

**Submission by Daly & Associates**

**Submission to the Panel on Security of the Legislative Council: An Update on the Comprehensive Review of the Strategy of Handling Non-Refoulement Claims – Proposals to Amend the Immigration Ordinance (Cap. 115)**

1. On 3 January 2019, the Security Bureau and Immigration Department released an updated brief on proposals to amend the Immigration Ordinance (Cap. 115) (“IO”) (“**updated brief**”) for consideration by the Legislative Council on 8 January 2019.
2. This submission is prepared in response to the updated brief.
3. We maintain and refer to our earlier submissions dated 18 October 2018.

**Comments on proposed amendments to the Immigration Ordinance (Cap. 115)**

Time limit for making a claim

4. Pursuant to the IO, claimants can only seek non-refoulement protection when they do not have permission to remain in Hong Kong and hence are liable to removal to the country they fear harm. In short, it is because of this requirement that would-be claimants must be liable to removal from Hong Kong that claimants are rendered “illegal immigrants” prior to lodging their claims. In respect of the purported delay in making claims “*only when they are arrested after illegally staying in Hong Kong for a long time*”<sup>1</sup> we have yet to see statistics justifying this statement.
5. Insofar as the updated brief (at §5) considers adding a provision that non-refoulement claims must be lodged within 3 months of a person becoming liable to removal, failing which the person will be banned from lodging a claim will place Hong Kong in breach of its obligations to screen non-refoulement claims both pursuant to the common law in Hong Kong and Hong Kong’s obligations under the Convention against Torture. Hong Kong’s obligation to assess non-refoulement claims in accordance with the high standards of fairness is well-established and cannot be sacrificed on the altar of expedience or convenience for the HKSAR Government.
6. We further query how such a 3 month limitation would work given that the Government fails to even allow or consider claims at the port of entry unless the person is refused landing and hence immediately liable to removal. Will the Government have information pamphlets in multiple languages available at ports of entry so that would-be claimants are

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<sup>1</sup> LC Paper No. CV(2)529/18-19(03) at §4

informed of the correct procedures? A more practical means of ensuring that non-refoulement claimants can lodge their claims in a timely way would be to allow claims to be made at the port of entry to Hong Kong regardless of whether the person has permission to enter and/or remain as a visitor or on some other visa and for clear information on the procedures for making a non-refoulement claim to be made publicly available and accessible at the same time.

### Removal Procedures

7. In respect of the indication in the updated brief (at §8) that the Security Bureau and/or Director of Immigration have been “maintaining communication with the Judiciary” in respect of non-refoulement claims and appeals, we are concerned as to what information is being passed to the judiciary given the importance of the impartiality and independence of the Courts in Hong Kong and bearing in mind that the Director of Immigration is often a party to judicial review proceedings on non-refoulement claims. We request that the communications between the Security Bureau and/or Director of Immigration with the judiciary be made publicly available.
8. The proposal at §10 of the updated brief proposing that removal may be effected notwithstanding that a person has applied for judicial review and/or Legal Aid, is of grave concern and in our view, will undermine rule of law and access to justice in Hong Kong should it be implemented. Insofar as a person is making an application for legal aid to challenge the decision(s) made on his/her non-refoulement claims and/or has applied for leave for judicial review, s/he is in the course of exercising his/her rights to pursue legal proceedings in court— which rights are protected by Article 35 and Article 4 of the Hong Kong Basic Law. Any attempt to remove a person while s/he is exercising the above-noted rights, including applying for Legal Aid to enable the person to bring a legal action, will frustrate and nullify those right to pursue legal remedies contrary to the Basic Law.
9. Moreover, any removal when an application for leave to bring the judicial review is before the Court would pre-empt the Court’s role and amount to an interference in a matter before the court and/or unlawfully frustrate the person’s right to pursue legal proceedings and the remedies available therein. This is because the intended challenge by judicial review, if successful, would usually result in the quashing of the decision made on the non-refoulement claim and remittance of the claim back to the Torture Claims Appeal Board/Non-refoulement Petition Office for determination afresh. The very relief sought in the court proceedings would become moot as the person would have been removed prior to judicial scrutiny of the decision against him/her. The role of the courts

would effectively be usurped and overtaken by the Director in exercising (improperly and prematurely) powers of removal.

10. Such removal would be contrary to the Basic Law and an unreasonable and unlawful exercise of removal powers by the Director of Immigration given, *inter alia*, the importance of the interests at stake to the person (i.e. life and limb) and the rigorous scrutiny that is required by the Court on any challenge to a decision on a non-refoulement claim.
11. As such, a person's application to Legal Aid and/or intended challenge of the decisions made on his/her non-refoulement claims constitutes a legal impediment to his removal from Hong Kong.

### Detention

12. Administrative detention is a draconian power which infringes upon important fundamental rights including the right to liberty and security of person and freedom of movement. These rights are set out in all major human rights instruments<sup>2</sup> as well as essential components of Hong Kong's Basic Law.<sup>3</sup> Accordingly, in determining the parameters of administrative detention, the starting point is to construe this power narrowly. Indeed, the administration concedes that in exercising its power to detain individuals under the IO, it must comply with the *Hardial Singh* principles in tandem with the Court of Final Appeal's judgment in *Ghulam Rbani v. Secretary for Justice* (FACV 15/2013), the latter of which holds, *inter alia*, that the Director of Immigration should not seek to exercise the power of detention if it becomes apparent that the purpose for said detention, such as removal, cannot be effected within a reasonable period of time.
13. Presently, non-refoulement claimants awaiting decisions on their claims and/or appeals have been detained for prolonged and unspecified durations solely on the basis that their cases are undergoing determination. The administration now proposes to take into account additional irrelevant factors, many of which are outside of the detained individual's responsibility and/or control to further expand its detention powers. We submit that the consideration of these additional factors (such as "*whether there are a large number of claims or appeals pending screening by ImmD or TCAB*", "*whether any procedures were hindered directly or indirectly by the person being detained*", and "*whether there are other situations beyond the control of ImmD*") to assess the

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<sup>2</sup> See for example: Articles 9, 12, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>3</sup> Articles 28, 31, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Hong Kong (1997).

justification of deprivation of liberty amounts to an unlawful and unreasonable exercise of power.

14. Administrative detention risks the erosion of fundamental human rights and any measures that would infringe upon such rights must be subject to intense scrutiny (i.e. their implementation should be strictly necessary and proportionate). In this connection, the administration already has an arsenal of less restrictive but nonetheless effective legal alternatives to detention. For example, under section 36 of the IO, the administration has the power to release non-refoulement claimants under conditions on recognizance and require them to report to the immigration authorities on a regular and ongoing basis, such as every two weeks, and to confirm in writing any change of address. This ensures that the presence, whereabouts, and general activities of such claimants in Hong Kong are known. Ultimately, the current proposal strays dangerously away from the basic principle that detention should be implemented as a last resort measure only.
15. Separately, seeing as the administration intends to expedite the screening process for non-refoulement cases, this proposal is counterproductive. In our experience, detention serves to delay the screening process by creating a myriad of problems including difficulties in: arranging for interpreters, seeking legal advice (for claimants), seeking instructions (for legal representatives), accessing necessary documentation, and gathering evidence. It is also massively expensive to detain an individual. In any case, fundamental rights should not be sacrificed on the altar of expediency or convenience for the administration.
16. Finally, detention laws must conform to the principle of legal certainty. This requires *inter alia* the law and its legal consequences to be foreseeable and predictable. The proposal does not afford non-refoulement claimants, the detaining authorities, or any entity reviewing the legality of the detention certainty as to the length of detention.

#### Unlawful employment

17. We note that the Immigration Department is proposing to amend section 38AA of the IO, so that it can prosecute any persons who enter Hong Kong as a visitor and is subsequently arrested for unlawful employment upon overstaying. The alleged purpose of this amendment is to reduce the economic incentives for non-refoulement claimants to take up unlawful employment in Hong Kong.
18. The starting position of the Immigration Department that non-refoulement claimants enter Hong Kong due to economic incentives is prejudicial and inaccurate. In our experience, the vast majority of non-refoulement claimants seek asylum in Hong Kong for the purpose of seeking protection from torture, cruel, inhuman and degrading treatment and other forms of persecution. In some occasions, they may have also experienced economic difficulty in their home country but this is not mutually exclusive from facing danger upon return. We would find it more understandable if the proposed amendment were intended to combat the general issue of unlawful employment.

19. Further, there is no evidence suggesting the proposed practice is not effective to achieve the intended objective. The Immigration Department fails to provide the figures of non-refoulement protection claimants who are **convicted** for taking up unlawful employment. Additionally, it is misleading to draw any conclusion on the seriousness of the issue of non-refoulement claimants taking up unlawful employment based on the figures of **arrest** of non-ethnic Chinese persons for taking up unlawful employment. Under the common law presumption of innocence, we remind the Government that it is wrong to assume an arrested person is guilty for the offences charged. Unlike a lawful arrest which only requires the existence of reasonable suspicion, the prosecution has to prove beyond reasonable doubt before the Court for establishing conviction. In fact, we have seen in a number of cases that the non-refoulement claimants were acquitted from the charge of taking up unlawful employment. They may be simply shopping in a shop, or heading to a restaurant when they were arrested for taking up unlawful employment. Therefore, without the conviction figures, it is ineffective to rely on the figures of arrest to conclude the effectiveness of the existing laws.
20. We note that the background information provided by the Security Bureau and the Immigration Department is inconsistent with the reality on the ground. It is our understanding that the Immigration Department will not give permission to enter Hong Kong to claimants who lodge their claims at the border control points. Even if they were previously allowed to enter Hong Kong with their valid visa, pursuant to the Court of First Instance's decision in *BK v Director of Immigration* [2010] HKEC 8<sup>4</sup>, the Immigration Department is allowed not to accept the non-refoulement protection claims before the visa of the non-refoulement claimants expire. In most of these cases, the Immigration Department will issue a removal/ deportation order against those non-refoulement claimants within a short period of time. Therefore, we believe that section 38AA is already sufficient to cover most, if not all, of the non-refoulement claimants.
21. Compared to the laws in other common law jurisdictions, the penalty for a person taking up unlawful employment is excessive. In the England and Wales, under the Immigration Act 2016, a person who commits an equivalent offence to taking up an unlawful employment is liable on summary conviction to imprisonment for a term not exceeding 6 months and/or a fine.<sup>5</sup> In Australia, a non-citizen who is convicted for breaching the condition of stay restricting the work that the non-citizen may do in Australia will only be fined.<sup>6</sup>
22. Finally, we also draw the attention of the members of the Panel that asylum seekers in Australia are eligible to apply for visas. With the strength of a valid visa, they would be

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<sup>4</sup> [2010] HKEC 8

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2016/19/section/34/enacted>

<sup>6</sup> [http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ma1958118/s235.html](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s235.html)

allowed to work in Australia.<sup>7</sup> In New Zealand, while the asylum claims is being processed, asylum seekers can apply for a work visa to work there.<sup>8</sup> We urge the Government of Hong Kong to catch up with the international practice and to improve the regulations regarding the immigration status and the condition of stay of non-refoulement protection claimants, in particular those successful claimants.

Dated this 28<sup>th</sup> day of March 2019

**Daly & Associates**

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<sup>7</sup> <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-protection-785>;

<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790>

<sup>8</sup> <https://www.immigration.govt.nz/audiences/supporting-refugees-and-asylum-seekers/asylum-seekers>