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Panel on Security

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 8 January 2019**

**Proposed legislative amendments relating to
the handling non-refoulement claims**

Purpose

This paper provides background information and summarizes Members' past discussions on the Administration's proposed legislative amendments relating to the handling of 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.

3. Pursuant to several court rulings since 2004, the Administration has reviewed and revised the administrative screening mechanism for torture claims. The revised mechanism, which commenced in December 2009, includes the provision of publicly-funded legal assistance ("PFLA") to torture claimants through the Duty Lawyer Service ("DLS"), enhanced training for decision makers and a petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

4. The Immigration (Amendment) Ordinance 2012, which came into operation in December 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 the Immigration Department ("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 ("TCAB").

5. In March 2014, the Administration commenced operating the unified screening mechanism ("USM") to screen non-refoulement claims on all applicable grounds.¹ The screening procedures of USM follow those of the statutory screening mechanism for torture claims, which have been in place since the enactment of the Immigration (Amendment) Ordinance 2012. Since then, there were increasing numbers of non-ethnic Chinese illegal immigrants and non-refoulement claimants. At the same time, the number of claims pending the commencement of screening procedures by ImmD was on the rise. As a result, the Administration launched a comprehensive review of the strategy of handling non-refoulement claims in 2016, focusing on the following four areas:

- (a) preventing potential claimants from entering Hong Kong;
- (b) expediting the commencement of screening procedures for pending claims, shortening the screening time per claim, and expediting the handling of appeals;
- (c) expediting repatriation of the claimants whose claims have been rejected; and
- (d) studying detention policies and stepping up law enforcement.

Members' deliberations

6. The Panel on Security ("the Panel") and the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims discussed the Administration's progress of comprehensive review of the strategy of handling non-refoulement claims and proposed legislative amendments in July and November 2018 respectively. The deliberations are summarized in the following paragraphs.

¹ A claim by someone subject to be removed from Hong Kong to another country that if removed to that country, he will be subjected to torture, or his absolute and non-derogable rights under the Hong Kong Bill of Rights ("HKBOR") will be violated (including being arbitrarily deprived of his life as referred to in Article 2 and cruel, inhuman or degrading treatment or punishment as referred to in Article 3 of HKBOR), or be persecuted, etc.

Measures to expedite the screening of non-refoulement claims

Submission of claim forms

7. Members noted that under the existing screening procedures, non-refoulement claimants were given 49 days to return their claim forms.² With a view to enhancing the screening efficiency, members were advised that the Administration was considering tightening the statutory timeframe for submission of claim forms (e.g. to 14 days). To ensure fairness, claimants could request for an extension of claim forms if they had exercised all due diligence to comply with the original deadline as far as practicable, and under "exceptional" and "uncontrollable" circumstances.

8. Information was sought on the extent to which the screening of non-refoulement claims could be expedited after the Administration's proposals were implemented. Members were advised that under the Administration's proposed legislative amendments, the average time needed for determining a claim by ImmD would be shortened from the current 10 weeks to about five weeks, and the average time needed for determining an appeal would be shortened from 16 weeks to about 11 weeks. In short, the entire process of determining a claim, including appeal, would be reduced from about 26 weeks to about 16 weeks.

9. Some members expressed support for the proposed tightening of the statutory timeframe for submission of claim forms so as to expedite the screening of claims. They were, however, concerned that allowing a claimant to request for an extension of the timeframe for returning a claim form on the ground of "exceptional" and "uncontrollable" circumstances might be open to abuse. The Administration explained that examples of circumstances which would be considered as "exceptional" and "uncontrollable" included situations in which the claimant was arrested by another law enforcement agency or suffered from serious illness. To avoid abuse, documentary proof of the "exceptional" and "uncontrollable" circumstances would be required.

10. Some other members, however, considered that shortening the timeframe for submission of claim forms to 14 days was unnecessary, given that the number of pending claims had been significantly reduced in recent years. Nonetheless, these members took the view that it was important for the legislative amendments to be introduced to meet the high standards of fairness laid down by the court. According to the Administration, the existing regime for the screening of non-refoulement claims, which incorporated

² A claimant must complete and return the claim form within 28 days to commence the screening procedures. At the request of DLS upon implementation of USM, claimants are given 21 additional days to return their claim forms by means of administrative measures.

publicly-funded legal assistance, free interpretation service and free medical examination, as well as an appeal mechanism, met the high standards of fairness required by the court. The proposed measures to expedite the screening of claims, which had been drawn up having regard to relevant overseas practice and the operational experience of USM, also adhered to such standards.

11. The Administration further advised that it was the requirement in relevant legislation of Canada and the United Kingdom ("UK") that the burden of proving a claim rested with the claimant. Besides, the proposal to shorten the statutory timeframe for submission of a claim form from 28 to 14 days had been drawn up having regard to the timeframes adopted overseas. For instance, the timeframe adopted in Canada had been shortened from 28 days in the past to 15 days. The screening procedures in Hong Kong, which had been drawn up having regard to the high standards of fairness required by the court, relevant overseas legislation and practice, as well as the circumstances of Hong Kong, offered better protection of the rights of claimants than many other jurisdictions. For example, an average of 57 hours of publicly-funded legal assistance was provided to a claimant in Hong Kong, as compared to an average of 13 to 23 hours for a claimant in other countries.

Screening interviews

12. As regards the screening interviews, members were advised that the Administration was considering adding provisions in the Immigration Ordinance (Cap. 115) ("IO") to set out the procedures and rules of arranging interviews between ImmD and claimants, so as to prevent claimants from making repeated requests for deferral of interviews or re-scheduling an interview without any reason. The Administration was also considering stipulating in IO that a claimant could apply for re-scheduling an interview only due to "exceptional" and "uncontrollable" circumstances, and such application must be submitted before the original interview date.

13. Some members noted with concern about the proposal to stipulate in IO that if a claimant was reasonably supposed to understand and to be able to communicate in another language, the screening interview needed not to be conducted in the claimant's most proficient language. These members were concerned that a claimant's basic rights would be affected.

14. The Administration advised that in other countries like Germany and UK, screening interviews also needed not to be conducted in the claimant's most proficient language or dialect, but only in languages in which the claimant could reasonably communicate. The proposal sought to minimize the delay in screening due to failure to arrange an interpreter as requested by the claimant.

Appeals

15. Noting that the Administration was considering tightening the statutory timeframe for lodging an appeal from 14 days to seven days if aggrieved by ImmD's decision, some members were concerned that the proposed arrangement was unfair to the claimants. This would also cause practical difficulties for the legal representatives of claimants to prepare and file a notice of appeal. According to the Administration, the role of TCAB was to consider the ground of the claim and the relevant supporting documents from the claimant afresh. Moreover, when lodging an appeal, the grounds and supporting documents of the claimant should in general be largely the same as those previously submitted to ImmD for screening. The Administration therefore proposed to tighten the statutory timeframe for lodging an appeal.

16. Information was sought on the average time taken for the determination of an appeal. The Administration advised that upon assignment of an appeal to a TCAB member, the average time for determination of the appeal was currently around 33 weeks. After preliminary assessment of an appeal case, an assigned TCAB member would decide whether there was a need to conduct an oral hearing. If an oral hearing was to be held, TCAB had to serve a notice on the relevant parties not less than 28 days before the date of hearing as required by law. Currently, the time for scheduling/conducting a hearing generally took about 14 weeks, and some 13 weeks were normally required for the issuance of the decision. Consideration was also being given by the Administration to tightening the timeframe for serving a notice of hearing on an appellant.

17. Some members expressed concern about whether TCAB had a sufficient number of members to hear and determine appeals. According to the Administration, it was aware of the need for a sufficient number of TCAB members to hear and determine appeals. It had since July 2016 appointed over 70 new members to TCAB, expanding its membership to the current strength of 102. The establishment of the TCAB secretariat had also been increased from 12 to 20 posts, with a further increase of 15 new time-limited posts in the 2018-2019 financial year. The Administration would further appoint suitable members to TCAB and increase the number of staff of the TCAB secretariat as and when necessary, so as to clear up the appeals backlog as soon as practicable. The Administration further advised that if the number of new claims and appeals received per month remained at the existing level, TCAB should be able to handle the pending appeals in about two to three years' time.

Removal procedures for rejected claimants

18. To enhance ImmD's removal efficiency, members were advised that the Administration was considering adding provisions in IO to prescribe that even though the appeal was pending, once the claim had been rejected by an

immigration officer, the Government could liaise with the relevant authorities for repatriation arrangements in parallel. Some members expressed concern about whether the proposed arrangement met the high standards of fairness. The Administration advised that liaison with relevant overseas authorities on the repatriation arrangements for a rejected claimant while the appeal concerned was pending would only be conducted on the prerequisite of not disclosing whether the person concerned had filed a claim. As the action was only taken after ImmD had determined the claim, fairness of handling the claim was safeguarded.

19. Some members enquired about the difficulties encountered in the repatriation of a rejected claimant. The Administration advised that before repatriation of a rejected claimant, ImmD had to contact the claimant's home country for verification of the claimant's identity and issue of necessary travel document. While the work required cooperation of the home country of the claimant, it had been observed that many authorities had accorded a rather low priority to such work. Complications might also arise in the repatriation arrangements if there was no direct flight from Hong Kong to the claimant's home country.

20. Some members were of the view that claimants convicted of crime in Hong Kong should be repatriated immediately. The Administration advised that the court had ruled that the right of a claimant not to be subjected to cruel, inhuman, or degrading treatment or punishment was absolute. Even if a claimant was convicted of crime, it was still necessary to screen the claim concerned under procedures which met the high standards of fairness required by the court. As such, removal procedures of rejected claimants would only be commenced after all the screening and appeal procedures were completed. The Administration assured members that although claimants would not be repatriated immediately upon their conviction of crime, their claims were given priority to be handled, such that they could be removed as soon as possible if their claims were rejected.

21. Some members expressed concern that claimants who had absconded might pose a security threat to Hong Kong. According to the Administration, consideration was being given to stipulating in IO that if a claimant had absconded or lost contact before commencement of the screening procedures, his claim would be deemed withdrawn automatically.

Accommodating non-refoulement claimants in closed detention centres

22. Members noted that about 1 500 claimants had been arrested for committing crime in Hong Kong in the previous two years respectively. The offences involved included wounding and serious assault, indecent assault, robbery, drug offences and theft. Some members expressed concern about the

prevalence of crime committed by non-refoulement claimants in districts such as Shamshuipo and asked whether consideration would be given to accommodating claimants in closed detention centres.

23. The Administration advised that it was very concerned about the crime committed by claimants and the Police had established a dedicated team under the Organized Crime and Triad Bureau to combat such crime. Regarding the question of closed detention, the Administration advised that according to a relevant court ruling, ImmD could continue to detain an illegal immigrant only if it was believed that the illegal immigrant could be removed within a reasonable period. As there were still around 3 000 claims pending screening and a number of appeals pending determination at present, the issue of whether all non-refoulement claimants should be detained could be further considered after the tightened timeframe and procedures had come into operation with the implementation of the proposed legislative amendments, by then the screening of claimants and removal of unsubstantiated claimants were expected to be executed within a reasonable period. The Administration stressed that the setting up of detention centres was a complicated issue with diverse views from the society, it would continue studying the issue, including exploring into any lawful, practicable and effective option, and would keep the Legislative Council ("LegCo") updated when ready.

Timing for introduction of the proposed legislative amendments and consultation with relevant parties

24. Members were advised that the Administration planned to introduce the proposed legislative amendments relating to the screening of non-refoulement claims into LegCo in the 2018-2019 legislative session.

25. Some members expressed concern whether the Administration had, apart from consulted LegCo, conducted any consultation on the legislative proposals. The Administration stressed that the comprehensive review of the strategy of handling non-refoulement claims was still ongoing and the proposed legislative amendments, including the tightening of the timeframe for submission of claim forms and lodging of appeals, were preliminary suggestions. It had maintained communication with the Hong Kong Bar Association and the Law Society of Hong Kong, as well as other relevant stakeholders on the review.

26. The Administration will brief the Panel on the latest legislative proposals relating to non-refoulement claims at the meeting on 8 January 2019.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
2 January 2019

Appendix

Relevant papers on proposed legislative amendments relating to the handling non-refoulement claims

Committee	Date of meeting	Paper
Panel on Security	2.7.2013 (Item II)	Agenda Minutes
	3.6.2014 (Item VI)	Agenda Minutes
	7.7.2015 (Item IV)	Agenda Minutes LC Paper CB(2)2048/14-15(01)
	3.11.2015 (Item V)	Agenda Minutes
	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)
Panel on Security	11.11.2016 (Item V)	Agenda Minutes

Committee	Date of meeting	Paper
	6.6.2017 (Item IV)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims	27.3.2018	Agenda Minutes
	24.4.2018	Agenda Minutes
	21.5.2018	Agenda Minutes
Panel on Security	10.7.2018 (Item III)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims	27.11.2018	Agenda

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