13 US Department of Justice Executive Office for Immigration Review (2011).
14 Musalo, Moore & Boswell (2008) p.947.
15 Congressional Research Service (2004) p.11.

Legal representation

2.2.9 The right to counsel in removal proceedings is grounded in the guarantee of due process provided by the Fifth Amendment to the US Constitution.[16] In certain circumstances, depriving a non-citizen of the right to counsel may rise to the level of a due process violation. The Board of Immigration Appeals ("BIA") has held that "since the right to counsel is ... often essential to the fundamental fairness of a hearing, meticulous care must be exercised to ensure that a waiver of this right is competently and understandably made."[17] INA provides for the right to representation in immigration court proceedings, but at no expense to the government. The immigration judge is required to ask the applicant whether he desires representation.

2.2.10 Federal regulations (8 CFR §1292.1) specify who can represent aliens in immigration proceedings. The categories of representation include: licensed attorneys, organizations officially recognized by BIA (such as non-profit, religious, charitable, or social service organizations), accredited representatives who are affiliated with an organization recognized and accredited by BIA, and "other qualified representatives" including law students and law graduates of accredited US law schools not yet admitted to the bar but working under the supervision of an attorney, reputable individuals of good moral character who have a personal or professional relationship with the applicant and accredited government officials, as well as free legal services providers.[18]

2.2.11 When an alien is unrepresented, immigration judges have a duty to "fully develop the record." Courts have found that non-citizens appearing *pro se*[19] in removal proceedings often lack the legal knowledge to navigate "the morass of immigration law" and that it is critical for immigration judges to "scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts." Where the immigration judge fails to develop the record fully by curtailing the alien's testimony, fails to instruct the alien that he should provide detailed responses, and fails to give the unrepresented alien adequate time to review the court submission, the alien's hearing may be considered fundamentally unfair.[20]

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16 The Fifth Amendment to the US Constitution, which is part of the Bill of Rights, protects against abuse of government authority in a legal procedure.

17 Germain (2007) pp.170-171.

18 US Department of Justice Executive Office for Immigration Review (2009).

19 *Pro se* is a Latin phrase meaning "on one's own behalf".

20 Germain (2007) p.171.

Burden of proof

2.2.12 In general, an applicant for protection from removal under Article 3 of CAT has the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of removal. In assessing whether it is "more likely than not" that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered, including:

(a) evidence of past torture inflicted upon the applicant;

(b) evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured;

(c) evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(d) other relevant information regarding conditions in the country of removal.[21]

2.2.13 BIA, the appellate administrative body within EOIR, has recognized that evidence concerning the likelihood of torture must be particularized, and evidence of torture of similarly situated individuals is insufficient alone to demonstrate that it is more likely than not that an applicant would be tortured if removed to a proposed country.[22] As with asylum and traditional withholding of removal claims, an individual's testimony alone, if credible, may be sufficient to sustain the burden of proof without corroboration.[23]

[21] 8 C.F.R. §1208.16(c)(3).

[22] Congressional Research Service (2004) p.9; *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America*, p.28.

[23] Germain (2007) p.274.

Decision

2.2.14 Unlike asylum claims, withholding of removal and deferral of removal claims under CAT are not subject to the requirement of a 180-day period during which asylum claims must be decided. In any event, a CAT claim will be adjudicated with asylum claims in removal proceedings. Since there is no separate hearing for a CAT claim, an individual who is applying for asylum and CAT relief simultaneously will be subject to the 180-day expedited docket.[24]

2.2.15 After the hearing, the immigration judge must determine whether it is more likely than not that the applicant would be tortured if removed to the proposed country of removal. If the immigration judge determines that the applicant would more likely than not be tortured in the country of removal, he is entitled to protection consistent with Article 3 of CAT.[25]

2.2.16 As a last step, the immigration judge must determine whether the applicant is subject to mandatory denial under one of the bars contained in INA §241(b)(3). If the individual has met his burden of proof and is not subject to a mandatory bar, the immigration judge must grant withholding of removal under CAT. If the individual has met his burden of proof, but is subject to a mandatory bar, the immigration judge must deny withholding of removal under CAT and grant the applicant deferral of removal.[26]

Appeal procedures

2.2.17 The administrative and judicial appeal processes are similar for applicants for asylum and applicants for protection from torture. In both cases, an applicant seeking protection from removal from the US could appeal against the adverse decision by the immigration judge to BIA.

[24] Germain (2007) p.283.

[25] *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America*, p.29; Germain (2007) pp.283-284.

[26] Ibid.

Appeal to the Board of Immigration Appeals

2.2.18 Board members of BIA are attorneys appointed by the Attorney General to act as the Attorney General's delegates to handle cases that come before DOJ. BIA conducts *de novo*[27] review of questions of law and reviews findings of fact, including findings relating to prevailing human rights practices in the designated country or countries of removal, under a "clearly erroneous" standard.[28] That means on questions of fact, BIA may reverse the original decision only if the factual findings of the immigration judge are clearly erroneous.

2.2.19 At the conclusion of the removal hearing, the applicant is provided notice of the opportunity to file an appeal to BIA. The appeal must be filed within 30 days of an immigration judge's decision. Upon appeal to BIA, the applicant may be represented by an attorney or an accredited representative. EOIR maintains and provides to applicants a list of *pro bono*[29] legal service providers in the locality of the immigration court.

2.2.20 In general, BIA does not conduct courtroom proceedings. It decides appeals by conducting a paper review of cases. An applicant may file a written brief in support of his appeal. Similarly, DHS may file a brief in opposition to the applicant's appeal. In addition, it may also appeal to BIA against an immigration judge's order granting an applicant protection from removal under Article 3 of CAT.

2.2.21 As a result of some streamlining measures adopted in 2002, many BIA cases are currently decided by a single Board member. Only a minority of BIA decisions are rendered by three-member panels, and occasionally the full Board decides cases *en banc*.[30]

2.2.22 An appeal to BIA of an immigration judge's order of removal has suspensive effect. An order of removal entered by an immigration judge is not considered to be final until BIA has affirmed the order or the time for filing an administrative appeal has expired. Removal of the alien cannot be effectuated while the appeal is pending before BIA.

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27 *De novo* is a Latin phrase meaning "anew", "afresh", "from the beginning".

28 *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America*, p.40.

29 *Pro bono* legal services are those provided free of charge.

30 *En banc* means "all together", "collectively". Legomsky (2009) pp.129-130.

Judicial review

2.2.23 A BIA decision ordering removal is reviewable, as of right, in the US Court of Appeals that serves the territory in which the hearing before the immigration judge took place. Therefore, the applicant may seek judicial review of a denial of CAT relief in the federal court. However, the applicant must exhaust his administrative law remedies with EOIR before proceeding to the federal court of appeals.

2.2.24 If the applicant seeks judicial review on the denial of CAT relief before the federal court of appeals and fails, he may proceed to file a petition for certiorari with the US Supreme Court. Nevertheless, there is no appeal as of right to the Supreme Court as FARRA generally specifies that no judicial review is available for any action, decision or claim raised under CAT. The only exception is judicial review of a final order of removal pursuant to INA §242.[31] Hence, the sole means for judicial review of any cause or claim under Article 3 of CAT is through a petition for review challenging a final order of removal.[32]

2.3 Legal aid and other support

Legal assistance

Availability of publicly-funded legal assistance

2.3.1 The US government does not provide legal representation to asylum seekers. Aliens in immigration proceedings, before either EOIR's immigration courts or BIA, may seek legal representation at their own expense. Pursuant to INA §240, asylum seekers have the right to representation as long as it is at no expense to the government.

2.3.2 EOIR's Office of the Chief Immigration Judge maintains a current list of free legal services providers who meet the qualifications specified in the regulations. This list is updated quarterly and is provided to applicants in immigration proceedings. It is also available on the website of EOIR.[33]

[31] Congressional Research Service (2004) p.7.

[32] *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America*, p.41.

[33] US Department of Justice Executive Office for Immigration Review (2009) p.5.

2.3.3 While not a substitute for legal representation, the Legal Orientation Program ("LOP"), an EOIR programme managed through a contract with the Vera Institute for Justice, which subcontracts with local non-profit legal service providers to provide basic legal information to some of the detained aliens who are unrepresented. LOP allows alien detainees to understand their legal options, and helps connect them to *pro bono* resources. LOP has received widespread praise for promoting the efficiency and effectiveness of the removal process from immigration judges. Nevertheless, LOP is available in only 25 of more than 300 detention facilities nationwide.[34]

Qualification and training of legal assistance providers

2.3.4 Federal regulations (8 CFR §1292) specify who may represent an alien in immigration proceedings and the requirements they must meet.[35] Under the regulations, only attorneys in the US, organizations officially recognized by BIA and their accredited representatives, and other qualified representatives including law students and law graduates, reputable individuals and accredited officials are eligible to represent aliens in immigration proceedings. There are no other specific requirements on the qualification of the aliens' representatives.

2.3.5 A non-profit religious, charitable or social service organization or one of a similar nature established in the US may apply to BIA for recognition as well as accreditation of its representatives. A qualified organization must establish to the satisfaction of BIA such that it only charges nominal fees and assesses no excessive membership dues for persons given assistance, and it has at its disposal adequate knowledge, information and experience. A recognized organization may apply for accreditation of persons of good moral character as its representatives. The application for accreditation must fully set forth the nature and extent of the proposed representatives' experience and knowledge of immigration and naturalization law and procedures. The accreditation of a representative is valid for a period of three years and is renewable.

[34] Human Rights First (2010) pp.19-20.

[35] Please refer to paragraph 2.2.10 of this report for more details.

Economic and social support

2.3.6 Under the current US policy, the government does not provide any financial or other support, such as housing and food, to people whose applications for asylum or other protection are pending. Rather, support will only be provided after the asylum seekers are granted asylee status, i.e. when their applications are successful.[36]

2.3.7 Asylum seekers cannot apply for work authorization during the asylum application process. They can only apply for work authorization if 150 days have passed since they filed the asylum application, excluding any delays caused by them, and no decision has been made on the application. The Form I-765, Application for Employment Authorization, should be submitted to USCIS no earlier than 150 days after the date the asylum application is filed. USCIS has 30 days from the date an application for employment authorization is filed to grant or deny the application. As such, employment authorization may not be granted prior to 180 days after the date of filing for asylum.

2.4 Issues and concerns

Use of diplomatic assurances

2.4.1 During the review of the recent periodic report submitted by the US government, the United Nations Committee against Torture ("the CAT Committee") was concerned by the US's use of "diplomatic assurances" to assure that a person would not be tortured if expelled, returned, transferred or extradited to another state. In particular, the CAT Committee was disturbed by the secrecy of such procedures, including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances were honoured. The CAT Committee therefore recommended the US to only rely on diplomatic assurances in regard to states which did not systematically violate the provisions of CAT, and after a thorough examination of the merits of each individual case. The US was advised to establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.[37]

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[36] Reply from the Refugee Council USA, 14 April 2011.

[37] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture: United States of America (1-19 May 2006)*, pp.5-6.

2.4.2 According to the Congressional Research Service, while Article 3 of CAT obligates signatory parties to take into account the proposed receiving state's human rights record and all relevant considerations when assessing whether to remove an individual to the proposed state, it does not provide guidelines for how these considerations should be weighted in determining whether substantial grounds exist to believe that an alien would be tortured in the proposed state. Accordingly, it does not appear that the use of diplomatic assurances by the US necessarily conflicts with its obligations under CAT. In any event, the Congressional Research Service agrees that the US has an obligation under customary international law to execute its Convention obligations in good faith, and is therefore required to exercise appropriate discretion in its use of diplomatic assurances. If a country has demonstrated a consistent pattern of acting in a manner contrary to its diplomatic assurances to the US, the US government should look beyond the face of these assurances before permitting transfer to that country.[38]

Quality of decision-making by the Immigration Courts and the Board of Immigration Appeals

2.4.3 The quality of decision-making by the Immigration Courts and BIA has been widely criticized by federal court judges, the Government Accountability Office, Members of the Congress, legal scholars, and other experts in recent years.[39] In particular, there are views that the quality of appellate review by BIA has been significantly diminished since DOJ implemented procedures designed to streamline the administrative review process in 2002. The new measures have resulted in decisions being made by a single Board member rather than by a panel of three, summary affirmances of Immigration Court decisions without issuing any analysis or basis for doing so, and three-member panels issuing precedent decisions rather than requiring participation of the entire Board in setting precedent decisions.[40] Studies of the Immigration Court process, including a report published by the American Bar Association Commission on Immigration, have highlighted serious concerns related to the adjudication system's ability to provide fair, legally accurate, and well-reasoned decisions in a timely manner.[41]

[38] Congressional Research Service (2004) pp.11-12.
[39] Human Rights First (2010) p.18. See Legomsky (2009) for the US Court of Appeals for the Seventh Circuit's summary of some of the post-2002 cases.
[40] Human Rights First (2010) p.19.
[41] Human Rights First (2010) p.18.

2.4.4 In response to the criticisms, the Attorney General appointed a review team in January 2006. Based upon the team's findings, the Attorney General announced 22 measures that he hoped would "improve the performance and quality of work" of the Immigration Courts and BIA in August 2006. Such measures included increased funding, additional personnel, and regular performance reviews of the immigration judges and BIA members.[42] However, a report released in 2009 found that many of these reform measures had not been implemented. In fact, while BIA issued fewer summary decisions, approximately one-third of its decisions were appealed to the federal circuit courts in 2008, indicating that many BIA decisions might continue lacking meaningful review or analysis.[43]

Lack of legal aid by the government

2.4.5 A right to legal representation is guaranteed in removal proceedings. However, such right to legal representation must be obtained at no expense to the government. Some scholars note that the qualifier "at no expense to the government" has made it difficult for asylum seekers to obtain counsel.[44] The obstacles to securing legal representation are particularly acute for aliens detained, because through incarceration the government significantly curtails their access to counsel.[45] The American Bar Association study has found that less than half of the applicants in immigration proceedings during the last several years had the benefit of representation, and for those in detention, about 84% were unrepresented.[46]

2.4.6 There are arguments for establishing a system of appointed counsel. However, it is opined that any proposal to furnish government-paid attorneys to aliens is politically "dead on arrival" in the Congress, and there have been no serious efforts of late to place this option on the legislative agenda.[47]

42 Department of Justice (2006).
43 Human Rights First (2010) p.19.
44 Musalo, Moore & Boswell (2008) pp.954-955.
45 Musalo, Moore & Boswell (2008) p.955.
46 Human Rights First (2010) p.19.
47 Musalo, Moore & Boswell (2008) p.958.

Chapter 3 – Australia

3.1 Background

3.1.1 Australia became a signatory to the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") in 1954 and to the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol") in 1973. It ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1989.

3.1.2 Consideration of Australia's non-refoulement obligation under the Refugee Convention mainly arises in relation to the seeking of refugee protection in Australia. Such protection is effected through the granting of either a temporary or permanent protection visa. The systems for determining refugee status are administered by the Department of Immigration and Citizenship ("DIAC").

Major relevant legislations

3.1.3 The Australian Constitution gives the Commonwealth Parliament power to make laws with respect to "naturalisation and aliens". Pursuant to this power, the *Migration Act 1958*, together with the *Migration Regulations 1994*, regulates the entry into, and presence in, Australia of aliens and non-citizens.

3.1.4 In Australia, international treaties are not self-executing. A treaty *per se* does not form part of Australian law unless it is incorporated by legislation. The Australian Parliament has incorporated the protection provided by the Refugee Convention into domestic law through the addition of section 36 to the *Migration Act 1958* in 1992. Section 36 provides for visas to be issued on refugee and humanitarian grounds to applicants under the government's Humanitarian Programme. This programme offers onshore protection for those applicants already in Australia, whether or not they arrived with temporary visas or without a visa at all, and offshore resettlement for overseas applicants in humanitarian need.

3.1.5 Section 36 states that a criterion for a protection visa is that the applicant should be a non-citizen to whom the Minister for Immigration and Citizenship is satisfied that Australia has protection obligations under the Refugee Convention. It thus can be seen that the current provision stresses both the discretion of the Minister for Immigration and Citizenship and the status of the applicant as a refugee.[48]

3.1.6 CAT is not incorporated into Australian law. Hence, no claim can be made under CAT directly. The only way to have a torture claim considered is for the Minister for Immigration and Citizenship to exercise his power under sections 417, 454 and 501J of the *Migration Act 1958* to substitute "a more favourable decision" (i.e. granting a visa) when all other avenues for claiming refugee status under Australian law have failed. In exercising the discretionary powers, the Minister for Immigration and Citizenship may take into account the CAT obligations.

Asylum system

3.1.7 Australia offers protection visas to asylum seekers who meet the United Nations definition of a refugee, as set out in the Refugee Convention and the Refugee Protocol. Australia also offers protection visas to applicants who meet the guidelines for staying in Australia on humanitarian grounds. The effect of the protection visa is to allow a person to remain permanently in Australia and, after satisfying the statutory criteria for citizenship, including a residency requirement, to be granted Australian citizenship.[49]

3.1.8 An asylum seeker should lodge an application for refugee status with DIAC. Applications may be submitted from individuals or family groups. In the case of family applications, the claims of each member of the family will be examined. If one member of the family is determined to be a refugee, the whole family is granted refugee status.

[48] Kneebone (2009) p.199.

[49] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Second periodic report of States parties due in 1994: Australia (19 October 1999)*, p.13.

3.1.9 Australia has a two-stage administrative determination procedure: primary and review stages. The primary stage commences with an asylum seeker lodging an application for refugee status with DIAC. There are only two possible outcomes from the primary stage: the application is accepted and the asylum seeker is granted a permanent protection visa, or the application is rejected. Applicants granted permanent protection visa receive work rights, access to health care and an entitlement to support payments through the social security system.

3.1.10 If a claim is rejected, the asylum seeker has the option to lodge an application for a review of this decision. Approximately 75% of rejected applicants take advantage of this option.[50] At the review stage, applicants can seek review of the decision by taking the matter to the Refugee Review Tribunal ("RRT"). RRT is an independent statutory body which has the power to affirm, vary or remit to the Minister for Immigration and Citizenship for reconsideration of decisions regarding refugee protection. Unsuccessful applicants of the review stage could challenge the lawfulness of RRT's decision in the courts.

3.2 Asylum procedures

Lodging of claims

3.2.1 Applications for a protection visa are lodged with DIAC through submitting Form 866, Application for a Protection (Class XA) Visa. The substantive parts of the application form are Parts C and D. Part C contains questions particularly for applicants who wish to submit their own claims to be a refugee, which include critical questions as to why the applicant is claiming himself to be a refugee. If the applicant does not answer such questions, the application does not substantially comply with the requirements and will not be considered. Part D is for members of the family unit who do not claim to be a refugee themselves but are included in the application.[51] Family members physically present in Australia can be included in the application, or they may provide their own claims for protection separately.

[50] Refugee Council of Australia (2011).
[51] Migration Review Tribunal & Refugee Review Tribunal (2010) p.1.5.

3.2.2 From 1 November 2010, applicants and any family members included in the application have been required to provide a digital photograph and fingerprints, which also known as "personal identifiers", to DIAC in order to be considered a valid application.

3.2.3 To be eligible for the protection visa, applicants must show that they have a well-founded fear of persecution for one of five reasons prescribed in the Refugee Convention, i.e. they will be persecuted because of their race, religion, nationality, political opinion, or membership of a particular social group.

3.2.4 Once DIAC has received a protection visa application, it will send a letter to the applicant acknowledging the receipt of application. This letter will provide information on the application process, health and character checks, and the type of bridging visas for which the applicant is eligible.

3.2.5 Soon after lodging a protection visa application, the applicant will be asked to undergo health and character checks. Illnesses and any required medical treatments will not prevent an applicant from being granted a protection visa.[52] In order for the Australian government to validate that the applicant is of good character, he may be asked to provide police certificates for each country he has lived in for 12 months or more over the last ten years since turning 16. Police certificates are normally not required for persons under the age of 16. Applicants aged 18 or above are also required to sign an Australian values statement. The statement is included in the visa application form and all applicants aged 18 or above will need to sign it to confirm that they will respect the Australia way of life and obey Australian laws.

3.2.6 For asylum seekers who enter Australia legally, they will be given a bridging visa that allows them to stay in Australia legally while their application for refugee status is being processed. On the other hand, for asylum seekers who enter Australia without a valid visa or passport, they will be detained while health and character checks are conducted.[53] With the exception of such unauthorised arrivals, most protection visa applicants are able to remain lawfully in the community on a bridging visa until their application is finalised.

[52] Department of Immigration and Citizenship (2011).
[53] Refugee Council of Australia (2011).

Interview to determine asylum claims

Asylum interview

3.2.7 Applications are assessed by case managers who are DIAC officers. They are trained in sensitive interviewing techniques and appropriate handling of people suffering from post-traumatic stress disorder or other psychological or emotional issues. At the interview, applicants will discuss their claims with the assigned case manager and provide further information if required.

3.2.8 It is important that the applicant attends the asylum interview to answer the questions posed by the case manager, and to give all the information necessary to facilitate the decision making process. If the applicant does not attend the interview, the application will be decided based on the information available to the case manager at the time solely.

Legal representation

3.2.9 No legal representation is allowed during the interview. Nevertheless, DIAC may allow the applicant's friend, relative or migration agent to attend the interview. Where necessary, it will arrange qualified interpreters for the interviews.

3.2.10 Applicants may solicit assistance from a migration agent with regard to their application. The migration agent may advise the applicants on the documents needed to submit with the application; help complete and submit the application form; and communicate with DIAC on the applicants' behalf. Migration agents are required to be registered with the Office of Migration Agent Registration Authority.

3.2.11 In addition to migration agents, DIAC also allows several categories of people to help applicants with the protection visa application: close family members (partners, children, adopted children, parents, brothers or sisters), Members of Parliament or their staff, officials whose duties include providing immigration assistance (e.g. legal aid providers), and members of a diplomatic mission, consular post or international organization. However, only a registered migration agent is allowed to charge a fee for helping with the application. Any person other than those listed above providing immigration assistance may be prosecuted for committing a criminal offence.

Burden of proof

3.2.12 The burden of proof is on the applicant, who is required to give all the information necessary to facilitate the decision making on the application. If the case manager asks the applicant to provide more information to support the claims, the applicant should provide this information within the timeframe specified by the case manager.

Decision

3.2.13 Most applications will be decided within 90 days. However, some checks undertaken as part of the application processing may take longer than 90 days.

3.2.14 The case manager will assess the application against Australian migration law and the Refugees Convention. The case manager may also refer to the latest information about the political conditions of the country in which the applicant fears persecution when assessing his claims for protection. All protection visa applications are considered individually. There are no general approvals for particular groups of applicants.[54]

Appeal procedures

3.2.15 If the application is refused, DIAC will write to the applicant to inform him of the decision and the reasons behind. The applicant has the right to seek a review of the decision. If the applicant is not in immigration detention, appeal must be lodged within 28 calendar days of the date he is notified of the decision by DIAC. If the applicant is in immigration detention, appeal must be lodged within seven working days. The applicant must complete an application for review form and supply other documents to support the application for review.

[54] Department of Immigration and Citizenship (2011).

Appeal to the Refugee Review Tribunal

3.2.16 The body responsible for reviewing appeal applications is RRT, which provides a final independent merits review of protection visa decisions made by the Minister for Immigration and Citizenship or by officers of DIAC acting as delegates of the Minister. At RRT, a sole Tribunal member, who is not necessarily a lawyer and is appointed by the Minister for Immigration and Citizenship, hears the appeal.

3.2.17 Hearings are non-adversarial and relatively informal. No representative for DIAC will attend hearings. The RRT member will guide the proceedings to suit the circumstances of the case. The RRT member may also take evidence from other persons at the hearing.

3.2.18 During the hearing, the RRT member will ask questions and will provide the applicant with an opportunity to make a statement or present arguments.[55] RRT hearings are held in private. Members of the public are not admitted to the hearing, but a friend or relative of the applicant may be able to remain in the hearing room with the applicant during the hearing. If requested, RRT will arrange for an interpreter to be present at the hearing. All hearings are audio-recorded. The applicant may ask RRT for a copy of the recording at the end of the hearing. The average length of a hearing is two hours.

3.2.19 The applicant may have a legal adviser or a family member present at the hearing to assist him. The person assisting the applicant cannot in normal circumstances present oral arguments or formally address the RRT member on the applicant's behalf. However, this person can give his advice and may be invited by the RRT member to comment on specific matters. If the applicant considers that RRT should allow a third person to present oral arguments or formally address the RRT member on his behalf, he should contact RRT prior to the hearing or raise the matter with RRT at the start of the hearing. In any event, RRT is committed to ensuring that outcomes do not depend on whether or not applicants have obtained professional advice or assistance. More than 30% of cases involve applicants who are not represented.[56]

3.2.20 The RRT member may announce the decision at the end of the hearing in some cases, but in most cases a decision will be given to the applicant at a later date.

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55 Refugee Review Tribunal (2010) p.1.

56 Migration Review Tribunal & Refugee Review Tribunal (2011).

3.2.21 In the event that the claim is rejected by RRT, there are two avenues that the applicant could explore. First, pursuant to the guidelines issued by the Minister for Immigration and Citizenship, if the RRT member considers that there may be compelling humanitarian reasons for an applicant not to be returned to his country of origin, the member may refer the case to DIAC. The member's views will then be brought to the attention of the Minister for Immigration and Citizenship by DIAC under the guidelines. Failed applicants can also make a direct approach to the Minister for Immigration and Citizenship seeking consideration of their cases. Second, applicants can lodge an appeal to the Court. If the Court rules in favour of the applicant, the case is referred back to RRT for reconsideration. Reconsideration does not mean that the applicant is automatically granted refugee status.[57]

3.2.22 A person must be removed from Australia as soon as reasonably practicable if the protection visa application has been finally determined to be unsuccessful, and an application is taken to be in such status when a decision is no longer subject to review by RRT.[58] Hence, an appeal has a suspensive effect in that the applicant will not be removed when the review by RRT is pending.

Judicial review

3.2.23 Where there is a perceived error of law in the decision of RRT, it is possible to appeal the decision to the Federal Court for judicial review of the decision. The Federal Court will normally assign a single judge to review the case. Applications for appeal must be lodged within 28 days of receipt of the RRT decision. The Federal Court has the power to either uphold the refusal to grant a protection visa or to direct that the application be reassessed. Failed applicants may go on appealing to the Full Federal Court, and may then be the subject of a special leave application to the High Court of Australia. However, the courts will not consider the merits of an asylum claim. The Federal Court will only consider whether RRT has made an error in law in reaching its conclusion, and the High Court will only consider whether the Federal Court has made an error in law.

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57 Refugee Council of Australia (2011).

58 *Consolidated Written Replies by the Government of Australia to the List of Issues to be taken up in connection with the consideration of the Fourth Periodic Report of Australia (7 April 2008)*, p.60.

3.2.24 On 11 May 2004, the government announced a package of migration litigation reforms aiming to deal more quickly with migration cases before the courts. Under the reform package, judicial review applications of RRT decisions can be lodged to the Federal Magistrates Court ("FMC") as well. In order to ensure that migration cases are dealt with quickly and fairly, the government has appointed eight additional magistrates to FMC.[59]

Ministerial intervention

3.2.25 In addition to the Refugee Convention, Australia's non-refoulement obligations are derived from CAT, the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Rights of the Child ("CRC"). In essence, Australia must provide protection for people who are not refugees but cannot be returned to their home countries because there is a real risk that they would suffer certain types of harm. Australia meets its protection obligations to these people through statutory powers that allow the Minister for Immigration and Citizenship to grant visas in appropriate cases. The Minister may exercise his discretionary power under section 417 of the *Migration Act 1958* to substitute RRT's decision for one that is more favourable to the applicant. Such discretionary powers are called the "public interest powers" or more commonly, "ministerial intervention". These powers could not be used to overturn a tribunal decision which is favourable to the applicant. Besides, the Minister could not override decisions made by the courts.[60]

3.2.26 On return from RRT, each case is reassessed by DIAC against the Minister's Guidelines for Stay in Australia on Humanitarian Grounds. The Guidelines provide guidance to DIAC officers in identifying cases with "unique or exceptional circumstances" which warrant referral to the Minister for Immigration and Citizenship for consideration as to whether or not to exercise his public interest powers. Most notably, the Guidelines refer to Australia's international obligations under CAT, CRC and ICCPR as relevant factors in deciding whether the Minister for Immigration and Citizenship should consider exercising these powers. Any individual or body may also request the Minister to exercise his discretionary powers on a particular case.[61]

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[59] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 2004: Australia (7 April 2005)*, p.12.

[60] *Committee against Torture Fortieth session Summary Record (Partial) of the 815th Meeting (30 April 2008)*, pp.2-3.

[61] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Second periodic report of States parties due in 1994: Australia (19 October 1999)*, p.14; *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 2004: Australia (7 April 2005)*, p.12.

3.2.27 Ministerial intervention is a non-compellable power in that the Minister for Immigration and Citizenship has no obligation to exercise discretion to consider a request for intervention. Meanwhile, cases subject to the ministerial discretion to intervene are non-reviewable by the courts. This power will only be exercised in "unique or exceptional circumstances". Such circumstances are considered in the light of international human rights conventions and other strong compassionate circumstances that might affect the applicant.[62] As stated on the website of DIAC, "There is a real risk that you will be arbitrarily deprived of your life or will suffer torture, cruel or inhuman or degrading treatment or punishment as a necessary and foreseeable consequence of return to your country or origin" is one of such "unique or exceptional circumstances". To support a torture claim, applicants may submit to DIAC a statutory declaration outlining the reasons for fears, and any other documents which may support the claim.

3.2.28 Under the existing DIAC policy, a protection visa applicant in immigration detention will not be removed from Australia while the outcome of either judicial review or a ministerial intervention request in relation to a protection visa application is pending.[63] Meanwhile, during the period when the case is under consideration by the Minister for Immigration and Citizenship, asylum seekers living in the community are granted a bridging visa which does not allow them to work.

3.3 Legal aid and other support

Legal assistance

Availability of publicly-funded legal assistance

3.3.1 The Immigration Advice and Application Assistance Scheme ("IAAAS") provides free immigration advice and application assistance to eligible needy immigration clients. All protection visa applicants in detention as well as the most disadvantaged protection visa applicants and other visa applicants (i.e. non-asylum seekers who apply for immigration to Australia) in the community are eligible for the assistance.

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62 Vrachnas, Boyd, Bagaric & Dimopoulos (2008) p.326.

63 *Consolidated Written Replies by the Government of Australia to the List of Issues to be taken up in connection with the consideration of the Fourth Periodic Report of Australia (7 April 2008)*, p.61.

3.3.2 Although IAAAS services are funded by the Commonwealth through DIAC, its advice is independent of DIAC. Under IAAAS, registered migration agents and officers of legal aid commissions are selected by tender to act as IAAAS service providers. They help all asylum seekers in immigration detention and disadvantaged protection and other visa applicants in the community with professional application assistance, including accompanying the asylum seekers to attend visa interviews and providing interpreters. There are currently 24 IAAAS service providers across Australia, and a list of IAAAS service providers is available on the website of DIAC.

3.3.3 All people in immigration detention who seek to apply for a protection visa are offered IAAAS assistance. An IAAAS service provider is allocated to them and they may accept or refuse the services. For those asylum seekers in the community, they have the option of choosing among IAAAS service providers listed in their areas if they meet the eligibility requirement. Only "disadvantaged persons" are eligible for IAAAS services. A "disadvantaged person" is one who is in financial hardship and disadvantaged due to non-English speaking background, youth or other cultural background, illiteracy, remote location (outside any Australian state capital city, except areas with known registered migration agents), physical or psychological disability, or physical or psychological harm resulting from family violence.

3.3.4 Under IAAAS, legal advice or assistance is provided with regard to the preparation, lodging and presentation of protection visa applications and applications for merits review of any refused decisions. Nevertheless, IAAAS services are not provided where an applicant appeals to the Federal Court or where an applicant seeks the Minister's intervention under section 417 of the *Migration Act 1958*. In any event, legal aid provided by legal aid commissions (publicly-funded legal aid providers) may be available for representation in refugee matters in the Federal Court, the Federal Magistrates Court or the High Court. For such legal aid to be granted, applicants should pass both means test and merit test.

3.3.5 If asylum seekers want to seek assistance from a non-IAAAS service provider, they have to arrange it at their own cost. Nevertheless, some migration agents may offer *pro bono* or free services.

Qualification and training of legal assistance providers

3.3.6 In Australia, migration agents must register with the Office of the Migration Agents Registration Authority. To be eligible for registration, a person needs to meet the requirements under Part 3 of the *Migration Act 1958*. One of the requirements is the "knowledge requirement", which requires that the applicant either is an Australian Legal Practitioner or has completed the Graduate Certificate in Australian Migration Law and Practice. Registration has to be renewed every year.

3.3.7 There is a Code of Conduct for registered migration agents to follow, and they are required to have an in-depth knowledge of Australian migration law and procedures, and to meet high professional and ethical standards. The promotion of Continuing Professional Development ("CPD") ensures that the level of professionalism and knowledge of registered migration agents is enhanced on an on-going basis. All registered migration agents are required to complete CPD annually. CPD points are awarded for completing CPD activities approved by the Office of the Migration Agents Registration Authority. Activities, like programmes of education and seminars, are approved with a value and a status (Core or Elective). In order to successfully apply for repeat registration, migration agents have to meet the CPD requirements. They need to complete at least 10 CPD points through the completion of the approved CPD activities, in which at least six must be Core CPD points. The Office of the Migration Agents Registration Authority has recently introduced new activities like mentoring, workshops and conferences.

Fee scheme of publicly-funded legal assistance

3.3.8 IAAAS funds selected registered migration agents by tender to act as IAAAS service providers. In 2009-2010, the cost of providing IAAAS services was some AUS$3.04 million (HK$24.62 million), with AUS$0.68 million (HK$5.51 million) for application assistance to 318 protection visa applicants in immigration detention (AUS$2,138 (HK$17,318) per case), AUS$1.44 million (HK$11.66 million) for application assistance to 826 disadvantaged visa applicants in the community (AUS$1,743 (HK$14,118) per case); and AUS$0.92 million (HK$7.45 million) for immigration advice to 8 756 disadvantaged persons in the community (AUS$105 (HK$851) per case).

3.3.9 Applicants who are eligible for IAAAS receive the services for free. In any event, the fees charged by registered migration agents may give some insights on the remuneration of the legal assistance providers. Although the fees charged by registered migration agents are not set by regulations, the Office of the Migration Agents Registration Authority provides details of the average range of fees charged by agents. During the period from January to March 2011, the range of fees charged by 70% of registered migration agents was AUS$1,000 (HK$8,100) to AUS$3,500 (HK$28,350) for providing services on application for onshore protection, and AUS$1,000 (HK$8,100) to AUS$4,000 (HK$32,400) for review applications.

Economic and social support

3.3.10 The Australian government provides limited assistance for deprived asylum seekers during the period when their applications for protection are being processed. Asylum seekers experiencing financial hardship may apply for financial assistance through the Asylum Seeker Assistance Scheme ("ASAS"), which provides financial assistance, health care and other services to vulnerable applicants in the community. ASAS is administered by the Australian Red Cross under contract to DIAC.

3.3.11 To be eligible for ASAS, asylum seekers must be in financial hardship and have lodged a valid protection visa application more than six months ago, with a bridging or other visa. They must not be in detention, eligible for either Commonwealth or overseas government income support, nor a partner or sponsored fiancé of a permanent resident. Nonetheless, vulnerable applicants in financial hardship who are unable to meet their basic needs and who have no continuing and adequate support within the community, such as unaccompanied minors and elderly persons, are exempted from the above criteria.

3.3.12 Permission to work while an applicant is on a bridging visa depends on the type of bridging visa and the stage of processing the application has reached. Generally, permission to work is available to applicants who have remained lawful and actively engaged with DIAC to resolve their immigration status. For applicants who have become unlawful and have not voluntarily approached DIAC, permission to work is only available in limited circumstances.

3.3.13 If the applicants have a bridging visa that allows them to work, they may also be able to receive medical assistance through Medicare, the Australian government's health insurance scheme.[64]

3.4 Issues and concerns

Ministerial discretion and complementary protection legislation

3.4.1 Some domestic and international human rights bodies have recommended that Australia introduces a formal system of complementary protection. At domestic level, in 2004, the Human Rights and Equal Opportunity Commission ("HREOC") made a submission to the Senate Select Committee on Ministerial Discretion in Migration[65] with the following observations and suggestions:

(a) the exercise of ministerial discretion (under section 417 of the *Migration Act*) provides inadequate protection against non-refoulement of asylum seekers who may be eligible for protection under CAT, ICCPR, or CRC;

(b) the section 417 ministerial discretion is non-compellable, non-reviewable and lacks the basic features of accountable and transparent decision-making;

(c) a specific "complementary protection" visa class should be introduced to ensure that Australia complies with its non-refoulement obligations under CAT, ICCPR and CRC. The decision to grant or decline the visa application should be based on the application of clear criteria, and subject to independent merits review and judicial review; and

(d) ministerial discretion should remain as a final safety check.

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64 Introduced in 1984, Medicare is Australia's universal health care system aiming to provide eligible Australian residents with affordable, accessible and high-quality health care. It provides access to free treatment as a public (Medicare) patient in a public hospital, and free or subsidised treatment by medical practitioners including general practitioners, specialists, participating optometrists or dentists.

65 Human Rights and Equal Opportunity Commission (2008) pp.10-11.

3.4.2 The Senate Select Committee on Ministerial Discretion in Migration supported HREOC's views. Its 2004 report recommended the government to "give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR".[66]

3.4.3 At international level, in 2001, the United Nations Committee against Torture (the "CAT Committee") raised concerns on the lack of appropriate review mechanisms in Australia for ministerial decisions in respect of cases coming under Article 3 of CAT. It recommended that Australia should consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under Article 3.[67] In spite of such calls, the Australian government retained the discretion of the Minister for Immigration and Citizenship to grant relief under section 417 and did not consider the introduction of an independent scheme. At its third periodic report submitted to the CAT Committee in 2005, the Australian government stated that it "does not consider an additional level of review, such as that suggested by the Committee, either necessary or appropriate. Furthermore, the government maintains that current policy and practice is not inconsistent with Australia's obligations under the Convention".[68]

3.4.4 In its concluding observations on Australia's third periodic report released in 2008, the CAT Committee reiterated the same concern. It recommended that Australia should adopt a system of complementary protection to ensure that it no longer relied solely on the Minister's discretionary powers to meet its non-refoulement obligations under CAT.[69]

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66 Human Rights and Equal Opportunity Commission (2008) p.11.

67 *Concluding observations of the Committee against Torture: Australia (21 November 2000)*, paragraph 53(b).

68 *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 2004: Australia (7 April 2005)*, p.12.

69 *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Australia (28 April-16 May 2008)*, pp.4-5.

3.4.5 It was in 2009 when the Australian government started to introduce complementary protection legislation. Complementary protection is the term used to describe a category of protection for people who are not refugees, but who cannot be returned to their home countries because there is a real risk that the persons would suffer certain types of harm that would infringe Australia's non-return obligations.[70] Complementary protection covers people who may be at risk of having their fundamental human rights violated, such as being arbitrarily deprived of their life; having the death penalty carried out on them, being subject to torture; or being subject to cruel, inhuman or degrading treatment or punishment, if returned to their home countries.

3.4.6 The *Migration Amendment (Complementary Protection) Bill 2009* was introduced into the House of Representatives on 9 September 2009. However, that *Bill* was not subsequently debated and lapsed on 19 July 2010 when the Parliament was prorogued for the 2010 federal election. The *Migration Amendment (Complementary Protection) Bill 2011* was introduced into the House of Representatives on 24 February 2011. The *Bill* intends to amend the *Migration Act 1958* so as to introduce a statutory regime for assessing claims that may engage Australia's non-refoulement obligations under various international human rights treaties otherwise known as "complementary protection". The *Bill* proposes to assess complementary protection claims under a single protection visa application process. Under this process, applicants who are found not to be refugees but owed protection on complementary protection grounds will be entitled to be granted protection visas with the same conditions and entitlements as refugees. In turn, unsuccessful applicants (i.e. applicants found not to be owed protection) will have equivalent administrative review rights as persons seeking protection under the Refugee Convention.[71]

[70] Department of Immigration and Citizenship (2011).
[71] Parliament of Australia Department of Parliamentary Services (2011).

3.4.7 Under the proposed legislation, protection claims will first be considered against the existing refugee criteria set out in the *Migration Act 1958*. Only those applicants who are found not to be refugees will have their claims being considered under the new complementary protection criteria.[72] Introduced to the House of Representatives on 24 February 2011, the *Bill* went through the first reading on the same day. Debate of the second reading has been adjourned. Subject to the passage of the legislation, the new complementary protection criteria are expected to commence approximately six months after the *Bill* is passed.

Detention

3.4.8 Mandatory detention of those persons who enter Australia irregularly (people arriving in Australia without lawful authority either on their own accord without any involvement by organizations, or organized by criminal networks and/or smuggling syndicates) has long been the concern of the CAT Committee and NGOs. In 2005, the government introduced a series of reforms, including the *Migration and Ombudsman Legislation Amendment Act 2005* and the *Migration Amendment (Detention Arrangements) Act 2005*. These *Acts* have brought in important changes to the processing of asylum seekers in Australia, which include requiring that the determination of protection visa applications for detained asylum seekers be concluded within 90 days, introducing the principle that an asylum seeker's children should only be detained as a measure of last resort, and requiring reports by DIAC to the Commonwealth Ombudsman on persons being held in detention for more than two years. In particular, asylum seekers who have been in detention for more than two years now have their cases reviewed by the Commonwealth Ombudsman, who will recommend courses of action to the Minister for Immigration and Citizenship. The Minister for Immigration and Citizenship must table the Ombudsman's report and recommendations in the Parliament. Nonetheless, the government is under no obligation to follow the recommendations.[73]

[72] Department of Immigration and Citizenship (2011).
[73] Briskman, Latham & Goddard (2008) p.366.

3.4.9 As a result of the 2005 reforms, all asylum seeking families with children have been moved from immigration detention centres into alternative detention arrangements in the community. Community detention enables them to move about freely in the community without needing to be accompanied or restrained by an officer under the *Migration Act 1958*. Apart from the fact that their legal status means that they do not have a visa, persons in community detention are in no way hampered in terms of mobility, and they are able to lead normal lives.[74] Government-funded NGOs are in place to ensure that people placed in community detention are properly supported, with access to medical services and pre-approved specialist services.[75]

3.4.10 Meanwhile, concerns on the situation of stateless people (people who do not have the legal bond of nationality with any state) remain. Stateless people are theoretically subject to indefinite detention as they are ineligible for a visa and have no country to which they could be removed. The CAT Committee has expressed concerns about the situation of stateless persons in immigration detention who risk being potentially detained "ad infinitum". It therefore recommends Australia to consider abolishing its policy of mandatory immigration detention for those entering irregularly its territory. According to the CAT Committee, detention should be used as a measure of last resort only, and a reasonable time limit for detention should be set. In particular, Australia should take urgent measures to avoid the indefinite character of detention of stateless persons.[76]

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[74] *Committee against Torture Fortieth session Summary Record (Partial) of the 815th Meeting (30 April 2008)*, p.11.

[75] *Committee against Torture Fortieth session Summary Record (Partial) of the 815th Meeting (30 April 2008)*, p.3.

[76] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Australia (28 April-16 May 2008)*, p.3.

Chapter 4 – The United Kingdom

4.1 Background

4.1.1 The United Kingdom ("the UK") is a signatory to both the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") and the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol"), having ratified the Refugee Convention in 1954 and acceded to the Refugee Protocol in 1968. The UK ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1988.

4.1.2 In the UK, international law does not by itself become part of the domestic legal order unless the Parliament passes a law to that effect. Nevertheless, enactment of legislation is not the only way for the UK to fulfil its obligations under international law. Sometimes when the domestic law is consistent with the UK's international obligations, no action is required,[77] which is the case of CAT.[78] Meanwhile, in the case of the European Convention of Human Rights ("ECHR"), the UK has adopted the *Human Rights Act 1998*. However, the aim of this enactment is not to incorporate ECHR into the domestic legal order but to allow the UK citizens to submit their cases to domestic courts instead of the European Court of Human Rights in Strasbourg.

4.1.3 As regards non-refoulement, the position in the UK law is that a person's removal would be a breach of its obligations under ECHR where such removal would expose the person to a real risk of torture or inhuman or degrading treatment or punishment or where such removal would lead to a flagrant breach of other ECHR rights. The protection offered by ECHR in the removal context is wider than that offered by CAT.[79] By taking account of ECHR in all removal cases, the UK ensures that it does not breach the obligations under CAT.[80]

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77 *UNCAT Hearing: Provisions of lists of issues to state parties (18 November 2004)*, pp.6-7.

78 *Committee against Torture Thirty-third session Summary Record of the 627th Meeting (18 November 2004)*, p.3.

79 For details, please refer to paragraph 1.4.13 of this research report.

80 *UNCAT Hearing: Provisions of lists of issues to state parties (18 November 2004)*, p.30.

Major relevant legislations

4.1.4 Although CAT is not incorporated into the UK law, the *Human Rights Act 1998* ("HRA") has embedded specific ECHR human rights protection. Most importantly, ECHR contains provisions prohibiting torture and inhuman or degrading treatment or punishment that is absolute and stronger than the protection against refoulement provided by the Refugee Convention.[81] Although HRA does not specifically set out protections for asylum seekers or refugees, a number of ECHR provisions embedded in HRA have been used by asylum seekers in litigation. For instance, Article 3 of ECHR, which prohibits the return of a person where there are substantial grounds for believing that there is a real risk of torture or inhuman and degrading treatment or punishment, is one of these provisions.[82]

4.1.5 In addition to the incorporation of ECHR via legislation, key articles of ECHR are also referred to in various asylum regulations and the current version of the UK Immigration Rules. Although the Immigration Rules are administrative rules which do not have the legal status of legislation, they are binding in that failure to act in accordance with the rules can render a decision appealable.[83] In terms of ensuring a level of consistency across the Home Office, the decisions of case owners are guided not only by relevant legislation and the Immigration Rules but also by detailed asylum policy instructions and asylum process guidance.

4.1.6 During the deliberation of the UK's fourth periodic report submitted to the United Nations Committee against Torture, the leader of the UK delegation provided reasons for the UK to deny asylum seekers with "clearly unfounded" claims appeal with suspensive effect. He pointed out that between 2000 and 2002, the UK received more asylum seekers than any other member states in the European Union ("the EU"). Most applicants were not in need of protection and claimed asylum as a means of sidestepping mainstream immigration controls. Hence, the UK government introduced the *Nationality, Immigration and Asylum Act 2002* to deter misuse of asylum. Applicants whose claims were certified as "clearly unfounded" would only be able to appeal after they had left the UK.[84]

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81 Kneebone (2009) p.289.
82 O'Sullivan (2009) pp.240-241.
83 O'Sullivan (2009) p.239.
84 *Committee against Torture Thirty-third session Summary Record of the 624th Meeting (17 November 2004)*, p.4.

4.1.7 The UK is a signatory to the EU regulations and directives on asylum. For many years, the EU member states have cooperated in a burden sharing arrangement in that they have followed certain adopted regulations to determine which member state will be responsible for examining an asylum application lodged in the EU.[85] The current regulation is the Dublin II Regulation. The 27 member states of the EU and the three associated states, Iceland, Norway and Switzerland, compose the Dublin Area specified in the Regulation. Adopted in 2003, the Dublin II Regulation establishes the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of them by a third-country (i.e. non-EU country) national. As a general rule, the responsible member state will be the state where the asylum seeker first enters the EU. A Europe-wide fingerprint database has been established under the EURODAC Regulation to help verify the identity of asylum seekers.

Asylum system

4.1.8 In the UK, the UK Border Agency ("UKBA") under the Home Office is the government body responsible for interviewing asylum claimants and assessing their asylum applications.

4.1.9 Since 5 March 2007, the Home Office has been processing all new asylum claims under the New Asylum Model ("NAM"). The aim of NAM is to produce a faster and more streamlined asylum process. Under NAM, a single case owner, who is an officer of the Home Office, has responsibility for an applicant throughout the asylum process from start to finish. The case owner is responsible for interviewing the applicant and making decision on the application. The case owner will also deal with the applicant's welfare needs and integration into daily life in the UK if he is granted a positive decision, or his removal if the application is rejected.

4.1.10 Another feature of NAM is the segmentation of cases. Upon the screening interview, asylum applicants are assigned to one of five "segments" that determines the future pathway of their claims:

(a) Segment 1 is "third country cases". Applicants are likely to be detained and, where possible, removed to the appropriate country;

[85] O'Sullivan (2009) pp.242-244.

(b) Segment 2 is "children". Unaccompanied asylum seeking children undergo a similar application process to asylum seeking adults. They are interviewed by a case owner about the substance of their claim if they are 12 years old or over. Case owners dealing with cases in this segment have been specially trained to deal with children;

(c) Segment 3 is "potential non-suspensive appeals". Applicants who are nationals of one of the countries designated "safe" do not have the right to appeal a negative decision on their cases from within the UK if the claim is certified as "clearly unfounded";[86]

(d) Segment 4 is "detained fast track". Applicants are detained at the Immigration Removal Centres, with initial decisions being made within three to four working days; and

(e) Segment 5 is "general casework". All remaining asylum cases under NAM are interviewed within two weeks of application, with the initial decision to be served in person within 30 working days.

4.2 Asylum procedures

Lodging of claims

4.2.1 Asylum is given under the Refugee Convention. To be recognised as a refugee, the applicant must have left his country and be unable to go back because he has a well-founded fear of persecution because of his race, religion, nationality, political opinion, or membership of a particular social group. For those applicants who have a real risk of being exposed to torture or inhuman or degrading treatment or punishment but whose fear of return is not due to the five reasons prescribed above under the Refugee Convention, they may lodge human rights claim under Article 3 of ECHR in order to stay in the UK.

[86] Section 94 of the *Nationality, Immigration and Asylum Act 2002* provides that the Secretary of State can deem a country to be "safe" and certify claims from that country as "clearly unfounded".

4.2.2 Claims for asylum often include assertions that applicants' human rights would be breached if they were removed to their country of origin. Since human rights and asylum claims often share the same basis, applicants making both claims could submit the same statement.[87] While applicants may make only one of these claims without lodging the other, paragraph 327 of the Immigration Rules requires UKBA to presume that a person asking for protection is claiming asylum even if the Refugee Convention is not mentioned in the application. Therefore, such cases must be treated as an asylum application.[88] Applicants may make human rights claims at any stage of the asylum process in the UK. Where asylum is claimed, it is considered that an implied Article 3 claim (i.e. human rights claim made under Article 3 of ECHR) has been made. In fact, the Home Office operates a "one-stop", single determination procedure for considering protection applications under human rights and asylum claims, even if the claim is made on only one of these two grounds.

4.2.3 Applicants can apply for asylum with the immigration officer on arrival at the port of entry, for example, at an airport or seaport. If they are already in the UK, they should book an appointment to meet with the Asylum Screening Unit of UKBA. Applicants who want any of their dependants to be part of the application must bring the dependents with them when they meet the Asylum Screening Unit.

4.2.4 For the meeting with the Asylum Screening Unit, applicants must bring with them passports, police registration certificates, other identification documents, any other documents that will support the application, and documentary evidence of their accommodation. All of these documents must be original documents. Applicants must also provide photographs of themselves and of each dependant included in the application for asylum.

Preliminary screening

4.2.5 Applicants will go through a screening process before being allocated to their case owners. At the screening interview, asylum applicants are required to submit any other information relevant to the application for staying in the UK in addition to their original asylum application. An interpreter will be provided should the applicants need one.

87 UK Border Agency (2010) p.10.
88 Ibid.

4.2.6 During the screening interview, UKBA will take the fingerprints and a photograph of the applicant which will be put on the application registration card. This card proves that the applicant is an asylum seeker and he can use it to obtain services like financial support. The applicant's dependants included in the application for asylum should accompany the applicant to this interview so that their details are recorded in the application.

4.2.7 The purpose of this screening interview is to establish the identity and nationality of the asylum seekers, their travel route to the UK, and the documentation they used to travel to the UK. Based on such information, UKBA will assign applicants to one of the five "segments" described in paragraph 4.1.10. If another country may be responsible for considering the asylum application under the Dublin II Regulation, the Segment 1 applicant will likely be detained and removed to the appropriate country and the asylum procedure will end at this stage. If the applicant is deemed to come from a "safe" country[89] (Segment 3), he may be detained and his claim may be certified as "clearly unfounded" in which the right of appeal has to be exercised from outside the UK. If UKBA decides that the claim may be decided quickly (Segment 4), the applicant will be processed via an "accelerated procedure" at the Immigration Removal Centres, with initial decision made within three to four days. Other cases (Segments 2 and 5) will be interviewed within two weeks.

4.2.8 Applicants whose claim has been certified by UKBA as being clearly unfounded can seek to challenge such certification in the courts through judicial review. During the review, they will not be removed until the judicial review proceedings are completed.

[89] The concepts of "safe country of origin" and "safe third country" originated in Europe and are explicitly set out in the EU Procedures Directive. The "safe country of origin" concept is premised on the assumption that certain asylum seekers do not require protection at all because their country of origin is regarded by the destination country as inherently safe. The "safe third country" concept is premised on the notion that for those asylum seekers who have not arrived directly from their country of origin, where they claim to face persecution, it is more appropriate for them to seek asylum in a third country. A "third country" can be defined as one of the countries through which an asylum seeker travels en route to a destination country. Applying these safe country concepts allows for unilateral designations based on the presumptions that if a particular country is classified as being safe according to established criteria, any claim for protection from an applicant coming from that country is to be treated as manifestly unfounded, or it is presumed that an applicant from that country is not subject to persecution and/or they ought to seek asylum elsewhere. See John-Hopkins (2009) pp.218-219.

Asylum determination

Asylum interview

4.2.9 After the screening stage, the case owner will conduct an interview with the applicant. The applicant must attend all the interviews that he is asked to attend. He must also complete and return any forms given within the prescribed time limit. Failing to do so may lead to UKBA rejecting the asylum application because the applicant does not comply with their requirements.

4.2.10 At the interview, the applicant will be asked to explain the reasons for seeking asylum in the UK. The applicant should give as much detail about the asylum application as possible. He should also submit any additional evidence, like medical records or newspaper reports relating to what is happening in his country. UKBA will provide the applicant with an interpreter if he needs one.

4.2.11 The interview will last around two to four hours. At the end of the interview, the applicant will be asked to sign the interview record. If no legal representative is attending, the applicant can request that the interview be tape-recorded. The applicant must make this request at least one day in advance. After the interview, if the applicant thinks he has missed out any relevant information, he must tell his legal representative as soon as possible, and the legal representative has to submit extra information within five days.

Legal representation

4.2.12 The applicant must respond in person to questions in the interview, but he may be accompanied by a legal representative. The case owner will not normally postpone the interview to allow the applicant time to get legal advice or representation. Since the presence of a legal representative is optional, if the applicant's legal representative cannot attend the asylum interview, the case owner will proceed without him.

Burden of proof

4.2.13 The interview is the only chance for the applicant to tell the case owner why returning to his country may lead to himself being tortured. This is also the applicant's opportunity to provide evidence supporting the application. The applicant must be able to prove his identity and nationality to the case owner. It is vital that the applicant gives the case owner all the information he wishes to be considered.

Decision

4.2.14 The case owner assesses each application on its merits. He will make the decision based on what the applicant says at the asylum interview, any evidence provided, and the information UKBA has about the applicant's country of origin.

4.2.15 The case owner aims to give the applicant the decision within about 30 days from the date when the application is made. Unless being detained, the applicant awaiting the asylum decision is expected to report on a regular basis to a reporting centre. The case owner will normally explain the decision to the applicant in person.

4.2.16 If the applicant is recognised as a refugee, he will be given permission to stay in the UK for an initial period of five years. He will be able to renew his residence permit or apply for permission to settle in the UK (also known as "indefinite leave to remain") by the end of the five-year period.

Appeal procedures

4.2.17 If the application is refused, the case owner will tell the applicant what rights of appeal he has and the time limit for making an appeal. The case owner will give the applicant the form needed to complete to make the appeal. The appeal form must reach the Immigration and Asylum Chamber of the First-tier Tribunal, an independent judicial body, within five working days from the day the applicant receives the notice of decision if he is in detention, or within 10 working days from the day the applicant receives the notice of decision if he is not in detention.

4.2.18 The applicant cannot be removed while the appeal is pending, but an applicant with "clearly unfounded" claim or who comes from "safe" countries will not have the right to make an appeal in the UK. He will be removed and will have to pursue any appeal from outside the UK.

Appeal to the Immigration and Asylum Chamber of the First-tier Tribunal

4.2.19 The role of the Immigration and Asylum Chamber of the First-tier Tribunal is to hear and decide appeals against decisions made by UKBA's officers. It reviews both facts and points of law. At the First-tier Tribunal, appeals are heard by one or more immigration judges who are sometimes accompanied by non-legal members of the Tribunal. Immigration judges and non-legal members are appointed by the Lord Chancellor.

4.2.20 A short hearing is usually arranged beforehand to ensure that all documents are in order so that the case is ready to proceed to a full hearing. A decision on the appeal will not be taken at the short hearing without the applicant's consent.

4.2.21 The applicant will usually attend the full hearing with his legal representative. At the full hearing, the applicant and his representative will argue the case. UKBA will also have a legal representative at the hearing. An interpreter will be provided free of charge at the full hearing. Evidence considered during the asylum interview is re-evaluated at the hearing. The immigration judge, or the panel of members of the First-tier Tribunal, will decide whether the applicant's appeal is successful or not. The decision will be given to the applicant in writing.

Appeal to the Immigration and Asylum Chamber of the Upper Tribunal

4.2.22 If the applicant is of the opinion that a decision made by the First-tier tribunals is wrong in law, he may challenge this decision by applying to the Immigration and Asylum Chamber of the Upper Tribunal. At the same time, UKBA may also apply to the Upper Tribunal to challenge a First-tier Tribunal decision.

4.2.23 At the Upper Tribunal, appeals are heard by one or more senior or designated immigration judges who are sometimes accompanied by non-legal members of the Upper Tribunal. Both immigration judges and non-legal members are appointed to the Tribunal by the Lord Chancellor.

4.2.24 The Upper Tribunal will decide whether the decision of the First-tier Tribunal is correct in law. If the Upper Tribunal deems that an error of law has been made in the decision of the First-tier Tribunal, it can substitute its own decision in place of that decision, or order the First-tier Tribunal to rehear the initial appeal.

Judicial review

4.2.25 A decision of the Upper Tribunal may be further appealed to the Court of Appeal for a judicial review. Ultimately, applicants may also be able to appeal (with leave) to the House of Lords, and from there, if a case involves the breach of a right under ECHR, it may be brought further to the European Court of Human Rights in Strasbourg.

4.2.26 The judicial review looks at whether the decision has been made fairly and properly rather than examining the facts of the claim. The test for the judicial review is whether or not the decision is "Wednesbury unreasonable", i.e. the decision may be successfully challenged if it is considered so unreasonable that no "reasonable public body" could have made such a decision.

Human rights claim and Humanitarian Protection

4.2.27 The Qualification Directive agreed by the EU in 2004 has been implemented in the UK from 9 October 2006. The Directive defines a category of persons eligible for "subsidiary protection". The EU provisions on subsidiary protection have been incorporated into the UK's Immigration Rules so as to revise the provisions on Humanitarian Protection. In brief, a person is eligible for Humanitarian Protection if the person is not a refugee and faces a real risk of suffering from "serious harm" in the country of return. Under paragraph 339C of the Immigration Rules, serious harm means death penalty or execution, unlawful killing, torture or inhuman or degrading treatment or punishment in the country of return, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

4.2.28 At the same time, the UK adheres to ECHR, which prevents it from sending anyone to a country where there is a real risk that he will be exposed to torture, or inhuman or degrading treatment or punishment. If the applicant does not qualify for recognition as a refugee but UKBA considers that there are humanitarian reasons of letting the applicant stay in the UK, it may give the applicant temporary permission to stay in the UK by granting him Humanitarian Protection.

4.2.29 There are significant similarities between the requirement to provide protection against serious harm under the Qualification Directive and the obligations imposed by Article 3 of ECHR. Nevertheless, they are not identical. The main difference between Article 3 and the Qualification Directive is that in the latter, torture or inhuman or degrading treatment or punishment only amounts to serious harm if the prohibited treatment would occur in the country of origin. There is no such restriction in Article 3 of ECHR that the risk must be expected in the country of origin only.[90] When a human rights claimant shows that there are substantial grounds for believing that returning to either his country of origin or other countries will expose him to a real risk, the applicant's removal will breach the UK's obligations under Article 3 of ECHR.[91]

4.2.30 A person being granted Humanitarian Protection will be given permission to stay in the UK for an initial period of five years. He will be able to apply for permission to settle in the UK after the five-year period.

4.2.31 While a person may not be granted Humanitarian Protection because of criminal conduct or danger to the community, the UK's obligations under Article 3 apply irrespective of any reprehensible or criminal conduct on the part of the applicant.[92] In general, Discretionary Leave[93] is granted where the applicant does not qualify for asylum or Humanitarian Protection but whose removal would breach an article of the ECHR. The standard grant period for Discretionary Leave is three years but a shorter period may be granted depending upon the circumstances of the individual case.

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90 UK Border Agency (2010) p.6.

91 UK Border Agency (2010) p.14.

92 UK Border Agency (2010) p.17.

93 If the applicant is not recognized as a refugee nor qualifies for Humanitarian Protection, UKBA may give him another type of temporary permission to stay in the UK. This is called "Discretionary Leave to Remain". The length of time for the applicant to stay depends on his particular circumstances, and is unlikely to be more than three year.

4.2.32 It has been UKBA's practice to treat asylum claims as implicit human rights claims. Where an asylum application has been made, the case owner should first consider whether the applicant qualifies for asylum. If not, he should consider whether the applicant qualifies for Humanitarian Protection. If not, he should then consider whether the applicant qualifies for Discretionary Leave on ECHR grounds.

4.3 Legal aid and other support

Legal assistance

Availability of publicly-funded legal assistance

4.3.1 Publicly-funded legal advice and representation is available for asylum cases. In England and Wales, such services are funded by the Community Legal Service Fund, the legal aid fund administered by the Legal Services Commission ("the LSC"). Free legal assistance is available to asylum seekers who either have no income or very low income. The LSC will only fund advisers whom it has a contract with to provide specialist immigration advice.

4.3.2 Since 1 April 2005, the LSC has required that all advisers be accredited by the Office of Immigration Services Commissioner ("OISC") if they wish to provide immigration advice. The level of advice that an adviser can give is determined by the level of accreditation they have achieved. The applicant should make sure that he uses either a solicitor (a qualified lawyer who is a member of the Law Society) or an adviser who is officially regulated by OISC.

4.3.3 At the screening stage, the asylum applicant will not usually have any contact with a lawyer yet. Nonetheless, at the applicant's own expense, a lawyer can attend the screening interview. No legal aid is available at this stage of the procedure, with the exception of asylum applications submitted by separated children or if the case has criminal law implications.

4.3.4 Legal advisers or lawyers may attend all asylum interviews. Nevertheless, their attendance is funded under the legal aid scheme only under exceptional circumstances. These exceptions include interviews for unaccompanied children, asylum seekers in the "detained fast track" segment and asylum seekers in the Early Legal Advice Pilot in Solihull. [94, 95]

4.3.5 Legal aid covers asylum application activities such as preparation of evidence, submissions to and participation in hearings before the appellate body. For applications for permission to appeal to the Upper Tribunal, legal aid will only be granted on the basis of sufficient merit when the application was made. If the appeal is to be made to the Court of Appeal, it will be funded on a non-conditional basis.

4.3.6 Meanwhile, there are NGOs which provide free legal assistance and representation to the most vulnerable asylum seekers in their applications to UKBA and all stages of appeals to the Tribunal, Court of Appeal and beyond.

Qualification and training of legal assistance providers

4.3.7 OISC accredits advisers based on the extent of work that can be undertaken. In the area of asylum, there are three levels of work: Level 1 - Initial advice (limited assistance within the immigration rules only), Level 2 - Casework (all aspects of asylum applications and related *Human Rights Act* applications), and Level 3 - Advocacy and representation (substantive appeals work, including representation and specialist casework). To be accredited and thus be eligible to provide legal assistance to asylum seekers, advisers have to meet OISC's requirements. There is a set of standards covering immigration, asylum and nationality law that advisers have to meet. If the advisers provide legally-aided advice, they also have to meet the standards of the LSC. In addition to related knowledge of law and procedure and skills, there are LSC's Specialist Quality Mark [96] and general quality as well as performance obligations that service providers have to meet.[97]

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94 Implemented in October 2006 and funded by the Legal Services Commission, the Early Legal Advice Pilot offers an asylum applicant pre-interview legal advice and allows a designated solicitor to be present during the asylum interview. This helps to ensure that all the case details and evidence are provided.

95 European Council on Refugees and Exiles (2010) p.111.

96 The Specialist Quality Mark ("SQM") was introduced in 2002 as a quality management system for legal aid providers. It is part of a family of standards which aims to enable legal service providers to demonstrate that they are well managed, provide good levels of client care and have systems in place to ensure delivery of good quality advice.

97 European Council on Refugees and Exiles (2010) pp.81-82.

4.3.8 No matter whether the provision of immigration advice is privately-paid or legally-aided, advisers must undertake Continuous Professional Development ("CPD"), which requires a certain number of hours of approved training or other activities each year. OISC requires advisers to undertake eight to sixteen hours CPD depending on the caseworker level.[98] In addition, LSC's Specialist Quality Mark requires a caseworker to take six hours CPD each year, of which 50% must be in immigration, asylum or nationality law. Supervisors are required to undertake six hours CPD which must directly or indirectly relate to immigration, nationality and asylum law.[99]

Fee scheme of publicly-funded legal assistance

4.3.9 The Immigration and Asylum Graduated Fee Scheme applies to all immigration cases and the majority of asylum cases lodged with the Home Office on or after 1 October 2007. The Scheme consists of two stages: Legal Help and Controlled Legal Representation ("CLR"). A single fee is charged for work done under Legal Help in connection with the initial application (Stage 1). At the appeal stage, the service provider concerned will decide if CLR should be granted. If CLR is granted, the provider may claim a certain fee for a case that concludes before the substantive hearing (Stage 2a) or a higher fee if representation is also provided at the substantive hearing (Stage 2b). Effective from 1 July 2008, the Asylum Graduated Fee is £459 (HK$5,692) for Stage 1, £252 (HK$3,125) for Stage 2a and £630 (HK$7,812) for Stage 2b.

[98] There are three types of caseworker accreditation: Level 1 - Accredited, Level 2 - Senior, and Level 3 - Advanced. Both senior and advanced caseworkers may apply to become Supervisors. The LSC requires all firms holding a contract for immigration and asylum services to have at least one practitioner who have the accreditation of "Supervisor".

[99] European Council on Refugees and Exiles (2010) pp.81-82.

4.3.10 Advocacy services like representation at the Home Office interview entail additional payments. Such payments will be paid on top of the appropriate standard fee. The scheduled payments for representation are: the Home Office Interview (£296 (HK$3,670)), an oral Case Management Review Hearing ("CMRH") (£184 (HK$2,282)), a telephone CMRH (£100 (HK$1,240)), a substantive appeal hearing (£336 (HK$4,166)), and additional hearings (£179 (HK$2,220)). A 5% uplift applies to all casework undertaken based on an immigration contract by an Advanced Caseworker under the Immigration and Asylum Accreditation Scheme. There will be separate contracting and fee arrangements for asylum cases not following the mainstream processes and services including advice and representation for detainees, information, advice and representation at the Asylum Screening Unit, and advice and representation for unaccompanied asylum seeking children.

Economic and social support

4.3.11 The majority of asylum applicants are not permitted to work while their application is being considered. However, if they have waited longer than 12 months for UKBA to make an initial decision on the asylum application (most asylum applications receive a decision within 30 days), they may request permission to work.

4.3.12 UKBA is responsible for supporting destitute asylum seekers. It can provide both accommodation and cash support for food and clothing. If the applicant has accommodation, say, with friends and relatives, he can apply for cash support only. The case owner will assess the applicant's circumstances and decide if he meets the requirements to receive support.

4.3.13 To be eligible for support, the applicant will have to prove to UKBA that he has applied for asylum and the application have not been refused; that he is destitute (having very little or no money and accommodation); that he has applied for asylum "as soon as reasonable practicable" after arriving in the UK (within three days of arrival); and that he is over 18.

4.3.14 UKBA will not refuse the application for support if the applicant is part of a family with children under 18; if the applicant has special needs, such as mental or physical disability; or if the applicant can show that he will suffer inhuman and degrading treatment, as set out in ECHR, when the government does not grant him support.

4.3.15 If the applicant meets the requirements to receive accommodation support, he will be given suitable housing, but he will not be able to choose where to live. The case owner will also arrange for the applicant to collect money from a post office near where he lives. The applicant will need to show his application registration card received at the screening interview to prove his identity when he collects money at the post office. Without the card, the applicant will not be able to collect any payments. If the applicant is eligible for receiving support, UKBA will also pay for his travel expenses to the asylum and appeal interviews.

4.3.16 In addition to housing and financial support, children of asylum applicants have the same right to education as all other children in the UK. While the applicant is waiting for the asylum decision, he and his dependants can receive health care from the National Health Service.

4.4 Issues and concerns

New Asylum Model

4.4.1 Some aspects of NAM have been welcomed by refugee organizations. For example, the introduction of the Early Legal Advice Pilot in Solihull is regarded as a positive aspect of NAM. Refugee advocacy groups would like the Solihull pilot to be replicated and expanded to all NAM teams across the UK.[100]

4.4.2 There are also views that the introduction of single case owners will foster better contact between applicants and the Home Office. It is believed that accountability for decision making may improve with case owners being responsible for asylum cases throughout the process and the establishment of a formal programme of staff training and accreditation. The UK Refugee Council has welcomed the introduction of the case owner approach, but at the same time it has pointed out some problems with the process, such as delays in asylum seekers receiving legal advice. The European Council of Refugees and Exiles has also highlighted concerns with the model, noting that interviews take place as early as the sixth day after initial screening, which does not allow asylum seekers sufficient time to prepare for their cases.[101]

[100] Independent Asylum Commission (2008a) p.24.
[101] Independent Asylum Commission (2008a) p.24 and O'Sullivan (2009) p.257.

4.4.3 Another concern in relation to NAM is that the implementation of segments may result in claims being pre-determined before they have been given substantive consideration. In addition, reporting arrangements under NAM are particularly strict for some segments. Non-detained applicants under the "non-suspensive appeal" segment are required to report daily to their case owners. If applicants are accommodated within three miles of a reporting centre, they are not given funds for transport. This has proved to be difficult for some claimants including the elderly, disabled and pregnant women.[102]

4.4.4 The faster timescales under NAM has added implications for some groups, in particular women and victims of torture. The Medical Foundation has expressed concern that the speed of the fast track process under NAM may lead to allegations of torture not being dealt with appropriately.[103] The Independent Asylum Commission has pointed out that the basis of the policy for deciding whether an asylum seeker should be subject to the detained fast track process is not whether the case is weak, but whether it is capable of being decided speedily, with some nationalities deemed particularly suitable and some exceptions set out. The Independent Asylum Commission has warned that the combination of the fact of detention and the speed of the fast track process imperils the high standards of fairness that should be used in deciding cases, where, if the decision is incorrect, the applicant's life may be at risk. If the fast track process is to be maintained, it is essential that the screening of applicants being assigned to the fast track process is effective and thorough.[104]

4.4.5 In response to the comments of the Independent Asylum Commission, UKBA maintains that each case is decided on its individual merits and no decision is taken until after the claimant has been interviewed. If at the interview it becomes clear that the case is complex and not suitable for the fast track process, the claimant is released from detention. It further points out that similar safeguards are built into the appeals process. Immigration judges can take a case out of the fast track process if they are satisfied that there are exceptional circumstances that the appeal cannot be justly determined.[105]

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[102] Independent Asylum Commission (2008a) pp.24-25.
[103] Independent Asylum Commission (2008a) p.25.
[104] Independent Asylum Commission (2008b) p.30.
[105] Independent Asylum Commission (2008c) p.22.

Non-suspensive appeal

4.4.6 A related issue is the non-suspensive appeal. It has been observed by various organizations that non-suspensive appeal cases give rise to several problems. Firstly, as a result of being certified "clearly unfounded", an asylum seeker could be returned to a country where he will be persecuted before being able to appeal. The Asylum Rights Campaign has recommended that any reasoned dispute over the safety of country of origin should always attract an in-country right of appeal.[106]

4.4.7 Secondly, it is noted that in practice it is difficult for an asylum seeker to be able to appeal from abroad and it remains unclear what responsibility the Home Office has for helping a successful appellant to return to the UK.[107]

Detention of torture victims

4.4.8 As stated by the Home Office, asylum seekers who may have been victims of torture should only be detained in exceptional circumstances. However, the Independent Asylum Commission has pointed out that victims of torture are detained even in cases where the Home Office has prior information of the applicant's past torture obtained during the asylum interview.[108] Meanwhile, difficulties in disclosing information on torture may lead to some asylum seekers being incorrectly processed in the fast track. The Medical Foundation believes that to avoid such mistakes, all asylum seekers must be treated as potential torture survivors first and foremost.[109]

[106] Independent Asylum Commission (2008a) p.29.
[107] Ibid.
[108] Independent Asylum Commission (2008a) p.64.
[109] Independent Asylum Commission (2008a) p.79.

4.4.9 In response to the comments of the Independent Asylum Commission, UKBA claims that detention is a measure of last resort and alternatives are considered before a person is detained. According to UKBA, at any one time only a very small number of the total population of asylum seekers and failed asylum seekers are detained.[110] The Independent Asylum Commission welcomes that the decision to detain is regularly reviewed and that every detained person is provided with written reasons for his detention. However, it remains concerned that this is in practice largely a paper exercise which does not always demonstrate how the specifics of the applicant's situation fulfil detention criteria. It also opines that detainees do not have adequate access to scrutiny of the decision to detain them, whether that scrutiny be at bail hearings or by judicial review.[111]

[110] Independent Asylum Commission (2008c) p.14.
[111] Independent Asylum Commission (2008c) pp.15-16.

Chapter 5 – Switzerland

5.1 Background

5.1.1 Switzerland is a country with a tradition of granting asylum to victims of persecution. Although it became a member of the United Nations as late as 2002, it was a signatory to the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") in 1955 and the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol") in 1967. Further, it ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1986.

5.1.2 Like the United Kingdom, Switzerland is a signatory to the European Convention of Human Rights ("ECHR") which provides for a prohibition on torture and inhuman or degrading treatment or punishment. In addition, while Switzerland is not a member state of the European Union ("EU"), it is a signatory to the Dublin II Regulation which determines the member state responsible for examining an asylum claim and provides for the transfer of an asylum seeker to that member state.

5.1.3 According to Article 121(1) of the Swiss Constitution, the domestic regulation of asylum procedures and admission or expulsion of migrants is one of federal competence. Nevertheless, the implementation of some legislative provisions in this area is the responsibility of the cantons (member states of the federal state of Switzerland). The Swiss Constitution provides for the prohibition of refoulement both in its international refugee law context (Article 25(2)) and its human rights law context, in the form of the absolute prohibition of a transfer of persons "to a state in which they face the threat of torture or any other form of cruel or inhuman treatment or punishment" (Article 25(3)).

5.1.4 Aliens with the risk of torture can seek asylum under the *Asylum Act*. For those applicants who are found not to be refugees, Switzerland may grant temporary protection to the ones in need of protection when it is determined that they will be exposed to a serious general danger.

Major relevant legislations

5.1.5 The *Asylum Act of 1998*, partially revised in 2005, sets out the regime applicable to the asylum process in Switzerland. The existing provisions of the *Asylum Act* cover the principle of a safe third state,[112] a full asylum procedure at registration centres and airports, the new status of persons admitted on a temporary basis and new funding models. The *Asylum Act* also contains provisions for standardizing and accelerating the appeal procedure before the Federal Administrative Court ("FAC"), the body which has replaced the Swiss Asylum Appeals Commission since 1 January 2007. The revised *Asylum Act* entered into force in part on 1 January 2007, and the remaining provisions took full legal effect on 1 January 2008.

5.1.6 The Swiss authorities have been applying the Dublin II Regulation since December 2008. According to the Dublin II Regulation, the EU member state responsible for considering the asylum claim will be the state through which the asylum seeker first entered the EU. This fact can be determined by the EURODAC fingerprint database. The Swiss authorities regard those cases where Switzerland is not the first country the asylum seeker entered and thus not its responsibility as "manifestly abusive applications" and be dismissed.

Asylum system

5.1.7 The Refugee Convention is the basis for the Swiss asylum law. The Asylum Procedure Directorate at the Federal Office for Migration ("FOM") is the government agency responsible for enforcing asylum policies and the asylum law. To be granted asylum, the asylum seeker must fulfil the definition of "refugee". According to Article 3 of the *Asylum Act*, "Refugees are persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions". This definition of refugees is similar to that of the Refugee Convention, i.e. persons with the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The *Asylum Act* also grants asylum to spouses and minors of refugees, even if they themselves do not fulfil the definition of refugees.

[112] For an explanation of "safe third state", please refer to Chapter 4.

5.1.8 FOM will examine whether the asylum claims are credible, and if so, whether the persons in question fulfil the requirements for refugee status laid down in the *Asylum Act*. Recognized refugees are mostly granted asylum. On the other hand, no asylum is granted for those applicants who have committed reprehensible acts or constitute a threat to Switzerland's national security.

5.1.9 Further to a positive decision of FOM, the cantonal immigration authorities will grant acknowledged refugees a residence permit for third-country nationals (i.e. a temporary residency permit). With the permit, they may apply for family reunion if they wish. Before the permit expires in five years, it is usually replaced by a settlement permit (i.e. a permanent residency permit) and an application for Swiss citizenship may then be made.

5.2 Asylum procedures

Lodging of claims

5.2.1 There are no requirements regarding in what form an application should be submitted.[113] It may be submitted orally or in writing to a Swiss mission abroad, to a border post, to the border control at a Swiss airport, or to a Reception and Procedure Centre of FOM. Most asylum applications are submitted directly to the Reception and Procedure Centres. If an application is made at the border, the border guards will notify FOM. Applicants who already have a valid residence permit may submit their application directly to the Aliens Police in the canton of residence in Switzerland.

5.2.2 Asylum applications should include supporting evidence whenever possible. Applicants are required to inform the Swiss authorities of their identity and submit such proof, if possible, by means of official documents. Applicants are also required to give an account of the reasons for leaving their home country.

[113] Federal Office for Migration (2011).

Preliminary screening

5.2.3 Irrespective of their method of entry, asylum seekers have to report to one of the four FOM Reception and Procedure Centres and undertake an interview. During this screening interview, the Reception and Procedure Centre will record the asylum seekers' personal details and will normally take their fingerprints and photographs. It may collect additional biometric data and summarily ask asylum seekers about their itinerary and the reasons for leaving their country. Applicants are requested to submit travel documents or proof of identity within 48 hours. Applicants are supposed to provide only those documents they actually used on their journey to Switzerland. If applicants refuse to comply, Article 32(2)(a) of the *Asylum Ac*t allows the asylum authorities not to examine the merits of an application but issue a decision to dismiss the application without entering into the substance of the case ("DAWES"). In this situation, the applicants may still get an opportunity to have their case examined if they can give convincing reasons of not submitting the requested documents within 48 hours, or if their refugee status is established in the screening interview. Applicants may also avoid a DAWES if they submit the required documents after the 48-hour deadline but before FOM has reached a decision on their case.

5.2.4 Since 1 January 2008, asylum seekers who, prior to lodging their asylum application in Switzerland, have lived in a safe third state to which they can return may be removed to that country without their application being proceeded upon. The Federal Council[114] has the power to designate safe third states. Certain conditions must be met in order to apply this ground for dismissal. First of all, the applicant must have lived in the country in question and, secondly, he must be able to find protection there. The concept of safe third state also covers countries where the applicant has already obtained asylum or a comparable measure of protection before arriving in Switzerland. As such, the decision not to proceed and to return a person to a third state puts a definitive end to the asylum procedure in Switzerland. The applicant can appeal against this decision, and the appeal deadline is five working days.

[114] The Federal Council is the seven-member executive council which constitutes the federal government of Switzerland and serves as the collective head of state.

5.2.5 According to Article 34(3) of the *Asylum Act*, dismissal and removal to a third state shall not apply when: close relatives of the applicant or persons with whom he has close ties are living in Switzerland; the applicant is clearly a refugee; and/or FOM has evidence that the third state does not offer effective protection with regard to the principle of non-refoulement.

5.2.6 Articles 32 to 35 of the *Asylum Act* provide an exhaustive list of cases warranting a DAWES. In addition to failure to provide appropriate travel or identity documents and coming from safe third state, failure to indicate that they have come to Switzerland in search of protection against persecution is another example. Other examples include, if applicants give a false identity; if they deliberately and grossly violate their duty to co-operate with the authorities; and if they can travel to another country where an application for asylum is still pending or to a country which is responsible for processing their asylum application in accordance with an international agreement (like the Dublin II Regulation). Furthermore, the asylum authorities may reject a case if the applicant previously applied for, and was denied, asylum in Switzerland or in the EU/European Economic Area, and no new events have occurred to justify the granting of refugee status. DAWES may also be warranted if a person has stayed illegally in Switzerland and submits the asylum claim solely to prevent deportation.

5.2.7 Notice of the decision on the preliminary screening should be given within 20 days following the lodging of the application. If a decision cannot be made within this timeframe, FOM will allocate the applicant to a canton. The cantonal authorities concerned may provide the applicant with accommodation when requested.

Interview to determine asylum claims

Asylum interview

5.2.8 In the canton, within 20 days after the decision on allocation to the canton (i.e. within 40 days after application), an officer of FOM will normally interview the applicant. The interview is conducted in the presence of an interpreter and a representative of a non-governmental organization ("NGO") which is a member agency of the Swiss Refugee Council.[115]

[115] Established in 1936, the Swiss Refugee Council is a non-governmental, politically and religiously independent umbrella association of all major Swiss relief organizations working for refugees and asylum seekers.

5.2.9 The NGO representative serves as an impartial observer to ensure that the rules of procedure are respected during the interview. The Swiss Refugee Council has to be notified of an asylum interview five working days in advance in order to ensure that its member agencies can assign a representative to the interview. The NGO representative should confirm his participation with signature and is subject to the duty of confidentiality towards third parties. He may suggest questions to be asked to clarify the facts of the case. However, even if the NGO representative does not turn up, the interview could still take place with full legal effect.[116]

5.2.10 At the interview, the asylum seeker may justify his application and explain the reasons for requesting asylum. After the interview, the official record is prepared, translated if necessary, and signed by the asylum seeker. Supporting documents such as medical reports and other pieces of evidence may be added to the file when they become available after the interview.[117]

Legal representation

5.2.11 In accordance with the *Asylum Act*, access to legal advice and legal representation must be ensured. Lawyers may, but are not obliged to, attend all interviews, but asylum seekers must respond in person to questions.[118] The lawyers should be informed by the authorities in advance of the time and place of the interview. While the lawyers may request postponement of interviews, the decision is at the discretion of the authorities. They may also ask the applicants additional questions at the asylum interview.

Burden of proof

5.2.12 The asylum seeker must justify his application and explain the reasons for requesting asylum during the interview. He must prove or at least credibly demonstrate his refugee status. Refugee status is credibly demonstrated if FOM officers regard it as proven on the balance of probabilities.[119]

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116 Article 30(3) of the *Asylum Act*.

117 *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 1996: Switzerland (7 November 1996)*, paragraph 21.

118 European Council on Refugees and Exiles (2010) p.112.

119 "Balance of probabilities" is the burden of proof in most civil trials. The standard is met if the proposition is more likely to be true than not true. Therefore, the decision is made according to the likelihood or probability of the existence of an event.

Decision

5.2.13 In making the asylum decision, the primary task of FOM officers is, on the one hand, to determine whether the asylum seeker meets the criteria for refugee status under article 3 of the *Asylum Act* and, on the other hand, to ensure that there are no legal grounds for refusing asylum. If it is shown that these criteria are met or there are at least reasonable grounds for believing that such is the case, asylum is granted.[120]

5.2.14 If the case cannot be decided, FOM will conduct additional investigations. It may obtain information from the Swiss representations, or it may conduct additional interviews for the asylum seeker or have the cantonal authority ask him supplementary questions. The asylum decision is normally made within three months of the application being filed.[121]

Temporary protection

5.2.15 If asylum is refused, FOM will examine whether the asylum seeker can indeed be expelled from Switzerland. This stage consists of three steps. It must examine, first, whether the removal of a person is admissible (whether it is in accordance with Switzerland's international obligations, such as those under ECHR); second, whether it is reasonable to remove a person to his home country or a third country on account of the general situation of the country in question; and third, whether the removal of the person is possible.[122] If any one of the above three conditions is not fulfilled, FOM grants that person temporary admission in Switzerland.

5.2.16 Under Article 4 of the *Asylum Act*, "Switzerland may grant temporary protection to persons in need of protection as long as they are exposed to a serious general danger, in particular during a war or civil war as well as in situations of general violence". In other words, persons who are in need of protection but are not refugees as defined by the Refugee Convention may be granted temporary protection.

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120 *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 1996: Switzerland (7 November 1996),* paragraph 22.

121 Articles 37 and 41 of the *Asylum Act*.

122 Federal Office for Migration (2011).

5.2.17 Since temporary protection is by definition of limited duration, beneficiaries are expected to return to their countries of origin as soon as the situation allows. However, after five years, if the Federal Council does not revoke temporary protection, the beneficiaries shall receive from the cantonal immigration authorities a temporary residence permit until the revocation of temporary protection. If the need of protection continues, they may obtain a permanent residence permit 10 years after the granting of temporary protection (i.e. another five years after granting the temporary residence permit). During the first five years of temporary protection, the federal government bears the sole responsibility for the financing of welfare benefits; after that, welfare costs are shared equally between the federal government and the cantons.[123]

Appeal procedures

5.2.18 Applicants have the right to appeal against a negative decision by FOM. The appeal must be submitted to FAC within 30 days after notification of the negative decision by FOM. Generally speaking, an appeal has suspensory effect, which means that the removal decision is not carried out while the appeal is pending.[124]

5.2.19 The appeal must be written in one of the official languages of Switzerland (German, French or Italian) and signed either by the appellant or a legal representative. The appeal must be submitted in duplicate and include all available documentary proof. A copy of the FOM decision should also be enclosed.

5.2.20 It should be noted that the asylum appeal procedure is a written procedure and no hearings take place. The appeal should contain a clear request or petition, stating whether the appellant is requesting temporary protection or political asylum. Appellants should state the reasons for their request. In general, three judges from FAC will conduct the review of a case.[125]

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123 Article 74 of the *Asylum Act*; *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Fourth periodic report of States parties due in 2000: Switzerland (18 December 2002)*, p.7.

124 *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Third periodic report of States parties due in 1996: Switzerland (7 November 1996)*, paragraph 29.

125 Reply from the Federal Office for Migration, Switzerland, 5 April 2011.

5.2.21 The scope of the asylum appeal is limited to violations of federal legislation, including excessive use of discretionary power, wrong or incomplete establishment of the relevant facts and/or inadequate nature of the first instance decision.[126] Evidence is re-evaluated by FAC which in principle builds on the findings of the first instance decision unless the facts are established in a wrong or incomplete manner.

5.2.22 NGOs may assist the asylum seeker with submitting the appeal or they may write the appeal as representatives of the asylum seeker. Their services are not publicly funded but can be reimbursed if legal aid is granted in the appeal procedure and a staff member of the NGO concerned is appointed as the legal representative of the asylum seeker.

5.2.23 FAC has the power to either change the first instance decision on the merits of the claim or identify legal or factual errors and refer the case back to FOM. The judgments of FAC are final and absolute, which means that there is no possibility for a further appeal.

5.3 Legal aid and other support

Legal assistance

Availability of publicly-funded legal assistance

5.3.1 Publicly-funded legal aid is available to asylum seekers who are unable to afford counsel. According to Article 29(3) of the Swiss Constitution, free legal aid in the form of a waiver of procedural and court costs is granted if a person does not have the necessary means, provided that his case has a chance of success. Asylum seekers are also entitled to free legal representation if such is necessary for the safeguarding of their rights.[127]

[126] European Council on Refugees and Exiles (2010) pp.123-124.
[127] European Council on Refugees and Exiles (2010) p.72.

5.3.2 No state-funded legal aid is granted for the services provided by legal advisers merely in the form of legal advice. State-funded legal aid is only available for legal representation. In practice, free legal aid is not granted during the first instance procedure, and legal aid will only be granted for cases that may potentially be successful, i.e. when the appeals do not appear to be futile. The test is applied by FAC on the basis of the written materials in the asylum seeker's file and the evidence submitted. No specific hearing is organised to apply the merits-of-the-claim test.[128]

5.3.3 There are NGOs in almost all the cantons which provide free legal advice and/or representation for asylum seekers.[129] These legal advisory services are coordinated by the Swiss Refugee Council. They are not funded by the state. The funding of the legal advisory services comes mainly from the Swiss Refugee Council's member agencies and regional church groups. These NGOs provide free legal assistance at all stages of the asylum procedure.

5.3.4 In addition, volunteers without formal legal education may provide general advice and assistance to asylum seekers in all stages of the procedure. In fact, there is no requirement for the legal representatives of asylum seekers to be lawyers or part of the lawyers' association. Therefore, any person can represent an asylum seeker in the asylum procedure.[130] However, in cases of detention, only lawyers who are registered in the lawyers' register of their canton can be legal representatives of the asylum seekers. It should be noted that the legal representative will only be appointed and reimbursed by the court if he is a fully qualified lawyer registered in the cantonal lawyers' register. Any person who is not a registered lawyer can represent an asylum seeker, but will not be reimbursed for his work unless the appeal is granted. In such case, compensation will be granted to the asylum seeker as the prevailing party, and it covers the representative's work.[131]

[128] European Council on Refugees and Exiles (2010) p.89.
[129] European Council on Refugees and Exiles (2010) pp.77-78.
[130] European Council on Refugees and Exiles (2010) p.82.
[131] European Council on Refugees and Exiles (2010) pp.77-78.

Qualification and training of legal assistance providers

5.3.5 There are no specific requirements for lawyers engaging in the provision of legal assistance to asylum seekers with regard to training or minimum practical experience. Legal advisers are not required to have any special qualifications. Nevertheless, the Swiss Refugee Council, which coordinates the legal advice centres, has produced guidelines on legal advice and legal representation. The Swiss Refugee Council also organizes training sessions on relevant topics for lawyers and legal advisers.[132]

Economic and social support

5.3.6 For the first three months after filing an application for asylum, asylum seekers may not engage in any gainful employment.[133] Applicants may receive work permits after three to six months have passed since application, depending on the canton and the circumstances.[134] Since the asylum decision should normally be made within three months of the application being filed, asylum seekers are generally not allowed to work.

5.3.7 While asylum seekers await the decision, they are assigned to cantons which are responsible for providing social assistance. Asylum seekers may be housed in shelters and receive social benefits. In some cantons, this task is delegated to the communal authorities, whereas in other cantons, relief organizations undertake this task.[135] The costs are reimbursed by the federal government. The amount of money available for the payment of benefits is prescribed according to cantonal law. Every canton has an asylum coordination office which ensures the coordination of social assistance within the respective canton, and functions as a contact agency for FOM as well.

[132] European Council on Refugees and Exiles (2010) p.82.
[133] Article 43 of the *Asylum Act*.
[134] Steiner, 2000, pp.27-28.
[135] Federal Office for Migration (2011).

5.4 Issues and concerns

Screening procedure

5.4.1 The International Commission of Jurists considers that the current DAWES procedure may fail to guarantee applicants a proper hearing and, consequently, violate the protection of non-refoulement under Article 3 of CAT. In particular, the strict requirement of travel documents and identity papers ignores the difficult reality faced by most refugees, who may be at risk in obtaining necessary documentation.[136]

5.4.2 The United Nations Committee against Torture ("the CAT Committee") is also concerned that this rapid procedure could impede the proper examination of the motives of appeal and constitute a violation of the principle of non-refoulement. It therefore recommends Switzerland to consider modifying the procedure to provide more time for thorough consideration of appeals and an assessment of whether the principle of non-refoulement is being violated.[137]

National security ban on protection

5.4.3 Protections under CAT are absolute, even in the context of national security concerns. However, in Switzerland, according to Article 5 of the *Asylum Act*, the ban on refoulement may not be invoked if the person has been convicted with full legal effect of a particularly serious felony or misdemeanour. The Swiss authority may regard this person as a threat to Switzerland's security or dangerous to the public, and refuse the protection. The CAT Committee is thus concerned that it may be incompatible with Switzerland's obligations with respect to the principles of non-refoulement under Article 3 of CAT.[138]

[136] International Commission of Jurists (2010) pp.9-10.

[137] *Committee against Torture Consideration of reports submitted by States parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Switzerland (26 April-14 May 2010)*, p.4.

[138] *Committee against Torture Consideration of reports submitted by States parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Switzerland (26 April-14 May 2010)*, pp.3-4.

Provision of legal aid

5.4.4 Theoretically, legal aid is available in the first instance procedure as well as the appeal procedure. However, in practice, legal aid is usually not granted in the first instance procedure because the authorities assume that this is not necessary due to the following factors: FOM has a legal obligation to investigate the relevant facts, an impartial NGO observer is present at the asylum interview, and free legal advisory services operated by NGOs are available.[139]

5.4.5 Unlike the other selected jurisdictions, judgements of FAC is final and no further appeal is possible. The Swiss Refugee Council argues that the single appellate level in Switzerland implies that the right to appeal, the right to legal counselling and the right to effective remedy should be more effectively provided by the state. It suggests that more public money should be spent on legal aid for asylum seekers.[140]

[139] European Council on Refugees and Exiles (2010) pp.77-78.
[140] Swiss Refugee Council (2010) p.9.

Chapter 6 – Japan

6.1 Background

6.1.1 Japan acceded to the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") in 1981 and the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol") in 1982. It acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in 1999.

6.1.2 While the *Immigration Control Law* had been in force since 1951, the accession to both the Refugee Convention and the Refugee Protocol demanded a change in the law to establish a refugee recognition system. Instead of introducing a new law specifically dealing with refugee and asylum matters, the *Immigration Control Law* was amended and renamed as the *Immigration Control and Refugee Recognition Act* ("ICRRA") in 1982. Since then, the law was not amended until 2005, which was the first amendment of ICRRA for asylum recognition.

6.1.3 Although CAT is not incorporated into the Japanese law, the refugee recognition procedures established by ICRRA constitute a system that is closely related to the implementation of Article 3 of CAT. The Japanese government claims that the implementation of Article 3 is guaranteed by Article 53 of ICRRA which prescribes the designation of a deportation destination in removal procedures. However, neither Article 53 nor any other article of ICRRA expressly prohibits deportation to countries where there is a risk of torture.[141]

[141] Japan Federation of Bar Associations (2007) p.51.

Major relevant legislations

6.1.4 When ICRRA was enacted in 1982, the system of refugee recognition was established for the purpose of domestic implementation of the provisions of the Refugee Convention and the Refugee Protocol. In 2002, the Ministry of Justice initiated a review of the refugee law and determination procedures, resulting in a revised ICRRA passed in June 2004. Under the 2004 ICRRA, the legal status of asylum seekers is slightly more certain due to the introduction of "Permission for Provisional Stay". Previously, asylum applicants had not been given any legal status at all. Permission for Provisional Stay gives legal status to those applicants with no residence status (i.e. those who have the authorized period of residence expired or entered Japan illegally) and grants provisional residence that keeps them from being subject to deportation procedures.

6.1.5 Failed asylum seekers may be given "Special Permission to Stay" for humanitarian grounds. According to Article 61-2-2-2 of ICRRA, "the Minister of Justice shall examine whether there are grounds for granting special permission to stay to the alien without a status of residence, and may grant special permission to stay if he finds such grounds". Nevertheless, the grounds for granting special permission are not defined. It is not known if Article 3 of CAT is taken into consideration by the authority when granting such special permission and ICRRA does not provide any further explanation.

Asylum system

6.1.6 Under the asylum system in Japan, an alien may apply for recognition of refugee status as prescribed in the Refugee Convention. Refugee status is decided by the Immigration Bureau of the Ministry of Justice at first instance and on appeal.

6.1.7 If an applicant is recognized as a refugee by the Ministry of Justice, he will be allowed to stay in Japan with an appropriate residency status and given rights similar to those of foreigners lawfully staying in Japan.

6.2 Asylum procedures

Lodging of claims

6.2.1 Asylum seekers are required to submit, in person, written application and evidentiary documents to a Regional Immigration Bureau. Application for recognition of refugee status is accepted by the Regional Immigration Bureau, or its district immigration office or branch office that has jurisdiction over the place of residence or of temporary lodging of the applicant. Only if applicants are illiterate or have a disability can they make an oral application. Applications for those who are under 16 years old may be completed by a close relative. Each asylum seeker, including minor children, must apply individually, with family members being normally considered together and thereby forming part of a common decision by the Ministry of Justice.

6.2.2 When the application is received, a Certificate of Receipt will be issued to the applicant, and it will usually be stapled to the applicant's passport. This receipt with the application number written on it is a very important document as its issuance deems that the application is officially accepted.

6.2.3 On average, the asylum procedure may last from six months to two years. Under Article 61-2-4 of ICRRA, persons applying for refugee recognition are generally granted Permission for Provisional Stay while the outcome of their asylum application is pending. In other words, they are given non-regular residence and will not be subject to deportation procedures during the application proceedings.

6.2.4 ICRRA does not explicitly set any deadline by which a person must apply for refugee status.[142] Nevertheless, in order to be qualified for Permission for Provisional Stay, the application must be filed within six months from the date of landing in Japan or since the date when the applicant becomes aware of the fact that the circumstances in connection with which he may become a refugee arise while he is in Japan. If there is a reasonable explanation for the delay in application, the applicant may still be granted Permission for Provisional Stay in case of failure to apply within the six-month period.

[142] UNHCR Representation in Japan (2005); Japan Association for Refugees (2008).

6.2.5 In addition to the aforementioned criterion, there are two criteria for granting Permission for Provisional Stay. First, the applicant should come directly from a territory where his life, physical security or physical freedom is threatened due to the reasons described by the Refugee Convention, and second, he should not be the subject of a deportation order.

Interview to determine asylum claims

Asylum interview

6.2.6 Once an application is processed, the applicant will be called for an interview with a Refugee Inquirer ("RI"), who is an Immigration Inspector designated by the Ministry of Justice. There may be one or more rounds of interview.

6.2.7 Applicants often submit a personal statement together with the application although the statement is not mandatory required. At the interview, RI may request additional information to be provided by the applicant. RI will ask questions based on the statement submitted by the applicant in order to understand the claim as accurately as possible. Similar questions may be asked repeatedly to verify facts and avoid misunderstandings. An interpreter will be arranged by the Regional Immigration Bureau. RI will take notes in Japanese during the interview. At the end, he will show the interview statement to the applicant and the interpreter will read back to the applicant what is written on the statement. The applicant will then be asked to sign the statement to confirm that it is what he has told the interviewer.

6.2.8 When sufficient proof cannot be established from the materials submitted by the applicant as well as through the interview, RI may request information about the applicant from public offices or private organizations.

Legal representation

6.2.9 Third parties, such as lawyers or friends, are not permitted to accompany the applicant to the interview. Even when the applicant is recalled for further interviews, he is not entitled to have a lawyer or anyone else present to assist or advise.

Burden of proof

6.2.10 Recognition of refugee status will be based on the materials submitted by the applicant. The applicant is expected to prove that he is a refugee by substantial evidence or by testimony of persons concerned.[143] To the extent possible, the applicant should provide all documentation to support his application. Identity cards, military service papers, school or university certificates, political party membership card/certificate, certificates of birth, documents of release from detention and the like may be useful evidence.

Decision

6.2.11 While there is no provision in law that limits the duration for making a decision on the application, the Ministry of Justice officially states its target of making the decision within six months.[144]

6.2.12 After the interview, RI submits a preliminary assessment for endorsement by the Regional Director General. It is then forwarded to the Refugee Recognition Section ("RRS") at the Tokyo headquarters of the Immigration Bureau for final assessment and decision. RRS can return the case to the Regional Immigration Bureau if further information is required. In general, if no further information is required, the RRS Director makes a recommendation to grant or refuse asylum and forwards the case to the Minister of Justice who makes the final decision.

[143] Immigration Bureau Ministry of Justice (2006) p.5.
[144] Reply from the Japan Association for Refugees, 5 April 2011.

Appeal procedures

Appeal to the Ministry of Justice

6.2.13 Applicants who do not receive refugee status recognition may file an appeal to the Ministry of Justice. An appeal can be filed at the Regional Immigration Bureau, its district office or branch office that has jurisdiction over the place of residence or of temporary lodging of the appellant as in the case of an application for recognition of refugee status. An appeal must be filed within seven days from the date the applicant receives the notice of refusal of refugee status. If any unavoidable circumstance such as a natural disaster prevents him from doing so, he may file an appeal even after seven days have passed.

6.2.14 Failed asylum applicants can lodge an appeal by submitting to the Ministry of Justice an Appeal Application Form provided to them when they are notified of the negative decision of the asylum application. In the Appeal Application Form, the applicant should specify the reasons for appeal and attach supporting materials. It is possible to submit additional reasons and materials later, but the Appeal Application Form itself must reach the Ministry of Justice within the seven-day period.

6.2.15 The review of the appeal is considered by the Adjudication Division within the Immigration Bureau. The amendment of ICRRA in 2004 has created a system in which independent Refugee Examination Counsellors are involved in the appeal procedure, and the law requires the Minister of Justice to hear the opinions of the Counsellors when making decisions on appeals. The Refugee Examination Counsellors are appointed by the Minister of Justice "from among persons of reputable character who are capable of making fair judgements and have an academic background in law or current international affairs", comprising former diplomats, businessmen, government officials, journalists, judges, academics and NGO members.[145] Teams of three Counsellors are formed and cases are assigned to each team for discussion. Nonetheless, the conclusions of the Counsellors are not binding and the final decision still rests with the Minister of Justice.[146]

[145] Dean (2006) p.12.
[146] Dean (2006) pp.12-13; Reply from the Japan Association for Refugees, 5 April 2011.

6.2.16 The applicant may request an interview with the Refugee Examination Counsellors. If the applicant makes such a request, the Adjudication Section will schedule an interview of the Counsellors and immigration officers with the applicant. The interview usually takes place only once. For those who do not request an interview, the Counsellors and immigration officers will review the case on paper.[147]

6.2.17 The interview with the Refugee Examination Counsellors lasts for approximately two hours, and the proceeding will be recorded. The applicant's friends or other interested third parties may attend the interview and provide their opinions as a curator or an intervener. In that case, the applicant must notify the Immigration Bureau in writing of the identities of those curators or interveners.

6.2.18 Unlike the interviews in the first instance, lawyers are allowed to attend the appeal interview. When permitted by the Refugee Examination Counsellors, lawyers may present the case on behalf of the asylum seekers during the interview.[148]

6.2.19 After the interview, the applicant will be notified of the decision on appeal. If the appeal review deems the decision in the first instance rejecting the granting of refugee status to have been erroneous and thereby overturns it, the applicant will be granted refugee status.

6.2.20 No matter whether the applicant has Permission for Provisional Stay or not, any ongoing deportation procedures are to be stopped when the refugee recognition procedures are in progress. The deportation procedures will resume once the appeal has been dismissed or rejected.

Judicial review

6.2.21 When the appeal fails, the applicant may seek judicial review at the District Court. The applicant must file an action for judicial review within six months of learning of the dismissal of the appeal.[149]

147 Reply from the Japan Association for Refugees, 1 April 2011.
148 Reply from the Japan Association for Refugees, 14 April 2011.
149 Japan Association for Refugees (2008) p.6.

6.2.22 Judicial review does not entail a full review of the facts of a case nor all the legal issues. The court only examines the legality of the decision made by the Ministry of Justice at the appeal review and does not consider any subsequent events. Since the judicial review process may last for a number of years, if the applicants wish to take subsequent events into account, they will need to make a fresh asylum application.

6.2.23 Access to judicial review is not necessarily guaranteed for all asylum seekers and some applicants are deported right after the administrative procedure has ended (i.e. up to the dismissal of the appeal to the Ministry of Justice). There is no legal provision for deportation not to take place within six months which is the timeframe necessary to bring an action to the court after rejection of an appeal.[150] Although it is possible to stop repatriation by judicial procedures, the decision ordinarily takes at least a month. As such, there are instances in which asylum seekers have, during preparations for filing lawsuits, been forced to board aircraft against their will and returned to their countries of origin.[151]

Special Permission to Stay on humanitarian grounds

6.2.24 Even when the requirements for recognition of refugee status are not met, an alien may be permitted to live in Japan under exceptional circumstances. Article 61-2-2 of the 2004 ICRRA provides that when an alien, without residence status, has had his application for refugee recognition refused, the Minister of Justice shall examine whether there are grounds for granting Special Permission to Stay ("SPR") and if such grounds are found, to grant that permission. SPR may be provided to those who do not meet the refugee criteria but are unable to return to their country of origin for compelling reasons such as war, civil war and the like.

[150] CAT Network Japan (2007) p.31.
[151] Japan Federation of Bar Associations (2007) p.66.

6.2.25 In order to be considered for SPR under Article 61-2-2 of ICRRA, applicants must have failed to be recognized as refugees. In other words, the request for SPR cannot be made at the beginning of the asylum application process. The Adjudication Division of the Ministry of Justice is responsible for handling requests for SPR. The basis of granting SPR is not prescribed by law and it is ultimately based upon the discretion of the Minister of Justice. The Ministry of Justice generally takes into consideration elements such as the applicant's past record, family links, and situation in the country of origin.[152] Only some of the related administrative guidelines have been publicly released, and they make no reference to Article 3 of CAT.[153]

6.2.26 The granting of SPR provides a less secure residency arrangement than that afforded to refugee status under the 2004 ICRRA. SPR is a one-year renewable residency permit. It is liable to discretionary revocation by the authorities but does allow the SPR holders' access to health, pension and education provision. In theory, after 10 years, the holders can apply for a change of visa status and, at the discretion of the Minister of Justice, be granted a long-term residence permit or permanent residence. In reality, few holders of SPR have obtained permanent residence. Permission of permanent residence is granted only when the Minister deems that the alien fulfils certain criteria (such as good behaviour and conduct and sufficient assets or ability to make an independent living in Japan) and it will be in accordance with the interests of Japan. Whereas the renewal of SPR is de facto automatic because of the discretionary power to revoke, a holder of SPR is always at risk of revocation and subsequent refoulement. For instance, this would be the case where the holder has committed a serious criminal offence leading to imprisonment.[154]

[152] Japan Association for Refugees (2008) p.11.
[153] Japan Federation of Bar Associations (2007) p.53.
[154] Dean (2006) p.16.

6.3 Legal aid and other support

Legal assistance

Availability of publicly-funded legal assistance

6.3.1 The *Law on Integrated Legal Assistance* provides that legal assistance be provided and funded by the government. Nevertheless, publicly-funded legal assistance is not available to foreigners with non-regular residence or residence permits of under one year. Accordingly, hardly any applicants for refugee recognition can receive legal assistance from the government.[155]

6.3.2 For aliens, legal assistance is provided by the United Nations High Commissioner for Refugees and private foundations. Their need for legal advice may also be partially satisfied by some lawyers working on a *pro bono* basis and others charging reduced fees or a nominal charge. Despite such efforts, the overall provision of legal advice to asylum seekers is considered inadequate.[156]

Qualification and training of legal assistance providers

6.3.3 ICRRA does not specify any requirement on the qualification of legal assistance providers who act as a representative of refugee recognition applicants during the appeal procedure.

Economic and social support

6.3.4 Asylum seekers are not qualified for any regular resident status, nor permitted to work. However, for those asylum seekers holding valid visas at the time of application, their status of residence will be changed into "Designated Activities", and when the application process for refugee status lasts more than six months, the Immigration Bureau will issue a work permit to them.

[155] Japan Federation of Bar Associations (2007) p.60.
[156] Dean (2006) p.11.

6.3.5 The Ministry of Foreign Affairs provides financial support to asylum seekers in serious need through the Refugee Assistance Headquarters ("RHQ"), a quasi-governmental organization created in the 1980s. According to the information leaflet issued by RHQ, persons who are eligible to receive assistance are those applicants for recognition of refugee status (including persons filing an appeal) who are recognized to be in need of protection (assistance), such as persons in a high degree of poverty. Those considered as eligible by RHQ receive financial assistance for living expenses and rent of accommodation, and may also have their medical expenses covered if necessary.[157]

6.3.6 In principle, asylum seekers seeking judicial review are not eligible for RHQ's assistance. Moreover, due to shortage of public funding, provision of financial assistance to each applicant is limited to about four months. Although it can be renewed, in practice it is difficult to do so in view of the tight budget.[158]

6.4 Issues and concerns

Lack of independent reviewing authority

6.4.1 The United Nations Committee against Torture (the "CAT Committee") is concerned that there is a lack of an independent body to review refugee recognition applications and to review decisions made by immigration officials in Japan. Especially, the Ministry of Justice does not allow refugee recognition applicants to select legal representatives at the first stage of application, and governmental legal assistance is de facto not available for non-residents.[159]

[157] Refugee Assistance Headquarters (2011).

[158] Japan Association for Refugees (2009) p.16.

[159] *Committee against Torture Consideration of Reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture: Japan (30 April-18 May 2007)*, pp.3-4.

6.4.2 In consideration of the possibility that the control of immigration and foreign policies may interfere with the administration for refugee recognition, the Japan Federation of Bar Associations has requested the Ministry of Justice to establish an independent authority to perform refugee recognition. It also suggests the Ministry not to select former prosecutors and former diplomats to Refugee Examination Counsellors. In order to enhance the independence of the Counsellors, the Counsellors' secretariat should better be independent of the Immigration Bureau.

Poor position of asylum seekers

6.4.3 Most applicants are prohibited from working. Whilst social assistance for asylum seekers in need is available during the processing of their claims, both scope and duration of such assistance are limited. The financial support dispensed is far smaller than the amount necessary to guarantee a minimum livelihood.[160] Moreover, financial assistance is limited to about four months only, which falls short of the asylum application processing period.

6.4.4 The Japan Federation of Bar Associations warns that prohibiting all people with temporary residence from working threatens the survival of refugee recognition applicants.[161] It recommends that refugee recognition applicants should be allowed to work or be given enough assistance to support their living during the application process.

[160] Japan Federation of Bar Associations (2007) p.65.
[161] Japan Federation of Bar Associations (2007) p.65.

Chapter 7 – Analysis

7.1 Introduction

7.1.1 Based on the findings in the previous chapters, this chapter compares the mechanisms for handling torture claims in the five selected jurisdictions, namely, the United States ("the US"), Australia, the United Kingdom ("the UK"), Switzerland and Japan with the enhanced administrative mechanism in Hong Kong. The comparison will focus on the following aspects:

(a) lodging of torture claims;

(b) asylum hearing/interview;

(c) appeal and review procedures;

(d) humanitarian considerations to grant protection to applicants with the risk of torture;

(e) legal aid and other support; and

(f) issues and concern.

7.1.2 To facilitate Members' deliberation on the relevant issues, key features of the mechanisms for handling torture claims in the selected jurisdictions and Hong Kong are summarized in the **Appendix**.

7.2 Mechanisms for handling torture claims

7.2.1 All the five selected jurisdictions are signatories to the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") and/or the 1967 Protocol relating to the Status of Refugees ("the Refugee Protocol"), and they also either ratified or acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

7.2.2 According to Article 3 of CAT which is applicable to Hong Kong, the Hong Kong Government will not expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subject to torture. Nevertheless, the Refugee Convention does not apply to Hong Kong.

Lodging of torture claims

Whether torture claims can be lodged directly

7.2.3 Except in the US where torture claims can be lodged under CAT directly, in the other four overseas jurisdictions, torture claims are lodged under the refugee/asylum programme. For those applicants who do not meet the refugee criteria but are unable to return to their countries of origin because of the risk of torture, they may have their claims considered under humanitarian grounds. There is no separate mechanism for handling torture claims. In the US, application for CAT relief should be filed in almost the same manner as that of seeking asylum. The only procedural difference is that while asylum claim can be lodged either affirmatively or defensively, torture claim cannot be lodged affirmatively. In the UK, applicants may also make human rights claims under the European Convention on Human Rights ("ECHR") during the asylum process. ECHR provides similar to and even greater protection than CAT.

7.2.4 In Hong Kong, torture claims can be lodged under Article 3 of CAT directly. Such claims are dealt with by the Immigration Department. While there are administrative procedures for assessing torture claims made under CAT, the Administration has long adopted a firm policy of not granting asylum. Applicants wishing to make an asylum claim may approach the Hong Kong Sub-Office of the United Nations High Commissioner for Refugees ("UNHCR"). UNHCR conducts "refugee status determination" (i.e. asylum seekers are interviewed by UNHCR staff) to identify refugees who need international protection. As recognized refugees are not permitted to stay in Hong Kong, UNHCR resettles them to other places willing to offer them protection. Resettlement countries have their own processes and often subject the refugees to additional interviews.

Forms of lodging applications

7.2.5 In the selected places studied, torture and asylum claims should be lodged by submitting a written application, except in Switzerland where application may be submitted orally or in writing. Regardless of the forms of application, applicants in all the selected jurisdictions should include proof of identity and supporting evidences whenever possible.

7.2.6 In Hong Kong, torture claim should also be lodged in written form. The reception staff of the Immigration Department will provide the applicant with a questionnaire to complete. Any other documents in support of the claim should be submitted together with the completed questionnaire.

Asylum hearing and interview

Preliminary screening before the asylum interview

7.2.7 In the UK, applicants have to go through a screening process before being allocated to case owners. In the screening interview, applicants are expected to produce passports or travel documents to establish their identity and nationality as well as to support their application. Similarly, in Switzerland, a preliminary interview is conducted to verify personal data and travel route of applicants. In these two European countries, those "clearly unfounded" or "manifestly abusive" applications as defined by the rules[162] are screened off. The US, Australia and Japan do not have such screening process.

7.2.8 In Hong Kong, there is no preliminary screening before the interview to determine torture claims.

[162] If an applicant comes from a "safe country of origin" or "safe third country" as defined by the regulations of the European Union and the domestic rules, his claim is deemed to be "clearly unfounded" or "manifestly abusive".

Nature of the asylum hearing/interview

7.2.9 In the US, while the affirmative asylum interviews are non-adversarial, removal proceedings for torture claims are adversarial in nature, with both parties (i.e. the applicant and the US government) presenting the merits of the case to the presiding immigration judge. In the other four selected jurisdictions, asylum interviews are non-adversarial, with officers of the responsible authorities asking applicants questions relating to the asylum claims.

7.2.10 In Hong Kong, torture claims are processed by the Torture Claim Assessment Section ("TCAS") of the Immigration Department. Upon receiving the completed questionnaire, a designated case officer from TCAS will meet with the applicant as soon as possible. Like most of the selected jurisdictions, the screening interview is non-adversarial. If the applicant fails to attend the interview, the case officer will determine the torture claim on the basis of available information. He may reject the claim if the applicant has not provided sufficient material to substantiate the claim.

Legal representation

7.2.11 In the US, legal representation is allowed in the removal proceeding, but it should be at no expense to the government. In Australia, the UK and Switzerland, during the asylum interview, the applicant must respond in person to questions, but he may bring a legal representative to the interview. Since the presence of legal representatives is optional, the authorities will not normally postpone the interview to give the applicant time to get legal advice or representation. In Japan, the applicant, by law, is not entitled to have a lawyer or anyone else present to assist or advise.

7.2.12 In Hong Kong, the applicant may bring a legal representative to the interview. If the applicant has a legal representative, he should inform TCAS of his representation in the case. The case officer will not normally be able to postpone the scheduled interview to give the applicant time to get legal advice or representation. If the applicant's legal representative does not attend the interview, the case officer may proceed without him.[163]

[163] Immigration Department (2011).

Burden of proof

7.2.13 In all the five selected jurisdictions, the burden of proof is on the applicant. In the US, the applicant has the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of removal. In the other four selected jurisdictions, asylum seekers are expected to prove that they are refugees by providing relevant evidence.

7.2.14 The obligation of Article 3 of CAT places the burden of proof on a claimant for non-refoulement to demonstrate that there are substantial grounds for believing that he would be in danger of being subject to torture upon removal to the country concerned. Hence, similar to the selected places, in Hong Kong, applicants have an obligation to furnish true and complete information relevant to the claim at the earliest opportunity during the screening process.[164]

Decision

7.2.15 In the selected jurisdictions other than Japan, the presiding immigration judge or the interviewer makes the decision based on the applicant's dialogue at the proceeding or asylum interview, any evidence provided, and the information the responsible authorities have. In Japan, preliminary assessment by the interviewers should be endorsed by superior officials, and the final decision is made by the Minister of Justice.

7.2.16 In Hong Kong, the case officer responsible for conducting the screening interview would decide whether the claim is substantiated. The case officer is required to take into account all the relevant information of the case including information on the relevant country of origin.[165]

7.2.17 In the selected jurisdictions, there are time limits for the authority to make the asylum decision. In the US, although claims under CAT are not subject to the 180-day timeframe of asylum claims, applicants applying for both asylum and CAT relief will still be subject to the 180-day expedited docket. In Australia, the UK and Switzerland, the time limits range from 30 days to three months. In Japan, there is no statutory provision on the timeframe, but the Ministry of Justice officially states its target of making the asylum decision within six months.

[164] Immigration Department (2011).
[165] Legislative Council Secretariat (2011c) Appendix II p.2.

7.2.18 In Hong Kong, there is no definite timeline specified to make a decision on the torture claim. Under the enhanced mechanism which has been implemented since December 2009, most cases are determined within two months after the questionnaire is returned.[166]

Appeal and review procedures

Lodging of appeals

7.2.19 In all the selected jurisdictions, appeals can be lodged against negative asylum decisions. Nevertheless, in the UK, asylum seekers with "clearly unfounded claims" or those from "safe" countries will only be able to appeal once they have left the UK.

7.2.20 In Hong Kong, unsuccessful torture claimants may petition against the decision to the Chief Executive of the Hong Kong Special Administrative Region under Article 48(13) of the *Basic Law*. The applicants should fill in the Notice of Petition, which is given to them with the notice of determination of the torture claim. They should lodge the completed Notice of Petition and all supporting documents, if any, with the office of the Petition Team of the Security Bureau within 14 days from the date of the notice of determination.

Review authorities

7.2.21 In Australia, the UK and Switzerland, the review authorities for asylum cases are independent from the original decision-making authorities. On the other hand, the Board of Immigration Appeals ("BIA") in the US is an administrative appellate tribunal within the Department of Justice, and in Japan, reviews are made in the Adjudication Section of the Immigration Bureau of the Ministry of Justice.

7.2.22 In Hong Kong, Adjudicators (Torture Petitions) have been delegated with the authority to determine petitions against a refused torture claim. Retired judges and magistrates are appointed as Adjudicators to handle such petitions. Each claim will be determined by one Adjudicator.

[166] Reply from the Security Bureau, 14 April 2011.

Process of appeal

7.2.23 Under the appeal procedure in the US and Switzerland, the responsible authorities decide the appeals by conducting a paper review of cases. The applicant should therefore file a clear petition and provide documentary proof. In Japan, it can be conducted in the form of either a paper review or an oral hearing. If the applicant requests an oral hearing, he may have an interview with the independent Refugee Examination Counsellors and immigration officers in a non-courtroom setting. In Australia, the appeal hearings are also non-adversarial, providing an opportunity for the applicant to give evidence and present arguments relating to the issues arising in relation to the decision under review. Meanwhile, in the UK, both parties will argue for the case during the relatively formal appeal hearing.

7.2.24 In Hong Kong, the Adjudicator will decide whether to conduct an oral hearing on the petition. If circumstances of the case so warrant, the Adjudicator may conduct an oral hearing with the applicant and representative from the Immigration Department. The oral hearing will be held in private. Other than the applicant and his representative, the Adjudicator, staff of the Petition Team, representatives of the Director of Immigration, witnesses invited by both parties, custody officers escorting the petitioner in custody (if applicable) and interpreters, no person will be allowed to be present at the hearing.[167] In making the hearing decision, the Adjudicator will, having regard to the information available and the circumstances, review the merits of the decision made by the case officer.

Legal representation

7.2.25 Applicants in all the selected jurisdictions may have legal representatives during the appeal procedure. Although the procedures are in written form in the US and Switzerland, an applicant may be represented with the legal representative submitting the appeal on behalf of him.

[167] Security Bureau (2011a).

7.2.26 In Hong Kong, applicants may have legal representatives to assist in preparing the petition submission. An applicant may bring his legal representative to the oral hearing if necessary. He should give details of the legal representative by completing Section 3 of the Notice of Petition beforehand. If there is any change of legal representative or witness, he must inform the Petition Team at least five working days before the hearing. The applicant cannot bring any other persons to the hearing without prior consent of the Adjudicator.

Whether the appeal has suspensive effect

7.2.27 In all the five selected jurisdictions, appeals have suspensive effect so that removal of an applicant cannot be effectuated while the appeal is pending. However, in the UK, applicants with "clearly unfounded claim" or who come from "safe" countries cannot make an appeal in the UK. They will be removed and will have to pursue any appeal from outside the UK.

7.2.28 In Hong Kong, torture claimants will not be removed when the appeal application is pending.

Whether the review decision is reviewable

7.2.29 Except in Switzerland where the judgments of the Federal Administrative Court are final and absolute, review decisions in all the other four selected jurisdictions are further reviewable. In the UK, the applicant can challenge a decision made by the First-tier Tribunal by applying to the Upper Tribunal on a point of law. A decision of the Upper Tribunal may be further appealed to the Court of Appeal. In the US, Australia and Japan, the review decisions can be appealed to the courts. Nonetheless, judicial review only reviews the law, looking at whether a decision has been made fairly and properly, rather than examining the facts of the claim.

7.2.30 In Hong Kong, unsuccessful torture claimants can apply for judicial review to challenge the decision.

Humanitarian considerations to grant protection to applicants with the risk of torture

7.2.31 Whereas in the US, applicants can make a torture claim under CAT directly, applicants in the other four jurisdictions may have their claims considered under humanitarian grounds. In Australia, the Minister for Immigration and Citizenship may exercise discretionary power to substitute the decision of the review authority for one that is more favourable to the applicant. Australia's international obligation under CAT is one of the relevant factors which the Minister should consider in exercising such discretionary power. The Australian government started to introduce complementary protection[168] legislation in 2009.

7.2.32 In the UK, human rights claims can be made under ECHR at any stage of the asylum process, and such applications will be considered as an asylum claim. If the removal of an applicant would expose him to serious harm or treatment that would otherwise be contrary to Article 3 of ECHR, he will be given permission to stay in the UK. Similarly, Switzerland will grant temporary protection to persons in need of protection as long as their removal is expected to expose them to a serious general danger.

7.2.33 In Japan, the Ministry of Justice may provide Special Permission to Stay to those who do not meet the refugee criteria but are unable to return to their countries of origin for compelling reasons. The criteria for granting the Permission are not disclosed, and the government may take Article 3 of CAT into consideration.

7.2.34 The situation of Hong Kong is different from the selected jurisdictions as Hong Kong does not provide asylum to refugees. In any event, applicants may lodge torture claims under CAT directly in Hong Kong. Like the US, if the application fails, the applicant cannot claim for any humanitarian protection.

[168] Complementary protection is the term used to describe a category of protection for people who are not refugees, but who cannot be returned to their home countries because there is a real risk that they would suffer from certain types of harm that would violate Australia's non-return obligations.

Legal aid and other support

Whether publicly-funded free legal assistance is provided

7.2.35 In Australia, the UK and Switzerland, free legal assistance is available to asylum seekers who have either no income or very low income. In the US, applicants may seek legal representation at their own expense or from free legal services providers in the private sector. Likewise, in Japan, state-sponsored legal aid is not available to asylum seekers. Limited legal assistance is provided by the non-governmental sector.

7.2.36 In Hong Kong, publicly-funded legal assistance under the Duty Lawyer Service ("DLS") is available for needy torture claimants through the Convention Against Torture Scheme. The Scheme commenced on a pilot basis for 12 months with effect from 24 December 2009. In view of the successful operation of the pilot Scheme, DLS has agreed with the Government to continue the Scheme for another 24 months with effect from 24 December 2010. Legal assistance will be provided to applicants who lack economic means. The Immigration Department will refer applicants to DLS for legal assistance, usually on the same day when they receive the questionnaire. On passing the relevant eligibility test, DLS will assign a duty lawyer to provide legal assistance to the applicant where appropriate. For example, the applicant may seek the advice of the duty lawyer to complete the questionnaire or the accompaniment of the duty lawyer to attend the screening interviews. At the petition stage, publicly-funded legal assistance will also be available for meritorious cases.

7.2.37 In all the selected jurisdictions, there are non-governmental organizations ("NGOs") which provide free legal assistance and representation to the most vulnerable asylum seekers. In Hong Kong, there are also similar NGOs providing free legal assistance.

Qualification and training of legal assistance providers

7.2.38 In the US, a non-profit religious, charitable or social service organization or one of a similar nature may apply to BIA for recognition as well as accreditation of its representatives. A qualified organization must establish to the satisfaction of BIA such that it only charges nominal fees and assesses no excessive membership dues for persons given assistance, and it has at its disposal adequate knowledge, information and experience. A recognized organization may apply for accreditation of persons of good moral character and with experience and knowledge of immigration and naturalization law and procedures as its representatives.

7.2.39 In Australia, registered migration agents are required to have an in-depth knowledge of Australian migration law and procedures, and to meet high professional and ethical standards. Registration has to be renewed every year. For repeat registration, migration agents have to meet the Continuing Professional Development requirements by completing programmes of education and seminars.

7.2.40 In the UK, advisers providing legal aid funded advice and representation must be accredited under the Immigration and Asylum Accreditation Scheme. They are required to pass tests which examine interviewing and drafting skills as well as knowledge of asylum and immigration law. They are also required to undertake Continuous Professional Development which involves a certain number of hours of approved training or other activities each year.

7.2.41 In Switzerland and Japan, there are no specific requirements for people who provide legal advices to asylum seekers with regard to training or minimum practical experience.

7.2.42 In Hong Kong, DLS generally requires and recruits qualified lawyers with a minimum of three years' post-qualification experience to be enrolled as duty lawyers for providing legal assistance to torture claimants.

Fee scheme of publicly-funded legal assistance

7.2.43 In the US and Japan, no publicly-funded legal aid is available to asylum seekers. In Australia, the Immigration Advice and Application Assistance Scheme funds registered migration agents by tender. In 2009-2010, the cost was some AUS$3.04 million (HK$24.62 million), with AUS$0.68 million (HK$5.51 million) for application assistance to 318 protection visa applicants in immigration detention (AUS$2,138 (HK$17,318) per case), AUS$1.44 million (HK$11.66 million) for application assistance to 826 disadvantaged visa applicants in the community (AUS$1,743 (HK$14,118) per case); and AUS$0.92 million (HK$7.45 million) for immigration advice to 8 756 disadvantaged persons (AUS$105 (HK$851) per case).

7.2.44 In the UK, the Asylum Graduated Fee is £459 (HK$5,692) for Legal Help with initial application, £252 (HK$3,125) for Controlled Legal Representation before appeal hearing, and £630 (HK$7,812) for Controlled Legal Representation at substantive appeal hearing. Advocacy services like representation at the Home Office interview entail additional payments.

7.2.45 In Hong Kong, the fee rate for provision of legal assistance to torture claimants is the same as those rates applied to other services provided by DLS, i.e. HK$720 per hour.

Whether applicants are allowed to work

7.2.46 In Australia, permission to work is available to applicants who are on a bridging visa and actively engaged with the Department of Immigration and Citizenship to resolve their immigration status. Similarly, in Japan, only those who hold valid visas at the time of application are allowed to work. Applicants are in general not permitted to work in the other jurisdictions, at least during the first few months after they have lodged the application. In the US, they can apply for work authorization if 150 days have passed since they file the asylum application and no decision has been made on the application. Similarly, in the UK, if the applicants have waited longer than 12 months for an initial decision on the asylum application, they may request permission to work. In Switzerland, applicants receive work permits after three to six months of application depending on the canton and the circumstances.

7.2.47 In Hong Kong, applicants are not allowed to work. Under section 38AA of the Immigration Ordinance (Cap. 115), as added by the Immigration(Amendment) Ordinance 2009, it is a criminal offence for illegal immigrants and other persons not lawfully employable to take up employment, whether paid or unpaid, or to establish or to join any business.

Economic and social support

7.2.48 In the US, there is no financial or other support provided to asylum seekers by the government. In the other four selected jurisdictions, limited financial assistance and social benefits are provided to applicants who are identified as vulnerable.

7.2.49 In Hong Kong, the Administration, in collaboration with NGOs and on a case-by-case basis, offers assistance-in-kind on humanitarian grounds to torture claimants who are deprived of basic needs during their presence in Hong Kong. The type of assistance offered includes temporary accommodation, food, clothing, other basic necessities, transport allowance, counselling and medical services.[169]

Issues and concerns

7.2.50 The United Nations Committee against Torture ("the CAT Committee") is concerned by the "diplomatic assurances" that the US government uses to assure that a person would not be tortured if expelled, returned, transferred or extradited to another state. Particular concerns are on the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances would be honoured. Moreover, the quality of decision-making by the Immigration Courts and BIA has been widely criticized. While the Attorney General announced 22 measures in August 2006 that he hoped would "improve the performance and quality of work" of the Immigration Courts and BIA, many of these reform measures have not been implemented. Furthermore, asylum seekers' right to legal representation must be obtained at no expense to the government. It is opined by some scholars that the qualifier "at no expense to the government" has made it difficult for asylum seekers to obtain counsel.

[169] Legislative Council Secretariat (2011c).

7.2.51 The CAT Committee and some domestic and international human rights bodies have raised concerns that Australia rely solely on the discretionary powers of the Minister for Immigration and Citizenship to meet its non-refoulement obligations under CAT. Besides, mandatory detention of those persons who enter Australia irregularly has long been a concern of the CAT Committee and NGOs. Particularly, stateless people are theoretically subject to indefinite detention as they are ineligible for a visa and have no country to which they could be removed. The CAT Committee has expressed concerns about the situation of stateless persons in immigration detention who risk being potentially detained "ad infinitum".

7.2.52 In the UK, there are concerns with the fast timelines of the New Asylum Model ("NAM"), under which asylum seekers may not have sufficient time to prepare for their cases. Another concern in relation to NAM is that the implementation of segments may result in claims being pre-determined before they have been given substantive consideration. It has been observed by various organizations that non-suspensive appeal cases give rise to problems like asylum seekers with "clearly unfounded" claims could be returned to a country where they will be persecuted before being able to appeal. There are also practical problems for asylum seekers to appeal from abroad. Besides, there are concerns that victims of torture are detained even in cases where the Home Office has prior information of the applicant's past torture obtained during the asylum interview.

7.2.53 There are views that the Swiss procedure to "dismiss the application without entering into the substance of the case" may fail to guarantee applicants a proper hearing and, consequently, violate the protection of non-refoulement under Article 3 of CAT. In addition, the ban on refoulement may not be invoked if the person has been convicted with full legal effect of a particularly serious felony or misdemeanour. Such national security ban on protection may be incompatible with Switzerland's obligations with respect to the principles of non-refoulement under Article 3 of CAT. Another concern is that theoretically legal aid is available but, in practice, legal aid is usually not granted in the first instance procedure.

7.2.54 The CAT Committee is concerned that Japan lacks an independent body to review refugee recognition applications and to review decisions made by immigration official. In particular, the Ministry of Justice does not allow refugee recognition applicants to solicit legal representatives at the first stage of application, and governmental legal assistance is de facto not available for non-residents. Moreover, most applicants are prohibited from working. Whilst social assistance for asylum seekers in need is available during the processing of their claims, both scope and duration of such assistance are limited.

7.2.55 In Hong Kong, there is no refugee status determination system to deal with asylum claims and the government relies on UNHCR to process these claims. Some NGOs invited by the CAT Committee to attend its hearing on the periodic report submitted by the Hong Kong Government in 2008 expressed their concerns that UNHCR could not provide adequate protection to asylum seekers in Hong Kong.[170] They claimed that the UNHCR procedure lacked guarantees to ensure procedural fairness such as transparency, written reasons for refusal, independent appeal, legal assistance and judicial review, which might consequently amount to a "constructive refoulement through process". The CAT Committee was of similar concern.[171] It thus recommended the Hong Kong Government to consider adopting a legal regime on asylum and establishing a comprehensive and effective procedure to examine thoroughly the merits of each individual case, and to consider the extension of the Refugee Convention and the Refugee Protocol to Hong Kong. In addition, the Law Society of Hong Kong and the Hong Kong Bar Association are concerned about the provision of legal assistance to torture claimants via the Convention Against Torture Scheme of the Duty Lawyer Service.

[170] Hong Kong Human Rights Commission Society for Community Organization (2008) and Hong Kong Human Rights Monitor (2008).

[171] *Committee against Torture Consideration of reports submitted by States parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Hong Kong Special Administrative Region (3-21 November 2008)*, p.3.

Appendix

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Background						
Major relevant legislations	Not applicable.	• *Foreign Affairs Reform and Restructuring Act of 1998*; • *Immigration and Nationality Act*; and • *Code of Federal Regulations*.	• *Migration Act 1958*; and • *Migration Regulations 1994*.	• *Nationality, Immigration and Asylum Act 2002*; and • *Human Rights Act 1998*.	*Asylum Act of 1998*.	*Immigration Control and Refugee Recognition Act*.
Responsible authorities	Immigration Department.	• US Citizenship and Immigration Services ("USCIS") under the Department of Homeland Security ("DHS"); and • Executive Office of Immigration Review ("EOIR") under the Department of Justice ("DOJ").	Department of Immigration and Citizenship ("DIAC").	UK Border Agency ("UKBA") of the Home Office.	Federal Office for Migration ("FOM").	Immigration Bureau of the Ministry of Justice ("MOJ").

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Lodging of torture claims						
Whether torture claims can be lodged under CAT directly	Yes, there are administrative procedures for assessing torture claims made under CAT.	Yes, such application should be filed in the same manner as those seeking asylum.	No.	No, but applicants may make human right claims under the European Convention on Human Rights ("ECHR")(1) during the asylum process.	No.	No.
How to lodge claims	The Immigration Department will provide the applicant with a questionnaire to complete so as to submit information in support of the claim.	Applicants may initiate a claim for CAT relief by either requesting such relief before an immigration judge during the removal proceeding, or by presenting evidence or information contained on Form I-589 to the Immigration Court to indicate that he may be tortured in the country of removal.	Applications for refugee status are lodged with DIAC by completing Form 866.	Applicants can apply for asylum through an immigration officer on arrival at the port of entry. If the applicants are in the UK, they should book an appointment to meet with the Asylum Screening Unit of UKBA.	There are no requirements on how an application is submitted. It may be submitted orally or in writing to a Swiss mission abroad, to a border post, to the border control at a Swiss airport, or to a Reception and Procedure Centre of FOM.	An asylum seeker is required to submit, in person, a written application and evidentiary documents to a Regional Immigration Bureau.

Note: (1) Article 3 of the European Convention on Human Rights provides a prohibition on torture and of inhuman or degrading treatment or punishment, which is similar to that of CAT.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Preliminary screening						
Whether there is preliminary screening before full hearing/ interview	No.	No.	No.	Yes. Applicants will go through a screening process before they are allocated to case owners.	Yes. A preliminary interview is conducted before applicants are allocated to cantons.	No.
Screening procedure	Not applicable.	Not applicable.	Not applicable.	• Applicants will be interviewed briefly and expected to produce either passports or travel documents to establish their identity and nationality and to support their application. • Applicants are assigned to one of five "segments" that determines the future pathway of their claim.	• Applicants will have to provide personal data and information on their travel route to Switzerland. • Decision should be made within 20 working days after application. If a decision cannot be taken within this timeframe, FOM will allocate the applicant to a canton.	Not applicable.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Hearing/interview to determine torture/asylum claims						
Form of the determination procedure	Non-adversarial interview.	Adversarial (courtroom-like) hearing.	Non-adversarial interview.	Non-adversarial interview.	Non-adversarial interview.	Non-adversarial interview.
Who will conduct the hearing/ interview	The case officer from the Torture Claim Assessment Section of the Immigration Department will conduct the interview.	Hearing is presided over by an immigration judge appointed by the Attorney General. The immigration judge will hear arguments from both parties (i.e. the applicant and the US government).	The case manager, who is a trained officer of DIAC, will conduct the interview.	The case owner, who is an officer of the Home Office, will conduct the interview.	Interview is conducted by a FOM officer in the presence of a representative of a non-governmental organization ("NGO"), who functions as an impartial observer to verify if the rules of procedure are respected during the interview.	A Refugee Inquirer ("RI") who is an Immigration Inspector designated by MOJ, will conduct the interview.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Hearing/interview to determine torture/asylum claims (cont'd)						
What will happen during the hearing/ interview	The applicant should answer the questions posed by the case officer.	Both parties will present the merits of the case to the immigration judge. The DHS attorney may cross-examine the applicant and other witnesses.	The case manager will ask the applicant questions about the claims.	The applicant will be asked to explain the reasons for seeking asylum in the UK. The applicant should give as much detail about the asylum application as possible and may submit additional evidence.	The applicant will have to justify his application and explain the reasons for requesting asylum.	RI will ask questions based on the statement submitted by the applicant together with the application.
Whether legal representation is allowed during the hearing/ interview	Yes, the applicant may bring a legal representative to the interview.	Yes, but at no expense to the government.	No, but DIAC may allow the applicant's friend, relative or migration agent to attend the interview.	No, the applicant must respond in person to questions, but he may bring a legal representative to the interview.	No, the applicant must respond in person to questions, but a lawyer may attend the interviews.	No, the applicant is not entitled to have a lawyer or anyone else present to assist or advise.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Hearing/interview to determine torture/asylum claims (cont'd)						
Burden of proof	The applicant has an obligation to furnish true and complete information relevant to the claim at the earliest opportunity during the screening process.	The applicant bears the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of removal. In making such assessment, all evidence relevant to the possibility of future torture is required to be considered.	The applicant is required to give the case manager all the information necessary for making a decision on the application within the timeframe specified.	The interview is the only chance for the applicant to tell the case owner why returning to his country may lead to himself being tortured, and all the information he wishes to be considered.	Asylum seekers must prove or at least credibly demonstrate their refugee status.	The applicant is expected to prove that he is a refugee by substantial evidence or by testimony of persons concerned.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Hearing/interview to determine torture/asylum claims (cont'd)						
Decision maker	The case officer responsible for conducting the screening interview.	The immigration judge.	The case manager.	The case owner.	FOM officer conducting the interview.	Preliminary assessment by RI, after endorsement by the Regional Director General, is forwarded for final assessment by the Refugee Recognition Section ("RRS") of the Immigration Bureau. The RRS Director submits a recommendation to the Minister of Justice who makes the final decision.
Time limit for making decision	There is no definite timeline specified to make a decision. Under the enhanced mechanism, most cases are determined within two months after the questionnaire is returned.	Unlike asylum claims, claims under CAT are not subject to the 180-day timeframe. In any event, applicants applying for both asylum and CAT relief will be subject to the 180-day expedited docket.	Most applications will be decided within 90 days.	The case owner aims to give the applicant the decision within about 30 days from the date of application.	The asylum decision is normally made within three months of the application.	While there is no statutory provision on the duration, the Ministry of Justice officially states its target of making the decision within six months.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Hearing/interview to determine torture/asylum claims (cont'd)						
How the decision is reached	The case officer is required to take into account all the relevant information of the case including information on the relevant country of origin.	If the immigration judge determines that the applicant would more likely than not be tortured in the country of removal, he is entitled to protection under Article 3 of CAT.	The case manager assesses applications against Australian migration law and the Refugee Convention, and may also refer to current information on the conditions of the country of origin.	The case owner assesses each application on its merits. He will make the decision based on information provided by the applicant, and the information that UKBA has about the applicant's country of origin.	In making the decision, FOM determines whether the applicant meets the criteria for refugee status under Article 3 of the *Asylum Act* and verifies that there are no legal grounds for refusing asylum.	Recognition of refugee status will be based on the materials submitted by the applicant.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Appeal and review procedures						
Time limit for lodging appeals	The applicant should lodge the completed Notice of Petition and all supporting documents within 14 days from the date of the notice of determination.	An appeal must be filed within 30 days of an immigration judge's decision.	An appeal must be lodged within 28 calendar days after notification of the decision by DIAC if the applicant is not in immigration detention. The timeframe for lodging appeal is seven working days if the applicant is in detention.	The appeal form must reach the First-tier Tribunal within five working days from the day when the applicant receives the notice of decision if he is in detention, or within 10 working days from the day when the applicant receives the notice of decision if he is not in detention. Asylum seekers with "clearly unfounded claim" or those came from "safe" countries(2) will only be able to appeal after they have left the UK.	An appeal must be submitted within 30 days after notification of the negative decision by FOM.	An appeal must be filed by submitting to MOJ an Appeal Application Form within seven days from the date when the applicant receives the notice of refusal of refugee status.

Note: (2) Under Section 94 of the *Nationality, Immigration and Asylum Act 2002*, the Secretary of State can deem a country to be "safe" and certify claims of applicants from that country as "clearly unfounded".

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Appeal and review procedures (cont'd)						
Review authorities	Adjudicators (Torture Petitions) who are retired judges and magistrates appointed to handle appeals.	Board of Immigration Appeals ("BIA"), an administrative appellate tribunal within DOJ.	Refugee Review Tribunal ("RRT"), an independent statutory body.	Immigration and Asylum Chamber of the First-tier Tribunal, an independent judicial body.	Federal Administrative Court, an independent court.	Adjudication Section of the Immigration Bureau of MOJ, a government agency.
Who will hear the appeal	An Adjudicator (Torture Petitions) will hear the appeal.	Mostly one but sometime a panel of three Board members of BIA, who are attorneys appointed by the Attorney General, will hear the appeal.	A sole RRT member, who is not necessarily a lawyer and is appointed by the Minister for Immigration and Citizenship, will hear the appeal and make the decision.	Appeals are heard by one or more immigration judges who are sometimes accompanied by non legal members of the Tribunal.	In general, three judges of the Federal Administrative Court conduct the review of a case.	The applicant may request MOJ to hold a hearing with the immigration officers and independent Refugee Examination Counsellors who are appointed by the Minister of Justice. Nonetheless, their conclusions are not binding. The final decision still rests with the Minister of Justice. For those who do not request a hearing, the Counsellors and immigration officers will review the case on paper.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Appeal and review procedures (cont'd)						
Form of the appeal procedure	Paper review or oral hearing.	Paper review.	Oral hearing.	Oral hearing.	Paper review.	Paper review or interview.
Appeal process	If circumstances of the case so warrant, the Adjudicator may conduct an oral hearing with the applicant and representative from the Immigration Department.	The applicant may file a written brief in support of his appeal, while DHS may file a brief in opposition to the applicant's appeal.	No representative for DIAC will attend the hearing. The applicant will present his case at the hearing.	At the full hearing, the applicant and his representative are provided with opportunities to present their case. UKBA will also have a legal representative at the hearing.	The appeal should contain a clear request or petition, and the appellant should state the reasons for his request and provide documentary proof if possible.	The applicant answers questions of the Refugee Examination Counsellors. The applicant's friends or other third parties may attend the hearing and provide their opinions for the Counsellors' consideration.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Appeal and review procedures (cont'd)						
Whether legal representation is allowed during the appeal procedure	Yes, applicants may have legal representative to assist in preparing the petition submission and at the oral hearing.	Yes, the applicant may be represented by an attorney or an accredited representative.	Yes, the applicant should contact RRT prior to the hearing or raise the matter with RRT at the start of the hearing if he requires legal representation.	Yes, the applicant will usually attend the hearing with his legal representative.	Yes, NGOs may assist asylum seekers in submitting an appeal, or they may write the appeal on behalf of the asylum seeker.	Yes, lawyers can be present on behalf of asylum seekers as a representative.
Whether the appeal has suspensive effect(3)	Yes, torture claimants will not be removed when the application is pending.	Yes, removal of the applicant cannot be effectuated while the appeal is pending before BIA.	Yes, a person must be removed from Australia as soon as reasonably practicable when an application rejection decision is no longer subject to review by RRT.	Yes, the appellant cannot be removed while the appeal is pending. However, applicants with "clearly unfounded claim" or from "safe" countries are not permitted to make an appeal in the UK. They will be removed and can only pursue any appeal from outside the UK.	Yes, the removal order is not carried out while the appeal is pending.	Yes, deportation procedures will only be resumed when an appeal has been dismissed or rejected.

Note: (3) With suspensive effect, the applicant will not be removed while the appeal is pending.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Appeal and review procedures (cont'd)						
Whether the review decision is further reviewable	Yes, unsuccessful torture claimants may apply for judicial review to challenge the decision.	Yes, a BIA decision ordering removal is reviewable in the US Court of Appeals that serves the territory in which the hearing before the immigration judge takes place. If unsuccessful before the Court of Appeals, the applicant may file a petition for certiorari with the US Supreme Court.	Yes, where there is a perceived error of law in the decision of RRT, it is possible to appeal the decision to the Federal Court or the Federal Magistrates Court for judicial review of the decision.	Yes, the applicant may be able to challenge a decision made by the First-tier Tribunal by applying to the Upper Tribunal of the Tribunals Service on a point of law. A decision of the Upper Tribunal may be further appealed to the Court of Appeal.	No, the judgments of the Federal Administrative Court are final and absolute.	Yes, the applicant may file an action for judicial review with the court.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Humanitarian considerations to grant protection to applicants with the risk of torture						
Availability of protection under humanitarian considerations	Not applicable.	Not applicable.	The Minister for Immigration and Citizenship may exercise discretionary power to substitute the decision of RRT for one that is more favourable to the applicant.	Human rights claims can be made under ECHR at any stage of the asylum process, and such applications will be considered by UKBA as an asylum claim.	Switzerland may grant temporary protection to persons in need of protection as long as they are exposed to a serious general danger.	MOJ may provide Special Permission to Stay to those who do not meet the refugee criteria but are unable to return to their country of origin for compelling reasons.
Criteria for granting protection	Not applicable.	Not applicable.	Australia's international obligation under CAT is one of the relevant factors that the Minister for Immigration and Citizenship would consider in exercising such discretionary power.	It is sufficient for an applicant to show that there are substantial grounds for believing that returning to his home country or other countries will expose the applicant to a real risk. Where the real risk test is met, protection will be granted.	Temporary protection is granted to persons in need of protection as long as their removal is expected to expose them to a serious general danger.	The criteria for granting the Permission are not disclosed. Nevertheless, Article 3 of CAT may be one of the considerations.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Legal aid and other support						
Whether publicly-funded free legal assistance is provided	Yes, publicly-funded legal assistance under the Duty Lawyer Service ("DLS") is available for needy applicants.	No, applicants may seek legal representation at their own expense.	Yes, free legal assistance is available through the government's Immigration Advice and Application Assistance Scheme ("IAAAS").	Yes, free legal assistance is available to asylum seekers who have either no income or very low income.	Yes, publicly-funded legal aid is available to those applicants who are unable to afford counsel.	No, state-sponsored legal aid is not available to asylum seekers.
Whether free legal assistance is provided by private organizations	Yes, there are NGOs providing free legal assistance.	Yes, EOIR maintains a list of free legal service providers who meet the qualifications specified in the regulations. This list is updated quarterly and is provided to applicants in immigration proceedings. It is also available on EOIR's website.	Yes, some migration agents may offer *pro-bono* or free services.	Yes, there are NGOs providing free legal assistance and representation to the most vulnerable asylum seekers in their asylum applications to UKBA and all stages of appeals to the Tribunal, Court of Appeal and beyond.	Yes, there are NGOs in almost all the cantons, providing free legal advice and/or representation for asylum seekers. These legal advisory services are coordinated by the Swiss Refugee Council.	Yes, limited legal assistance is provided by the United Nations High Commissioner for Refugees and private foundations. There are also some lawyers working on a *pro bono* basis while others for reduced fees or a nominal charge to help asylum seekers.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Legal aid and other support (cont'd)						
Qualification and training of legal assistance providers	DLS generally requires and recruits qualified lawyers with a minimum of three years' post-qualification experience to be enrolled as duty lawyers for providing legal assistance to torture claimants.	A recognized organization must only charge nominal fees and assess no excessive membership dues for persons given assistance, and has at its disposal adequate knowledge, information and experience. Such organizations may apply for accreditation of persons of good moral character and with experience and knowledge of immigration and naturalization law and procedure as their representatives.	Registered migration agents are required to have an in-depth knowledge of Australian migration law and procedures, and to meet high professional and ethical standards. For repeat registration, migration agents have to meet the Continuing Professional Development requirements by completing programmes of education and seminars.	Advisers should be accredited by the Office of Immigration Services Commissioner. There is a set of standards covering immigration, asylum and nationality law that advisers have to meet. If they provide legally-aided advice, they also have to meet the standards of the Legal Services Commission. They are also required to undertake Continuous Professional Development which involves a certain number of hours of approved training or other activities each year.	There are no specific requirements for lawyers with regard to training or minimum practical experience.	ICRRA does not specify any requirement on the qualification of legal assistance providers.
Fee scheme of publicly-funded legal assistance	The fee rate currently adopted by DLS is HK$720 per hour.	Not applicable.	IAAAS funds registered migration agents by tender. In 2009-2010, the cost was some AUS$3.04 million (HK$24.62 million).	The Asylum Graduated Fee is £459 (HK$5,692) for Legal Help with initial application, £252 (HK$3,125) for Controlled Legal Representation before appeal hearing, and £630 (HK$7,812) for Controlled Legal Representation at substantive appeal hearing. Advocacy services like representation at the Home Office interview entail additional payments.	Information not available.	Not applicable.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Legal aid and other support (cont'd)						
Whether applicants are allowed to work	Applicants are not allowed to work.	Applicants cannot apply for work authorization when applying for asylum. They can apply for work authorization if 150 days have passed since they filed asylum application, and no decision has been made on the application.	Generally, permission to work is available to applicants who are on a bridging visa and actively engaged with DIAC to resolve their immigration status.	The majority of asylum applicants are not permitted to work while their application is being considered. However, if they have waited longer than 12 months for UKBA to make an initial decision on the asylum application, they may request permission to work.	Applicants receive work permits after three to six months have passed since application, depending on the canton and the circumstances.	For those asylum seekers who hold valid visas at the time of application, their status of residence will be changed into "Designated Activities", and after more than six months since application without any decision, the Immigration Bureau will issue a work permit.
Economic and social support	The Administration, in collaboration with NGOs and on a case-by-case basis, offers assistance-in-kind on humanitarian grounds to applicants who are deprived of basic needs.	There is no financial or other support provided to asylum seekers by the government.	Asylum Seeker Assistance Scheme provides limited financial assistance, health care and other services to applicants who are identified as vulnerable.	The case owner will assess applicants' circumstances and decide if they meet the requirements to receive support. Applicants may qualify for help with housing and living costs. If housing is provided, the applicant will not be able to choose where to live.	Applicants are assigned to cantons where they may be housed in shelters and receive social benefits or emergency aid if needed.	The government provides financial assistance for applicants in serious need through the Refugee Assistance Headquarters, a quasi-governmental organization.

Appendix (cont'd)

Mechanisms for handling torture claims in selected jurisdictions and Hong Kong

	Hong Kong	The United States	Australia	The United Kingdom	Switzerland	Japan
Issues and concerns						
Issues and concerns	• No refugee status determination system to deal with asylum claims. • The Hong Kong Sub-Office of the United Nations High Commissioner for Refugees not able to provide adequate protection to asylum seekers as its procedure lacks guarantees ensuring procedural fairness. • Provision of legal assistance.	• Absence of judicial scrutiny and lack of monitoring mechanisms put in place to assess if "diplomatic assurances"(4) were honoured. • Quality of decision-making by the Immigration Courts and BIA. • Lack of legal aid provided by the government.	• Reliance solely on ministerial discretion to provide protection against non-refoulement of asylum seekers who may be eligible for protection under CAT. • Mandatory detention of those persons who enter Australia irregularly.	• The New Asylum Model not able to allow asylum seekers sufficient time to prepare for their cases, and claims pre-determined before they have been given substantive consideration. • Problems of non-suspensive appeal, like asylum seekers with "clearly unfounded" claim returned to a country where they will be persecuted and practical problems for asylums seekers to appeal from abroad. • Detention of torture victims.	• The procedure to "dismiss the application without entering into the substance of the case" failing to guarantee applicants a proper hearing. • National security ban on protection incompatible with the principles of non-refoulement under Article 3 of CAT. • Legal aid usually not granted in the first instance procedure.	• Lack of an independent body to review refugee recognition applications and to review decisions made by immigration officials. • Most asylum seekers prohibited from working while the scope and duration of financial assistance limited.

Note: (4) The US government may use "diplomatic assurances" to ensure that a person would not be tortured if expelled, returned, transferred or extradited to another country.

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