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**Panel on Security**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 2 February 2016**

**Unified screening mechanism for non-refoulement claims**

**Purpose**

This paper provides background information and summarises the past discussions of the Panel on Security ("the Panel") on the unified mechanism for screening non-refoulement claims.

**Background**

2. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") has been applied to Hong Kong since 1992. Article 3 of CAT provides that no State Party shall expel, return 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.

**Administrative mechanism for handling torture claims**

3. In the past, torture claims made under Article 3 of CAT were handled by the Immigration Department ("ImmD") in accordance with a set of administrative procedures. The administrative mechanism had been subject to challenge in courts. In *Sakthevel Prabakar v Secretary for Security* ((2004) 7 HKCFAR 187), the Court of Final Appeal ("CFA") held that high standards of fairness must be demanded in the determination of CAT claims. In *FB v Director of Immigration and Secretary for Security* ((2009) 2 HKLRD 346), the Court of First Instance ("CFI"), in considering the fairness of the procedures for dealing with torture claimants, held, *inter alia*, that the Director of Immigration's blanket policy of denying legal representation to torture claimants

was unlawful and failed to meet the required high standards of fairness. In December 2008, CFI 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.

4. The Administration subsequently implemented the enhanced mechanism in December 2009. The enhanced mechanism incorporated the provision of publicly-funded legal assistance to torture claimants through the Duty Lawyer Service ("DLS"), enhanced training for decision makers and the establishment of a new petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

### **Establishment of a legislative regime for handling torture claims**

5. In the light of the concerns and recommendations raised in the concluding observations of the United Nations Committee Against Torture on the "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two : Hong Kong Special Administrative Region", the Administration introduced the Immigration (Amendment) Bill 2011 into the Legislative Council ("LegCo") in 2011, which was passed in July 2012 and came into operation on 3 December 2012. The Immigration (Amendment) Ordinance 2012 provides for a statutory process for making and determining claims, including how a torture claim is made, the time limit for a claimant to return the torture claim form, the requirements for ImmD to arrange screening interviews and issue written notices of decision, etc. It also provides that a claimant who was aggrieved by the decision might lodge an appeal, which would be handled by a statutory Torture Claims Appeal Board.

### **Unified screening mechanism**

6. Pursuant to the judgment of CFA in *Ubamaka and C*, the Administration introduced a unified screening mechanism ("USM") which commenced operating on 3 March 2014 to screen claims made by illegal immigrants refusing to be removed to another country on all applicable grounds (i.e. non-refoulement claims). Apart from the risk of torture as defined under CAT, these applicable grounds include the risk of cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights ("BOR Article 3 claims"), and/or persecution drawing reference to Article 33 of the 1951 Refugee Convention relating to the Status of Refugees ("the Refugee

Convention"). The screening procedures of USM follow those of the statutory screening mechanism for torture claims, which has been in place since the enactment of the Immigration (Amendment) Ordinance 2012.

7. According to the Administration, the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong. The Administration has a long-established policy of not granting asylum to nor determining the refugee status of anyone. The illegal immigrant status of non-refoulement claimants will not change because of their non-refoulement claim, regardless of its result.

8. In view of the influx of illegal immigrants since 2014, the Administration has reviewed the procedures of USM and introduced in 2015 some enhancement measures to achieve more efficient screening and optimise the use of available manpower and financial resources, such that illegal immigrants lodging a claim for non-refoulement could be screened (and if rejected, removed from Hong Kong) as early as possible. Such measures include -

- (a) abridging the claim form by reducing the number of questions;
- (b) providing claimants with a screening bundle containing personal records that are relevant to the claim, so as to save all parties' time and effort to peruse irrelevant records; and
- (c) requesting duty lawyers to offer possible dates for conducting screening interviews immediately after a claim form is served on claimants in order to expedite the screening procedures.

According to the Administration, with the implementation of the above enhancement measures, the time needed for determining a claim could be shortened from an average of 25 weeks in the past to about 15 weeks.

## **Deliberations of the Panel**

### Handling of non-refoulement claims under USM

#### *Processing time for non-refoulement claims*

9. Members noted with grave concern that there were 9 884 claims for non-refoulement pending determination by ImmD as at the end of May 2015. Some members pointed out that based on the Administration's expected rate of making about 2 000 decisions in a year, it would take at least five years for

ImmD to process all the 9 884 outstanding claims. It would still take about three years for determining all the claims pending screening, even if the time needed for determining a non-refoulement claim could be shortened to 15 weeks upon the introduction of enhancement measures. Given the substantial increase in the number of new non-refoulement claims in 2014, members considered that there was a pressing need to expedite the screening procedures.

10. The Administration explained that the time needed for determining a non-refoulement claim varied from one case to another. Before the commencement of USM, most torture claims (nearly 70%) could be determined within five months of commencing the statutory screening procedures. However, the processing of some torture claims had taken a longer time when difficulties were encountered, including the claimant's failure to attend a briefing session for commencement of the screening process, failure to contact his lawyer to give instruction for submission of torture claim form and supportive documents, failure to attend scheduled interviews without reasonable excuse and failure to provide supplementary information after extension of the deadline for submission. In cases where the claimant lodged an appeal or applied for a judicial review, the time taken would even be longer. Nonetheless, with the implementation of the enhancement measures, the time needed for determining a claim would be reduced.

*Time allowed for completion of non-refoulement claim form*

11. Members noted that under the statutory mechanism, claimants had 28 days to complete their claim forms. Since the introduction of USM, claimants had been given 21 additional days to return their claim forms. The time allowed in Hong Kong for completion of non-refoulement claim form was longer than that allowed in other jurisdictions. According to the Administration, since the implementation of USM, 95% of the claimants completed the claim forms within the extended deadline of 49 days. The average time involved for return of the completed claim forms was 35 days, as compared to an average of 27 days under the former mechanism.

12. In response to some members' concern about whether the time allowed for a claimant to complete a claim form could be reduced to speed up the screening process, the Administration explained that at the request of DLS, an additional three weeks had been given to a claimant to complete a claim form under USM, thus giving a claimant a total of seven weeks to return a claim form. The Administration would consider reviewing the time allowed for a claimant to complete a claim form, after implementation of the enhancement measures.

*Processing of claims under Article 3 of the Hong Kong Bill of Rights and persecution claims*

13. Clarification was sought on whether BOR Article 3 claims and persecution claims were processed under USM by the Administration or United Nations High Commissioner for Refugees ("UNHCR"). According to the Administration, asylum claims lodged under the Refugee Convention were processed by UNHCR, while BOR Article 3 claims as well as persecution claims drawing reference to the same Convention were processed by the Administration under USM. ImmD was required to determine persecution claims lodged by persons whose asylum claim was found not substantiated by UNHCR.

14. Some members were concerned about whether the Administration had any plan to establish a statutory mechanism to process BOR Article 3 claims and persecution claims. The Administration advised that its intention was to process torture claims under a statutory mechanism, whereas BOR Article 3 claims and persecution claims were processed under USM (the screening procedures of which followed those of the statutory screening mechanism for torture claims). The Administration considered it more appropriate to accumulate more experience in the screening of such cases before considering the way forward.

*Substantiated non-refoulement claims*

15. Noting that the substantiated non-refoulement claims determined by ImmD was only about 0.3%, some members expressed grave concern that the percentage was very low. The Administration explained that whether a person's non-refoulement claim was substantiated depended on the individual circumstances of his case as well as the situation in his country of origin. In determining a non-refoulement claim, the duty of ImmD was to assess whether an illegal immigrant should be removed immediately, or whether removal action should be temporarily withheld until his claimed risks ceased to exist.

16. Some members also expressed concern as to whether the claimants of substantiated non-refoulement claims had been referred to UNHCR for resettlement in other countries. The Administration advised that non-refoulement claimants whose claims had been substantiated would be allowed to remain in Hong Kong and their removal would be withheld until their claimed risk ceased to exist. Where a non-refoulement claim was substantiated on grounds of, inter alia, persecution risks, the claimant would be

referred to UNHCR for consideration of recognition as refugee and arrangement of resettlement to a third country.

### Abuse of USM

17. Some members were gravely concerned that the long waiting time before a claim was determined would expose the existing regime to abuse by claimants. These members considered that the determination process of claims should be completed as soon as possible to prevent abuse. Some members were concerned that most claimants in Hong Kong came from countries not in war. These members sought information on the places from which the claimants had come to Hong Kong and how the profile of claimants in Hong Kong compared to those in other countries as well as the average time period for which the claimants whose claims had been determined under USM had remained in Hong Kong. Some members further asked whether a non-refoulement claimant who was an illegal immigrant or overstayer could be removed from Hong Kong once he was arrested for taking up illegal employment, so as to prevent the abuse of USM by those claimants who took up illegal employment in Hong Kong. Some members suggested that the Administration should impose a time limit for non-foulement claimants to make claims under USM during their stay in Hong Kong.

18. The Administration advised that according to UNHCR's statistics, refugees originated mostly from Syria, Afghanistan, Somali, Sudan and South Sudan. In Hong Kong, most claimants came from South or Southeast Asia, with Pakistan, India, Vietnam, Bangladesh and Indonesia ranking the top five as at the end of May 2015. Some claimants had travelled from their country of origin to Hong Kong directly, while others had travelled via another place to Hong Kong. Among the claimants, 43% entered Hong Kong illegally. Some claimants had been arrested for taking illegal employment in Hong Kong. Overall speaking, claimants had remained in Hong Kong for 13 months on average before lodging a claim. For overstayers, the average was 19 months.

19. The Administration further advised that once a non-refoulement claim had been lodged, the Director of Immigration was required, according to the ruling of CFA, to independently determine whether the claim was substantiated before executing removal. The Administration further advised that the Immigration (Amendment) Ordinance 2009, which came into effect in November 2009, prohibited illegal immigrants or people who were subject to a removal order or deportation order from taking any employment. Continued efforts had been made by law enforcement agencies ("LEAs") to combat illegal immigration and illegal employment. About 100 to 200 claimants had been

arrested per year for taking up illegal employment. In the first five months of 2015, 16 employers had been prosecuted for illegal employment of non-refoulement claimants. Besides, intelligence was exchanged between LEAs and relevant Mainland authorities to combat illegal immigration. The Administration added that the conviction of a claimant and his non-refoulement claim were separate issues which had to be dealt with separately. CFA had ruled that claimants might only be detained for a period that was reasonable in all circumstances.

#### Support for non-refoulement claimants

20. Some members were concerned about the support services provided for non-refoulement claimants, such as education, interpretation service and medical service. The Administration advised that schooling applications from minors of non-refoulement claimants were handled by the Education Bureau having regard to the circumstances of individual cases, upon confirmation with ImmD that they would unlikely be removed from Hong Kong in the near future.

21. With respect to the provision of interpretation service, the Administration advised that ImmD had employed five in-house interpreters to provide language support for claimants during briefing sessions and screening interviews, and translate documents submitted by claimants. ImmD also hired part-time non-government interpreters on a need basis from a pool of over 280 such interpreters registered under the Judiciary. ImmD would recruit more interpreters to cater for the ongoing influx of illegal immigrants making non-refoulement claims.

22. Members noted that non-refoulement claimants were prohibited under the law from taking up employment in Hong Kong. For those substantiated non-refoulement claimants who might stay in Hong Kong for an indefinite period until his claimed risks ceased to exist, the Director of Immigration might, on their application and as a matter of discretion, grant them permission to take up employment on an exceptional basis.

#### Public expenditure on non-refoulement claims

23. Members were concerned that the estimated expenditure arising from the screening of claims and provision of support for claimants would amount to \$644 million in 2015-2016. Some members expressed the view that the Administration should consider imposing a cap on publicly-funded legal assistance to claimants. The Administration advised that while some countries

had imposed statutory limit on publicly-funded legal assistance to claimants, it needed to study such overseas experience before drawing up concrete proposals.

Training for the legal profession on the handling of non-refoulement claims

24. Some members called on the Administration to speed up the screening of non-refoulement claims by allocating more resources for the training of duty lawyers in handling non-refoulement claims. The Administration advised that training on the handling of non-refoulement claims for duty lawyers was provided by the Law Society of Hong Kong and the Hong Kong Bar Association with the support of the Administration. As of July 2015, about 500 duty lawyers had already received relevant training.

**Relevant papers**

25. A list of relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
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## Appendix

### Relevant papers on unified screening mechanism for non-refoulement claims

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Welfare Services and Panel on Security	18.7.2006 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	31.7.2006 (Item I)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2994/05-06(01)</u> <u>LC Paper CB(2)526/06-07(01)</u>
	5.12.2006 (Item V)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2429/07-08(01)</u>
	27.10.2008 (Item IV)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)366/08-09(01)</u> <u>LC Paper CB(2)433/08-09(01)</u>
	3.2.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	6.7.2009 (Item III)	<u>Agenda</u> <u>Minutes</u>
	29.9.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
	1.12.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	12.4.2011 (Item IV)	<u>Agenda</u> <u>Minutes</u>

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Bills Committee on Immigration (Amendment) Bill 2011	--	<u>Report of the Bills Committee to the Legislative Council</u>
Legislative Council	21.11.2012	<u>Official Record of Proceedings (Question 10)</u>
	20.2.2013	<u>Official Record of Proceedings (Question 14)</u>
Panel on Security	2.7.2013 (Item II)	<u>Agenda Minutes</u>
Legislative Council	7.5.2014	<u>Official Record of Proceedings (Question 4)</u>
Panel on Security	3.6.2014 (Item VI)	<u>Agenda Minutes</u>
Legislative Council	18.6.2014	<u>Official Record of Proceedings (Question 14)</u>
	21.1.2015	<u>Official Record of Proceedings (Question 9)</u>
	29.4.2015	<u>Official Record of Proceedings (Question 16)</u>
Panel on Security	7.7.2015 (Item IV)	<u>Agenda Minutes</u> <u>LC Paper CB(2)2048/14-15(01)</u>
Legislative Council	28.10.2015	<u>Official Record of Proceedings (Question 1)</u>
	28.10.2015	<u>Official Record of Proceedings (Question 12)</u>

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Security	3.11.2015 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>

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