



Research Office  
Legislative Council Secretariat

## Fact Sheet

# Handling of non-refoulement claims in selected places

FS03/15-16

## 1. Introduction

1.1 In Hong Kong, upon the amendment of the *Immigration Ordinance* (Cap. 115) in July 2012 and implementation of an unified screening mechanism in March 2014, any illegal immigrant claiming that he or she would face risks of torture, cruel, inhuman or degrading treatment or punishment or persecution in his or her country of origin is subject to a standardized screening procedure. If the non-refoulement claims are unsubstantiated, the claimant would be removed to his or her home country as soon as practicable. Even if such claims are substantiated, the claimants must leave when the alleged risks cease to exist, as Hong Kong is not a signatory of the 1951 Convention Relating to the Status of Refugees.

1.2 At its meeting on 7 July 2015, the Panel on Security discussed various concerns arising from the handling of the non-refoulement claims, including the screening procedure and its associated resource implications. In this connection, the Research Office is requested to study overseas practice in handling non-refoulement claims made by asylum applicants.<sup>1</sup> The study covers three selected places, namely Australia, the United Kingdom ("UK") and Germany.<sup>2</sup> Findings are shown in the summary table in the **Appendix**.

1.3 It is cautioned that the asylum and screening policy in all these three places have been frequently reviewed and revised in recent years. In the face of looming European refugee crisis amid the influx of over 700 000 asylum applicants so far in 2015, it is expected that the asylum policy in these three places especially Germany may be subject to further review in the near future. Information in this note may need further update as and when necessary.

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<sup>1</sup> Asylum applicants are those persons seeking international non-refoulement protection but whose claims for refugee status are not yet determined.

<sup>2</sup> These three places are selected because they have a long history in handling a massive number of asylum applications. According to the United Nations High Commissioner for Refugees ("UNHCR"), Australia is the largest country in Asia and Oceania to pay host to asylum applicants, with a total of 60 640 new asylum applications received during 2010-2014, ranking 14<sup>th</sup> in the world. For Germany and the UK, they received a total of 434 260 and 137 660 respectively over the same period, with a global ranking of the 1<sup>st</sup> and 7<sup>th</sup> respectively.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong  | Australia  | The United Kingdom  | Germany   |
|---|--|--|---|---|
| <b>Number of new applications<sup>3</sup></b>         | <ul style="list-style-type: none"> <li>March-December 2014: 4 634.<sup>4</sup></li> </ul>  | <ul style="list-style-type: none"> <li>In 2013-2014: 18 718.</li> </ul>  | <ul style="list-style-type: none"> <li>In 2014: 25 033.</li> </ul>  | <ul style="list-style-type: none"> <li>In 2014: 173 072.<sup>5</sup></li> </ul>   |
| <b>Ratio of applicants granted protection</b>         | <ul style="list-style-type: none"> <li>0.5%.<sup>6</sup></li> </ul>  | <ul style="list-style-type: none"> <li>By air: 33%.<sup>7</sup></li> <li>By boat: 68%.</li> </ul>  | <ul style="list-style-type: none"> <li>41%.<sup>8</sup></li> </ul>  | <ul style="list-style-type: none"> <li>42%.<sup>9</sup></li> </ul>  |
| <b>Major legislation and implementation authority</b> | <ul style="list-style-type: none"> <li><i>Immigration Ordinance</i> (Cap. 115) implemented by the Immigration Department.</li> </ul> | <ul style="list-style-type: none"> <li><i>Migration Act 1958</i> and <i>Migration Regulations 1994</i> implemented by the Department of Immigration and Border Protection ("DIBP").</li> </ul> | <ul style="list-style-type: none"> <li><i>Nationality, Immigration and Asylum Act 2002</i> implemented by the Home Office.</li> </ul> | <ul style="list-style-type: none"> <li><i>Asylum Procedure Act</i> implemented by the Federal Office for Migration and Refugees.</li> </ul> |
| <b>Any application deadline upon arrival</b>          | <ul style="list-style-type: none"> <li>No.</li> </ul>  | <ul style="list-style-type: none"> <li>No.</li> </ul>  | <ul style="list-style-type: none"> <li>No.<sup>10</sup></li> </ul>  | <ul style="list-style-type: none"> <li>No.</li> </ul>   |

<sup>3</sup> Applications are for non-refoulement in Hong Kong, but for asylum in Australia, the United Kingdom and Germany.

<sup>4</sup> These were new claims after implementation of the unified screening mechanism in March 2014. Total number of claims pending screening was 10 450 at end-September 2015.

<sup>5</sup> New asylum applications in Germany has nearly doubled to 331 226 in the first 10 months of 2015, consequential to the outbreak of European refugee crisis.

<sup>6</sup> Ever since the unified screening mechanism was in place in March 2014, the Immigration Department has determined a total of 2 602 claims up to end-September 2015. Only 12 of them were substantiated (including 2 appeal cases), while the rest were unsubstantiated.

<sup>7</sup> These figures refer to the period of 2012 to 2013.

<sup>8</sup> In 2014, amongst 19 782 initial decisions made in the UK, 8 150 cases were granted protection.

<sup>9</sup> In 2014, amongst 97 275 initial decisions made in Germany, 40 560 cases were granted protection.

<sup>10</sup> Applicants must lodge application as soon as possible upon arrival in the UK. Any delayed reporting may affect the credibility of the application.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong  | Australia   | The United Kingdom   | Germany  |
|---|--|---|--|--|
| <b>Standard screening procedure</b>                             | <ul style="list-style-type: none"> <li>Including completing application form, conducting screening interview and making initial decision.</li> </ul> | <ul style="list-style-type: none"> <li>Including submitting protection visa application form, conducting interview and making decision.</li> </ul>  | <ul style="list-style-type: none"> <li>Including lodging application, screening application, conducting interview and notifying decision.</li> </ul>                   | <ul style="list-style-type: none"> <li>Including filing application form, submitting necessary identity proof and document and conducting personal interview.</li> </ul> |
| <b>Any list of safe countries of origin<sup>11</sup></b>        | <ul style="list-style-type: none"> <li>No.</li> </ul>  | <ul style="list-style-type: none"> <li>No.</li> </ul>   | <ul style="list-style-type: none"> <li>Yes.</li> </ul>   | <ul style="list-style-type: none"> <li>Yes.<sup>12</sup></li> </ul>  |
| <b>Any special measures to accelerate the screening process</b> | <ul style="list-style-type: none"> <li>No.</li> </ul>  | <ul style="list-style-type: none"> <li>Fast track assessment ("FTA") for a backlog of applications.<sup>13</sup></li> <li>Enhanced screening process ("ESP") for applicants from Sri Lanka arriving by boats.<sup>14</sup></li> </ul> | <ul style="list-style-type: none"> <li>Detained fast track ("DFT") measure for asylum applicants but such measure has recently been suspended.<sup>15</sup></li> </ul> | <ul style="list-style-type: none"> <li>Fast-track measure for asylum applicants from Syria, Eritrea and ethnic minorities from Iraq.<sup>16</sup></li> </ul>             |

<sup>11</sup> According to the directives on asylum procedures of the European Union ("EU"), "safe countries of origin" refers to those countries with stable democratic system and compliant with international human rights treaties. Migrants from these sources are presumed to be safe upon return. The list of safe countries differs among member states of EU. For instance, there are 26 countries included in the safe countries list in the UK, but only six in Germany.

<sup>12</sup> In face of the European refugee crisis, Germany amended the list of "safe countries" in 2014 and 2015, adding countries like Serbia, Kosovo and Albania. Asylum applicants from these countries are still allowed to file application, but their applications are more likely to be dismissed as manifestly unfounded, unless they could provide reasons to believe that they face political persecution in their country of origin in spite of the general situation there. There is a separate airport procedure for applicants from safe countries of origins. The whole process will not last more than 19 days and the applicants are housed in premises at the airport during the process.

<sup>13</sup> FTA was introduced in Australia in December 2014, targeting the sudden influx of some 30 000 asylum seekers by boat between August 2012 and December 2013. While the duration of claim assessment under FTA is generally shorter, the review procedure for refused applications is handled without hearing.

<sup>14</sup> ESP was introduced in October 2012, as the number of asylum applicants from Sri Lanka surged that year. Under ESP, if an asylum applicant does not raise any protection concerns during a quick interview made by DIBP, they are "screened out" and will be returned to Sri Lanka without having the opportunity to formally lodge a protection claim. The system is criticized for lacking transparency and preventing asylum seekers from being able to have their claims assessed fairly.

<sup>15</sup> The UK government introduced DFT in 2003. For those asylum applicants whose statuses were expected to be able to be quickly decided, the applicants would be put into detention and were given two days to appeal the initial decision. In 2014, there were 3 865 applicants accepted onto the fast track process. However, after the court ruled in July 2015 that DFT was "structurally unfair" to asylum applicants, the measure has been suspended since late July 2015.

<sup>16</sup> The German government has skipped conducting personal interview with applicants from Syria and ethnic minorities from Iraq since 18 November 2014, and applicants from Eritrea since 25 June 2015 in the application process.

## Key features of handling non-refoulement claims in selected places

|  | Hong Kong   | Australia  | The United Kingdom  | Germany   |
|--|---|--|---|---|
| <b>Time required for an initial decision</b> | <ul style="list-style-type: none"> <li>25 weeks from lodging claims to initial decision, with cooperation from claimants.<sup>17</sup></li> </ul>   | <ul style="list-style-type: none"> <li>Only 8% of applications were decided within 12.9 weeks (90 days) in 2014-2015.<sup>18</sup></li> </ul>  | <ul style="list-style-type: none"> <li>52% of asylum applications were concluded within 52 weeks (one year) in 2014-2015.</li> </ul>    | <ul style="list-style-type: none"> <li>31 weeks (7.1 months)<sup>19</sup> on average in 2014.</li> </ul>  |
| <b>Appeal procedure</b>                      | <ul style="list-style-type: none"> <li>Decision by Torture Claims Appeal Board may be made without hearing.</li> <li>No information on the length of time in the appeal procedure.</li> </ul> | <ul style="list-style-type: none"> <li>Decision by the Administrative Appeals Tribunal ("AAT") after hearing.</li> <li>75% of review cases were finalized within 52 weeks (1 year) after lodgment.<sup>20</sup></li> </ul> | <ul style="list-style-type: none"> <li>Appeals could be made to the First Tier Tribunal, Upper Tribunal and Court of Appeal.</li> </ul> | <ul style="list-style-type: none"> <li>Appeals can be first filed to the Administrative Court, and further appeals to the Higher Administrative Court and Federal Administrative Court.<sup>21</sup></li> </ul> |

<sup>17</sup> Yet the average duration of stay of non-refoulement claimants in Hong Kong was 2.7 years, starting from first lodging a claim up to the decision of the Immigration Department. This was partly due to uncooperative action from claimants, including in particular 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.

<sup>18</sup> Although the Australian government introduced a statutory timeframe to finalize an application within 90 days in 2005, it was removed following the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill* in December 2014. There is no official statistics on the duration of stay of asylum applicants in Australia, but it was estimated that those applicants held at closed detention centres have stayed in the country for an average of 14 months in August 2015, according to DIBP. For those living in the community on bridging visas, it was estimated that most of them have already stayed in Australia for at least two years for the opportunity to lodge a claim, according to the Refugee Council of Australia.

<sup>19</sup> See Asylum Information Database's Germany report.

<sup>20</sup> For the rest of 25% of review cases, they could not be concluded within 12 months due to the following reasons: (a) delay caused by the backlog of cases; (b) more than one hearing required; (c) rescheduled hearings for reasons beyond the authority's control; (d) request of additional time by the applicant to obtain evidence or make a submission; (e) newly available information in the process; and (f) need of a report or assessment provided by another body or agency.

<sup>21</sup> If there is suspected violation of rights, the applicants can also lodge complaints to the Federal Constitutional Court.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong   | Australia   | The United Kingdom  | Germany   |
|---|---|---|---|---|
| <b>Availability of publicly-funded legal assistance</b> | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  | <ul style="list-style-type: none"> <li>• Only for those asylum applicants with valid visa.<sup>22</sup></li> </ul>  | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  |
| <b>(a) means test and merit test</b>                    | <ul style="list-style-type: none"> <li>• No.</li> </ul>   | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  |
| <b>(b) any cap on legal assistance</b>                  | <ul style="list-style-type: none"> <li>• No.</li> </ul>   | <ul style="list-style-type: none"> <li>• No information available.<sup>23</sup></li> </ul>  | <ul style="list-style-type: none"> <li>• No information available.</li> </ul>                             | <ul style="list-style-type: none"> <li>• No.</li> </ul>   |
| <b>(c) scope of legal assistance</b>                    | <ul style="list-style-type: none"> <li>• Throughout the entire screening and appeal procedure.</li> </ul> | <ul style="list-style-type: none"> <li>• Only for completion of application form and assessment procedure.</li> <li>• Not available in the appeal and judicial stages.</li> </ul> | <ul style="list-style-type: none"> <li>• Throughout the entire screening and appeal procedure.</li> </ul> | <ul style="list-style-type: none"> <li>• Only for appeal cases.</li> <li>• Not available in other stages of application and screening.</li> </ul> |
| <b>(d) expenditure on legal assistance in 2015</b>      | <ul style="list-style-type: none"> <li>• HK\$108 million.<sup>24</sup></li> </ul>                         | <ul style="list-style-type: none"> <li>• AUD\$2.5 million (HK\$17.5 million).</li> </ul>  | <ul style="list-style-type: none"> <li>• £40 million<sup>25</sup> (HK\$511 million).</li> </ul>           | <ul style="list-style-type: none"> <li>• No information available.</li> </ul>   |

<sup>22</sup> Since 31 March 2014, the Australian government has restricted the access of publicly-funded legal assistance to those asylum seekers who arrived lawfully on valid visas on the one hand, and removed such assistance to applicants seeking review or judicial review on the other. In other words, those asylum seekers without valid visas are not covered. Publicly funded legal assistance to qualified asylum seekers are provided through the Immigration Advice and Application Assistance Scheme ("IAAAS") through its registered providers. Currently, there are 19 IAAAS providers located across the country.

<sup>23</sup> The Research Office has written to the relevant authorities in Australia, the UK and Germany to enquire about legal aid for asylum applicants. As at the publication of this fact sheet, the authorities have not responded to the requests.

<sup>24</sup> This is the projected figure for 2015-2016. On average, each non-refoulement claimant in Hong Kong receives 57 hours of legal assistance, costing around \$30,000 per claim.

<sup>25</sup> This figure refers to the legal aid expenditure on completed immigration cases during the period from July 2014 to June 2015. The scope of "immigration cases" includes asylum, immigration-detention, victims of trafficking and judicial review.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong  | Australia  | The United Kingdom  | Germany   |
|---|--|--|---|---|
| <b>Any detention of applicants</b>                          | • No.  | • Yes. <sup>26</sup>   | • No. <sup>27</sup>   | • No. <sup>28</sup>   |
| <b>Permission to work</b>                                   | • No.  | • No. <sup>29</sup>  | • No. <sup>30</sup>   | • Yes. <sup>31</sup>  |
| <b>Publicly-funded humanitarian assistance to claimants</b> | • In 2014-2015, monthly assistance averaged at HK\$2,800 per capita. <sup>32</sup> | • A single person can receive up to AUS\$1,020 (HK\$7,140) per month, including rental assistance. <sup>33</sup> | • Each person could apply for cash allowance of £161 (HK\$2,057) per month, plus accommodation in kind if needed. <sup>34</sup> | • Each person in reception facilities can receive monthly assistance ranging between €84 (HK\$865) and €143 (HK\$1,473), depending on age.<br>• For those staying outside, monthly assistance ranged from €133 (HK\$1,370) to €216 (HK\$2,225). <sup>35</sup> |

<sup>26</sup> In 1992, the Australian government introduced the mandatory detention policy on asylum applicants. "Unlawful non-citizens" would be detained in closed facilities. However, since 2005, the Australian government has been moving away from such policy to other arrangements such as community detention and granting bridging visas that allow applicants to legally live in the community, after initial health, identity and security checks. By August 2015, only 11% of the overall asylum applicants stayed in closed detention centres, while the majority (87%) lived in the community with bridging visas. The other 2% lived in community detention centres.

<sup>27</sup> The detained fast track was temporarily suspended, following the court judgment made in July 2015. See footnote 15 above.

<sup>28</sup> For up to three months after application, asylum applicants are housed in the initial reception centres which are nevertheless not regarded as detention centres. They can move out after three months.

<sup>29</sup> In August 2012, the Australian government removed the right to work attached to bridging visas.

<sup>30</sup> As a general rule, asylum applicants are not allowed to work in the UK. However, asylum applicants who have waited for more than 12 months for an initial decision are eligible to apply for permission to work.

<sup>31</sup> Asylum applicants pending decisions can generally be allowed to work after a three-month stay at the initial reception centres.

<sup>32</sup> Humanitarian assistance including food and accommodation is provided by the Social Welfare Department through a non-governmental organization, namely International Social Service Hong Kong Branch. In 2014-2015, 7 357 applicants received such assistance, costing a total of HK\$246 million. Per capita assistance is expected to increase to about \$3,200 per month in 2015-2016.

<sup>33</sup> Financial assistance is available for applicants living on bridging visas under the Asylum Seeker Assistance Scheme administered by the Australian Red Cross.

<sup>34</sup> In the UK, humanitarian assistance is provided to the destitute asylum applicants whilst their claims are being decided. At the end of March 2015, around 30 500 asylum seekers were being supported. Each person could apply for cash allowance of £36.95 (HK\$472) per week.

<sup>35</sup> Asylum applicants staying in the initial reception centres receive primarily essential items in kind or vouchers, while those staying in accommodation outside the centres receive cash allowances to purchase essential items.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong  | Australia  | The United Kingdom   | Germany   |
|---|--|--|--|---|
| <b>Annual public expenditure arising from such claims</b> | <ul style="list-style-type: none"> <li>Taking all cost together, public expenditure is estimated to more than double in five years to \$644 million in 2015-2016.</li> </ul> | <ul style="list-style-type: none"> <li>In 2014-2015, humanitarian assistance amounted to AUS\$143 million (HK\$ 1,001 million), while legal assistance was AUS\$2.5 million (HK\$17.5 million). The detention cost was AUS\$2.9 billion (HK\$20.3 billion).</li> </ul>   | <ul style="list-style-type: none"> <li>Annual asylum cost excluding detention and legal expenses was £235 million (HK\$3,003 million) in 2014-2015.</li> </ul> | <ul style="list-style-type: none"> <li>Expenditure on allowance for asylum applicants was €1.5 billion (HK\$15.45 billion) in 2013.<sup>36</sup></li> </ul>   |
| <b>Major issues and concerns</b>                          | <ul style="list-style-type: none"> <li>There is concern about the prolonged stay of unsubstantiated applicants in Hong Kong.</li> </ul>                                      | <ul style="list-style-type: none"> <li>The asylum policy has been regarded as effective in deterring irregular migrants.<sup>37</sup></li> <li>The gradual replacement of closed detention by community detention and bridging visas in recent years has been regarded as a move to bring Australia into a closer alignment with its international human rights obligations.<sup>38</sup></li> </ul> | <ul style="list-style-type: none"> <li>Measures giving special care and protection to children welcomed by an agency.<sup>39</sup></li> </ul>                  | <ul style="list-style-type: none"> <li>Access to the labour market and relaxed freedom of movement of asylum applicants noted as positive development.<sup>40</sup></li> <li>Accelerated asylum procedure for the Syrian and other eligible countries noted with satisfaction by an agency.<sup>41</sup></li> </ul> |

<sup>36</sup> At the end of 2014, the number of asylum applicants in Germany receiving allowance increased by 61% to 363 000, compared to 2013. According to media reports, Germany spent a total of €1.5 billion (HK\$15.45 billion) on asylum benefits in 2013. The Germany Federal government is expected to spend €6 billion (HK\$61.8 billion) to cope with the influx of asylum applicants in 2015-2016, including €3 billion (HK\$30.9 billion) for the states to accommodate the rising number of new arrivals of asylum applicants.

<sup>37</sup> Remarks made by the European Parliamentary Research Service in October 2015.

<sup>38</sup> Remarks made by the Australian Human Rights Commission in its annual report in 2013.

<sup>39</sup> Remarks made by the United Nations High Commissioner for Refugees in 2015.

<sup>40</sup> Remarks made by the Commissioner for Human Rights of the Council of Europe in 2015.

<sup>41</sup> Remarks made by the Commissioner for Human Rights of the Council of Europe in 2015.

## Key features of handling non-refoulement claims in selected places

|   | Hong Kong  | Australia  | The United Kingdom  | Germany  |
|---|--|--|---|--|
| <b>Major issues and concerns (cont'd)</b> | <ul style="list-style-type: none"> <li>• Resource implications arising from handling the claims.</li> <li>• Screening process noted as unfair by some agencies.</li> </ul> | <ul style="list-style-type: none"> <li>• Detention of asylum applicants including children at closed facilities criticized as inhuman.<sup>42</sup></li> <li>• Fast-track screening procedures criticized as unfair and lack of transparency.</li> </ul> | <ul style="list-style-type: none"> <li>• Detention measure criticized as inhuman, without statutory time limit and without independent oversight.</li> <li>• Restriction of asylum applicants' rights to work being another cause for concern.</li> </ul> | <ul style="list-style-type: none"> <li>• Continued influx of refugees overloading the asylum system.</li> <li>• Implications on the labour market and government expenditure.</li> <li>• Creating tension between the Federal Government and state governments responsible for accommodating asylum applicants.</li> <li>• Quota system to receive the refugees still being disputed within the European Union.</li> </ul> |

<sup>42</sup> On 8 November 2015, a riot broke out at the detention facility on Christmas Island located about 2 500 km northwest of the Australian city of Perth and 380 km south of the Indonesian island of Java, following the death of an asylum seeker who escaped from the facility on Christmas Island.

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27 November 2015  
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