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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 11 November 2016**

Unified screening mechanism for non-refoulement claims

Purpose

This paper provides background information and summarizes 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 any non-refoulement claimants 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 reviewed the procedures of USM and introduced in 2015 some enhancement measures to achieve more efficient screening and optimize 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.

Deliberations of the Panel

Screening of non-refoulement claims under USM and abuse of USM

9. Noting that there were 11 178 claims pending determination by the end of April 2016 and many claimants had to wait for about a year to attend an interview by officers of ImmD, members were generally of the view that measures should be introduced to expedite the screening of non-refoulement claims. More manpower resources should be provide to ImmD to speed up the screening of claims. Some members suggested that a claimant should be required to submit a claim within a specified time period from his time of arrival in Hong Kong, the time allowed for completion of a claim form should be shortened and the application of a claimant who failed to attend an interview without a valid reason should be revoked.

10. The Administration advised that the time needed for determining a non-refoulement claim varied from one case to another. Measures had been introduced to address the rapid increase in the number of new claimants. These included the tightening of immigration control, the launching of enforcement operations in parallel with relevant Mainland authorities to combat smuggling of non-ethnic Chinese illegal immigrants ("NECIIs") across the boundary and the commencement of the Immigration (Unauthorized Entrants) (Amendment) Order 2016 in May 2016 to impose a heavier penalty on syndicates involved in the smuggling of NECIIs into Hong Kong.

11. Members noted 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 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.

Substantiated non-refoulement claims

12. 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.

13. Some members also expressed concern as to whether the claimants of substantiated non-refoulement claims had been referred to the United Nations High Commissioner for Refugees ("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. Members were also advised that the 1951 Refugee Convention and its 1967 Protocols had never been applied to HKSAR and the Administration would never consider non-refoulement claimants as "refugees" or "bogus refugees". The Administration stressed that all non-refoulement claims were screened in accordance with relevant laws and court judgments in Hong Kong.

Public expenditure on non-refoulement claims

14. 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.

Crime committed by non-refoulement claimants

15. Some members were concerned that there was an increase in crime committed by claimants. These members expressed concern that non-refoulement claimants were affecting the daily life of Hong Kong residents. The ethnic minorities in Hong Kong had also complained that their daily life was affected by the large number of non-refoulement claimants in Hong Kong. They considered that the Police should step up patrol in districts and ImmD should launch more operations to combat illegal employment. Some members, however, queried whether the crime rate of non-refoulement claimants was exceptionally high in comparison with the overall crime rate of Hong Kong. The Administration advised that the total number of NECIIs released on recognizance who were arrested for crime in 2014, 2015 and the first five months of 2016 were 665, 1 113 and 542 respectively. The Administration further advised that prosecution had been instituted against claimants who took up illegal employment as well as their employers, who were both in breach of the law.

16. Some members were of the view that claimants convicted of crime in Hong Kong should be immediately repatriated. The Administration advised that even if a claimant was convicted of crime, it was still necessary to meet the court's request to screen the claim concerned under procedures which met a high standard of fairness. In this connection, the Administration was seeking to complete the screening of such claims before the claimants concerned had completed their sentence terms.

17. Some members considered that accommodating non-refoulement claimants in closed camps would better protect the personal safety of claimants and facilitate the maintenance of law and order in Hong Kong. This would also reduce the incentives for claimants to come to Hong Kong. According to the Administration, the detention of non-refoulement claimants involved legal and other complex issues. While the Administration would study the issue, it had not formed any views on the matter.

Comprehensive review of USM

18. In the Policy Agenda published in January 2016, the Administration highlighted the need to launch a comprehensive review of the strategy in handling USM claims in the areas of pre-arrival control, screening procedures, detention and enforcement, so as to contain and reverse the growing number of USM claimants stranded in Hong Kong.

19. When deliberating on the scope of the review, members strongly called on the Administration to speed up the processing of non-refoulement claims. Some members were gravely concerned about the abuse of the screening procedures. They considered that the prolonged presence of a growing number of non-refoulement claimants in Hong Kong would result in financial burden and impact on law and order. Some other members, however, considered that a sympathetic attitude should be adopted towards claimants.

20. The Administration advised that its priority was to adopt appropriate measures, under the prevailing legal requirements, to intercept illegal immigrants at source and to expedite the screening process to remove unsubstantiated claimants to their country of origin as soon as possible. Necessary training had also been provided to all ImmD staff involved in handling non-refoulement claims. Members were assured that throughout the review process, the Administration would listen to the views of stakeholders on effective measures to ensure that genuine claimants were identified without delay, abuses of the screening procedures were minimized, and economic migrants were deterred from coming to Hong Kong for illegal work.

Relevant papers

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

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

Committee	Date of meeting	Paper
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>

Committee	Date of meeting	Paper
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 9)</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>
Panel on Security	3.11.2015 (Item V)	<u>Agenda Minutes</u>

Committee	Date of meeting	Paper
Panel on Security	2.2.2016 (Item VI)	Agenda Minutes
Legislative Council	24.2.2016	Official Record of Proceedings (Question 18)
Panel on Security	7.6.2016 (Item IV)	Agenda Minutes
Subcommittee on Immigration (Unauthorized Entrants) (Amendment) Order 2016	--	Report of the Subcommittee to the House Committee
Panel on Security	11.6.2016 (Item I)	Agenda Minutes
Legislative Council	15.6.2016	Official Record of Proceedings (Question 12)

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