

SUBMISSION TO THE PANEL ON SECURITY OF THE LEGISLATIVE COUNCIL

For its meeting on 8 January 2019

January 2019

Justice Centre Hong Kong (Justice Centre) makes the following submissions to the Panel on Security (the Panel) of the Legislative Council of the Hong Kong Special Administrative Region, China (Hong Kong) for its meeting on 8 January 2019 on government proposals to amend the Immigration Ordinance in relation to non-refoulement claims.

Justice Centre welcomes the Administration's consideration of calls of civil society for a comprehensive legal basis to the Unified Screening Mechanism, which is now premised on a statutory mechanism for torture claims as well as administrative measures for non-refoulement claims.¹ We request the Administration to consult civil society, the legal community and people in need of protection for this purpose.

Justice Centre recommends members of the Panel oppose the proposals that the Administration considers making to amend the Immigration Ordinance, Cap.115 to limit the time for making a non-refoulement claim, to allow removal of a claimant before leave to judicial review is granted, to add factors that justify the detention of claimants, and to prevent the entry of potential claimants into Hong Kong by prohibiting from boarding the plane or other means of transportation. They raise concern over the protection of the rights of non-refoulement claimants and their unhindered access to the Unified Screening Mechanism, which the United Nations Committee against Torture has recommended Hong Kong to safeguard.² Many of the proposals are vague, not proportionate to their intended aims, lack evidence to justify their implementation and in Justice Centre's view would not increase efficiency as claimed by the Administration. Additionally, these proposals have not undergone considered and meaningful consultation process with impacted stakeholders prior to being presented to the Panel.

¹ Security Bureau and Immigration Department, "An Update on the Comprehensive Review of the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No. CB(2)529/18-19(03), January 2019, paragraph 20, available at: <https://www.legco.gov.hk/yr18-19/english/panels/se/papers/se20190108cb2-529-3-e.pdf>.

² Committee against Torture, 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China', CAT/C/CHN-HKG/CO/5, 3 February 2016, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/HKG/CAT_C_CHN-HKG_CO_5_22478_E.docx.

PROTECTING FORCED MIGRANTS' RIGHTS

Justice Centre takes this opportunity to reiterate the concerns and recommendations made in previous submissions on proposals to amend the Immigration Ordinance, the Firearms and Ammunition Ordinance and the Weapons Ordinance:

- Submission to the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims for its meeting on 27 November 2018;³ and
- Submission to the Panel on Security on 10 July 2018.⁴

Limiting the time for making a non-refoulement claim

In the Administration's paper for this meeting, it claims that persons in genuine need should lodge claims within a reasonable period of time.⁵ This assumes that people in need of protection know about the mechanism for claiming protection, which is not common from Justice Centre's experience. Justice Centre has clients who overstayed because they did not feel safe to return to their home countries. These claimants generally have very limited understanding of the Unified Screening Mechanism or non-refoulement laws and policies. They only made non-refoulement claims after coming into contact with the Immigration Department or other authorities because the risk of removal did not arise until then, not because they did not feel unsafe to return home. Introducing a time limit for making a claim will raise concern over violating the right of these people to non-refoulement protection.

Also, in the Administration's paper for this meeting, the fact that circumstances can change and the risk of persecution or torture can arise after the time limit has passed seems not to have been considered.

Besides, it is unclear how introducing a time limit for making a non-refoulement claim will achieve the objective of discouraging the "abuse" of the screening procedure to delay repatriation, if any, as claimed by the Administration. If such a time limit is introduced, individuals who know about the Unified Screening Mechanism and the time limit will likely try to comply with it. It will unlikely reduce the number of claims received by the Administration. Such claims may also be prepared without the benefit of legal advice, which will not increase the efficiency of the Unified Screening Mechanism, as claimants do not have access to publicly funded legal advice before they lodge a claim.

The Administration's paper provides no data to demonstrate that limiting the time for making a claim in the manner proposed would be effective, such as referring to similar jurisdictions where such measures have been successful.

³ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims", LC Paper No. CB(2)325/18-19(01), November 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181127cb2-325-1-e.pdf.

⁴ Justice Centre Hong Kong, "Submission to the Panel on Security On the comprehensive review of the strategy of handling non-refoulement claims", LC Paper No. CB(2) 1794/17-18(01), November 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1794-1-e.pdf>.

⁵ Security Bureau and Immigration Department, "An Update on the Comprehensive Review of the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)", paragraph 4.

Given that representatives from the Security Bureau have considered non-refoulement policies in overseas jurisdictions as part of the comprehensive review, it is notable that neither this measure, nor any other proposed in Administration's paper, refers to comparative jurisdictions or provides relevant data to justify the considerations.

Allowing removal before leave to judicial review is granted

The proposal being considered by the Administration to allow removal before leave to judicial review is granted is very concerning. It will in effect deny access to the fundamental constitutional right to judicial review of non-refoulement claimants. This is a disproportionate response for the sake of efficiency that will negatively impact upon the rule of law in Hong Kong.

To justify this proposal, the Administration stated that claimants can appeal a rejection of their non-refoulement claim at the Torture Claims Appeal Board (TCAB). However, the decision of the TCAB itself is an administrative decision and is therefore subject to judicial review by definition like any other administrative decisions. In fact, there have been very problematic decisions made by the TCAB, which have led to judicial review challenges. Basic mistakes are frequently noted including such as where the country claimants come from (in more than one case) and TCAB adjudicators using information from Wikipedia as country of origin evidence to determine claims.⁶ In a specific case of a client assisted by Justice Centre, the adjudicator insisted the hearing continue despite the pregnant claimant going into labour, which has been found by the High Court to be unlawful, failing to adhere to a high standard of fairness.⁷

The Administration also justified the proposal with the fact that only 2% of the applications for leave to judicial review relating to non-refoulement claims since 2017 have been granted. Justice Centre requests the Administration to provide the number of cases settled to give a full and accurate picture.

The publicly funded legal assistance mentioned by the Administration in its paper also ceases at the TCAB stage most of the time. Claimants have limited access to justice and redress for wrongdoings of TCAB adjudicators. 91% of non-refoulement claimants were not legally represented at the TCAB stage in 2017.⁸ It is entirely for the duty lawyers who represented the claimants at the Immigration Department stage to decide whether to continue the representation at the TCAB stage. For further information about this issue, please see Justice Centre's submission

⁶ See, for example, *Md Nazir Ahmed Sarkbar v Torture Claims Appeal Board* [2018] HKCFI 801, available at: http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114733&QS=%2B&TP=JU

⁷ *Villarico Loutherliz Talag v. Torture Claims Appeal Board* [2018] HKCFI 468; HCAL 179/2017, available at: <http://hklii.hk/eng/hk/cases/hkcfi/2018/468.html>.

⁸ Theresa Lee, for Secretary for Security, response to data request titled "Torture Claims Appeal Board Operations", 28 June 2018, available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_oper.

to the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims for its meeting on 18 October 2018.⁹

A key principle of the rule of law is that the law should be applied to all people equally and should not discriminate on arbitrary or irrational grounds. Denying access to a particular class of people to judicial review by permitting removal of non-refoulement applicants limits equal protection before the law for all persons. The Administration's paper fails to provide a rational basis for the differentiation in treatment in this case. Such an approach stands in contrast to the consistent public claims of the Administration's strong adherence to the rule of law as being "a cornerstone of our legal system"¹⁰ and would negatively impact upon the reputation of Hong Kong's legal system internationally.

Adding factors that justify the detention of claimants

The Administration is considering adding factors to consider when determining whether a period of detention is reasonable, such as whether the Immigration Department or the TCAB has a large number of claims or appeals pending and whether any procedures were hindered by the person being detained. As the Administration has recognised, the Immigration Department's detention power is subject to the common law *Hardial Singh* principles, under which the Immigration Department cannot continue to detain a person if it cannot complete the removal or screening procedures within a reasonable period of time. The assessment should be individualised. The additional external factors set out in the Administration's paper do not seem to comply with these principles and will likely result in avoidable judicial review challenges and significant public expenditure.

Also, most of the factors mentioned by the Administration are vague and without guidelines on how to objectively interpret them, such as "a large number of claims or appeal pending", "any procedures", and "hindered directly or indirectly". Moreover, it is unclear on what basis the Administration finds it necessary to allow the detention of persons who are believed to possibly pose a threat to life or property. There is no evidence suggesting that persons liable to detention are more likely to pose a threat to life or property. Again, there are no guidelines on how the Immigration Department will determine whether a person may pose a threat to life or property.

Preventing the entry of potential claimants into Hong Kong

The Administration is considering proposing legislative amendments to prevent potential claimants from entering Hong Kong, for example by requiring airlines to provide passenger information before flight departure and authorising

⁹ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims", LC Paper No. CB(2) 38/18-19(01), October 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181018cb2-38-1-e.pdf.

¹⁰ For example, see Secretary for Justice, Ms Teresa Cheng SC, "Secretary for Justice's speech at Ceremonial Opening of the Legal Year 2018", 8 January 2018, available at: <https://www.doj.gov.hk/eng/public/pdf/2018/pr20180108e1.pdf>.

the Immigration Department to request airlines not to allow individuals to board a plane. Firstly, it is unclear how, with the limited information that airlines have relating to passengers, the Administration can determine which passengers may make a non-refoulement claim upon arrival in Hong Kong. Secondly, even if the Administration can do so, the number of individuals that they can identify may be small. This has the potential to have unintended negative consequences for tourism and business, from the perspective of immigration.

Improving efficiency by providing access to early legal advice and representation to non-refoulement claimants
Improving the efficiency of the Unified Screening Mechanism without compromising fairness is in the interest of both the Administration and people in need of protection. As Justice Centre has stated in previous submissions to the Legislative Council, ensuring claimants' access to early legal advice and representation will effectively improve how a claim is argued and prepared and therefore the efficiency of the process sustainably. Allowing and funding community legal centres to develop the expertise of lawyers will ensure a sufficient number of lawyers specialising in refugee law in the long term. For further information about our proposals in this regard, please see our submission to the Panel on Administration of Justice and Legal Services in July 2017.¹¹

Responsibility sharing and granting rights to people in need of protection

The proposals under consideration suggest that the Administration regards non-refoulement claimants only from a control viewpoint without considering how Hong Kong can be in a position to protect them from persecution and torture and how they can be an asset to Hong Kong. It has been recognised by the international community that the responsibility for hosting and supporting refugees as well as protecting the human rights of all migrants should be shared, most recently in the Global Compact on Refugees and the Global Compact on Migration. China has voted for the former in its adoption and has signed the latter without excluding it from Hong Kong.¹²

Non-refoulement claimants are never considered to be assets by the Hong Kong Administration as they are classified as "illegal immigrants". However, they are so classified by the Administration itself and do not have to be. The United Nations Office of the High Commissioner for Human Rights (OHCHR) and DLA Piper released the findings of a mapping of national forms of admission and stay based on human rights and humanitarian grounds in December

¹¹ Justice Centre Hong Kong, "Submission to Panel on Administration of Justice and Legal Services", LC Paper No. CB(4)1427/16-17(01), July 2017, available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-submissions-to-AJLS-v.2.pdf>.

¹² *Report of the United Nations High Commissioner for Refugees*, United Nations General Assembly Official Records Seventy-third Session Supplement No. 12, A/73/12 (Part II), 2018, available at: <https://www.unhcr.org/excom/unhcrannual/5ba3a5d44/report-united-nations-high-commissioner-refugees-part-ii-global-compact.html> and Nathalie Risse, "UNGA Votes to Adopt Global Compact on Refugees", *ISD*, 18 December 2018, available at: <https://sdg.iisd.org/news/unga-votes-to-adopt-global-compact-on-refugees/>.

2018 in Marrakech.¹³ As pointed out by our Research and Policy Officer Annie Li, who was invited by OHCHR to speak at the panel discussion to release the findings, Hong Kong was the only jurisdiction studied in the mapping where persons in need of protection are forever considered to be irregular with no prospect of regularising their status, while in other jurisdictions there are grounds for admission and stay for irregular migrants. These grounds include being a victim of domestic violence, having been trafficked or smuggled or having serious illnesses.¹⁴ Such grounds for admission and stay exist outside of the 1951 Refugee Convention context.

Late delivery of Administration papers prior to meetings

Justice Centre is concerned that the Administration's paper for this meeting was not made publicly available until 3 January 2019, three working days before the meeting. This was not the first time the Administration's paper for a meeting of the Legislative Council was made public so close to the meeting, leaving insufficient time for key stakeholders, including civil society, to prepare written submissions. This limits the space for civil society actors to be involved in public policy and legislative developments, leading to less effective discussions in the Legislative Council and limiting the diversity of information available to Legislative Council members. For information about previous occurrences of this problem, please see Justice Centre's submissions to the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims for its meetings on 18 October 2018 and 27 November 2018.¹⁵

Recommendations

The Panel should express opposition to the above-mentioned legislative amendments being proposed or being considered to be proposed by the Administration in its papers for this meeting.

The Administration should:

¹³ United Nations Office of the High Commissioner for Human Rights and DLA Piper, *Admission and Stay Based on Human Rights and Humanitarian Grounds*, December 2018, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf.

¹⁴ Other jurisdictions studied in the mapping are Argentina, Austria, Brazil, Finland, Morocco, the Netherlands, New Zealand, Portugal and Spain. OHCHR will continue to study the practice of more jurisdictions.

¹⁵ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims", LC Paper No. CB(2) 38/18-19(01), October 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181018cb2-38-1-e.pdf and Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims", LC Paper No. CB(2)325/18-19(01), November 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181127cb2-325-1-e.pdf.

- Provide quality information about the Unified Screening Mechanism to non-refoulement claimants or potential claimants at the earliest opportunity;
- Ensure early access to legal advice and legal representation to non-refoulement claimants immediately upon the registration of claims;
- Ensure that Administration papers are made available in both Chinese and English at least two weeks in advance of the deadline for civil society to make submissions for a meeting; and
- Immediately commence a meaningful and considered public consultation process for key stakeholders with respect to the proposals being considered as part of the Comprehensive Review of the Strategy of Handling Non-refoulement Claims.

Questions for the Administration

- Since the Administration announced that it was considering proposing amendments to the Immigration Ordinance, the Firearms and Ammunition Ordinance and the Weapons Ordinance in July 2018, there has been opposition from Legislative Council members, the legal community and NGOs.¹⁶ Why has the Administration still proceeded from considering proposing some of the amendments as well as considering proposing even more legislative amendments?
- Has the Administration maintained data to track delays, if any, in the Unified Screening Mechanism? How long did the handling of non-refoulement claims take on average in each of the years from 2014 to 2018? What was the longest time taken? How many claims were delayed? What were the causes for delays?
- How will the Immigration Department interpret the factors the Administration is considering proposing to add when considering whether a period of detention is reasonable? Will any written guidance be issued?
- In coming to the proposals outlined in the Administration's paper, what research and evidence has been accumulated from other jurisdictions?
- Will the Administration hold a public consultation process on the proposals with respect to changes to the Unified Screening Mechanism being considered under the comprehensive review?

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About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

¹⁶ See, for example, Raquel Carvalho and Alvim Lum, "Rights lawyers slam Hong Kong plans to tighten asylum procedures, calling proposals 'wholly unreasonable'", *South China Morning Post*, 7 July 2018, available at: <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2154233/rights-lawyers-slam-hong-kong-plans-tighten>.

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