香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR

電話 Phone: (852) 2811-4488　電郵地址 Email: info@hkhrm.org.hk

Refugee Rights, Screening Procedures and Immigration Law

Submission to Bills Committee on Immigration (Amendment) Bill 2009
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Introduction

1. The proposed amendments to the Immigration Ordinance (Cap. 115) would allow Macao permanent residents to visit Hong Kong anytime solely on the basis of their Macao permanent identity cards. This change serves to enhance the convenience for visitors from Macao. Another set of amendments makes new provisions under the Immigration Ordinance to specify an offence against taking up of employment by illegal immigrants (IIs) and other ineligible persons.

2. The Hong Kong Human Rights Monitor supports the amendments for Macao permanent residents to visit Hong Kong solely on the strength of their Macao permanent identity cards. We take this opportunity to remind the Macao and Hong Kong authorities not to use immigration control as a political tool to bar exchanges of political discourse or any lawful expression by denying the entry of people holding different opinions into the territory under the respective control of the Macao and Hong Kong authorities.

Immigration law

3. The other amendments in the Bill were introduced to make it an offence for illegal immigrants (IIs) or those with removal or deportation orders against them to take up employment or establish or to join in business in Hong Kong. This new offence is in response to the rulings in *Iqbal Shahid & Others v Secretary for Justice*. In scrutinizing the amendments, it is important for the LegCo, the Government and the public to consider the wider issues affecting Hong Kong immigration law, especially in light of the application of the Convention Against Torture and our system for handling refugees and other non-residents. It is also important for the authorities not to overreact and resort to rigid and unfair measures which may be inconsistent with international legal norms, our international obligations or our constitutional requirements.

4. The Hong Kong immigration system suffers from a number of serious problems which negatively impact on the rights of non-permanent residents and their families whose members may be Hong Kong residents. The immigration control system contained in the Immigration Ordinance and in unpublished Departmental guidelines has developed in a piecemeal manner in response to particular problems or issues and often without proper attention to the rights of non-residents. In doing so, we have created a number of serious defects and unfair elements in our immigration law. Asylum seekers, stateless persons,

foreign domestic workers, right of abode claimants and their families are just some of the victims of this system.

5. The lack of rights for refugees under Hong Kong immigration law is particularly unsatisfactory. Presumably, motivated by an overzealous desire in the government to keep refugees from entering Hong Kong, the government's approach relies entirely on administrative discretion by the authorities and is tainted by non-transparent and unfair elements. It is totally out of step with most developed jurisdictions in this respect. Such an approach toward shaping our immigration laws backfires. This is evident in a series of legal decisions against the Government, in court challenges. We have wasted millions of dollars of public money in administering an unfair torture claim screening system and by defending the defective system in doomed court cases. The government was forced to suspend all screening activities.

6. If we allow this approach to continue to shape our immigration law without taking various factors into consideration, we may not be able to address the interwoven problems in our immigration system properly. If this remains the case, we will run into serious problems again.

Established government policies on torture claimants and asylum seekers

7. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention or CAT) is applicable to Hong Kong. Under article 3 of the Convention, Hong Kong should not expel, return or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. For some time there was an administrative torture claimants screening procedure put in place by the Government.

8. The Court ruled in late 2008 that the torture claimants screening procedures failed to meet the high standards of fairness. The screening process was then suspended, and the Government has undertaken a study on the implementation of a legislative regime for handling torture claims under the Convention. Although the framework of the improved screening procedures lacks detail and was criticized, particularly for practical problems regarding the provision of legal assistance, the Government is confident it can resume improved screening procedures within the year. The Human Rights Monitor understands that there are several thousand asylum-seekers in Hong Kong who are waiting for the new system to be put into place. The delay in their screening is a matter of great concern.

9. On the other hand, the 1951 UN Convention relating to the Status of Refugees as updated by its 1967 Protocol (the Refugee Convention) is not applicable to Hong Kong although they are applicable to Mainland China and Macao. The United Nations High Commissioner for Refugees (UNHCR) Hong Kong sub-office is responsible for the screening of refugee claims. The Government has repeatedly insisted that it has no plans to request that the Convention be extended to Hong Kong. The Government has reaffirmed its refusal even though it knows that these dual, parallel systems are unfair to genuine refugees and enable those who do not have genuine and valid claims to drag out their

cases in Hong Kong. It is difficult, if not impossible, to see how this dual system, one being subject to the scrutiny of the courts and the other not, can operate efficiently and effectively in practice.

Legal lacuna in section 36

10. Currently there is no offence against the taking of employment or establishing or entering into business by IIs, and the established policy of the Government is that IIs found working illegally in Hong Kong would be prosecuted for the offence of unlawfully remaining under section 38 of the Immigration Ordinance.

11. This established policy was recently challenged in the case *Iqbal Shahid, Waseem Abbas & Others v Secretary for Justice* in which the Court of First Instance of the High Court ruled in March 2009 that recognizance granted to IIs represented an authority from the Director of Immigration for them to remain in Hong Kong. At the same time, the Director of Immigration has no power under section 36 to impose any conditions of stay when granting such recognizance. IIs on recognizance can therefore take up work lawfully.

12. A better, more straightforward way to address this problem would be to amend Section 36 of the Immigration Ordinance, and the standard recognizance form, to enable the Director of Immigration to impose a condition of stay. This would be simpler as it adapts or tweaks existing legislation rather than creating an entirely new provision. Any persons on recognizance working in Hong Kong prohibited from working could therefore be charged under section 41 of the Immigration Ordinance.

13. Instead of addressing the lacuna in the most straight forward way mentioned in the last paragraph, the Government has chosen to create a new criminal offence.

14. The Human Rights Monitor **opposes** the new criminal offence approach proposed by the Government for several reasons. Firstly, we should avoid the creation of a new criminal offence if we can amend an existing provision to close the loophole. Secondly, a different approach could avoid incentives for the Government to impose removal orders on all CAT claimants and asylum seekers, which ads unnecessary psychological stress to those genuine claimants or refugees already suffering from trauma. Thirdly, we prefer that section 36 be amended to further improve our immigration system by giving the Director of Immigration the discretion to allow some non-residents to take up work in Hong Kong in deserving cases. Incidental measures, particularly amendments to the concept and categories of employable persons, under section 17G(2) of the Ordinance would be desirable to enable a more liberal regime on work for non-residents including but not limited to certain deserving CAT claimants and asylum seekers. At the end of the day, it would give the Director of Immigration the discretion to decide whether to allow or prohibit a person or a class of persons to work in Hong Kong in the light of Government policy, current economic factors, individual circumstances, and other situations in Hong Kong.

15. The Government's piecemeal and short-sighted approach is evident in its choice to create a new offence instead. It rejects the option of amending section 36

because this would require more rationales to justify it and therefore would require more time to amend the law to close the loophole. It claims that having a new offence would be quicker and would meet the need to enable the Government to stop any influx of illegal immigrants into Hong Kong to take advantage of the legal lacuna to work.

16. Amending Section 36 and the standard recognizance form to prohibit work would be one way in which to proceed. This would be simpler and more straightforward as it adapts existing legislation rather than creating a whole new provision. This approach would also avoid the negative impact of the Director of Immigration's proposed measures create a new offence.

17. The main practice is that the current system of CAT requires that the entrant must have overstayed his/her visa before his/her claim can be considered. Granting the person a visitor's visa would be very different from the current arrangements.

18. With this discretionary power, similar to the power to grant visas with different conditions of stay, the Director is not obliged to prohibit or grant the right to work to any non-residents. He would have a neutral legal tool at his disposal. This would allow him the necessary flexibility to exercise his discretion in such a way so as to be consistent with current policy choices. He may give priority to ensuring job opportunities for local workers, for example. At the same time, if the Government and stakeholders decide to allow certain non-residents or certain classes of persons to work in special humanitarian cases, the discretionary power of the Director of Immigration will provide the director the necessary flexibility. Indeed, current delays in screening provide a strong humanitarian basis for allowing claimants to work to support themselves while awaiting the outcome of their claims.

19. In reply to the Government's other reason for refusing to amend section 36 - i.e. that by granting a refugee or asylum seeker the right to work, they would be able to claim permanent residence status in the future - one should be reminded that according to section 2(4)(a)(i) of the Immigration Ordinance, a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong with or without the authority of the Director, after landing unlawfully. An illegal immigrant on his own recognizance is considered to have the authority of the Director to remain in Hong Kong according to *Iqbal Shahid* but since he has landed in Hong Kong unlawfully, his stay here is incapable of amounting to ordinary residence and even if he is allowed to work or even if gainfully employed for many years, it would not change this. He would not be able to claim permanent residence if the Government has faith in the validity of section 2(4)(a)(i). We would like the Government to clarify whether it is not sure whether this provision would be able to withstand a legal challenge in the court.

20. We do not agree with an approach to create an offence if existing provisions can be modified to address any drafting defects or lacuna identified.

21. The proposed offence would be a problematic solution. Under the government proposals, those asylum seekers or CAT claimants who are on recognizance but have no removal order or deportation order in force against them would not commit the new offence even though they take up work in Hong Kong. To

ensure that all of them would not be able to get around this proposed law, the authorities would great incentive to issue almost indiscriminately against all of them a removal order before they are released. This would mean a substantive departure from the current policy and practices in the issuing of such orders on these people, especially in timing. Obviously, the government proposal would create a serious negative impact on the Government's methods of handling torture claimants and asylum seekers.

22. Hong Kong non-permanent residents who have committed certain types of offences before they acquire their permanent resident status could also be affected in a similar way if the Government considers deporting them after their prison sentences have been served. A deportation order may be issued against them more readily in the light of the new offence.

23. It is important to be mindful of the fact that those CAT claimants and asylum seekers who have a genuine and valid claim are usually in serious psychological distress and trauma. Counseling services provided to them are extremely inadequate. The psychological pressure generated by imposing a removal order should be avoided unless strictly necessary. Such a tendency to impose a removal order in a virtually indiscriminate manner to all CAT claimants and asylum seekers before their claims have been assessed, and to issue them at the earliest possible date and time, amounts to cruel, degrading and inhumane treatment. The new offence would create this tendency which would otherwise be totally unnecessary.

24. Administratively, this need to impose a removal order on CAT claimants and asylum seekers – created by the existence of the offence - could lengthen the detention of these persons due to extra paper work involved in issuing removal orders. This is undesirable, unnecessary and unacceptable.

25. The Bills Committee **should ask** the Government whether it intends to impose removal orders on all CAT claimants and asylum seekers, and to impose them as early as possible, and urge them not to do so.

International standards and practices

26. Article 11 of the Covenant on Economic, Social and Cultural Rights (ICESCR) also recognizes the right of everyone to an adequate standard of living, including adequate food, clothing and housing. Article 6 of the International ICESCR states the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. Article 17 of the Refugee Convention requires state parties to give sympathetic consideration to granting refugees the same rights with regard to wage-earning employment as those of nationals.

27. The European Directive 2003/9/EC of January 2003 lays down the minimum standards for the reception of asylum seekers, which could provide a useful reference and benchmark for Hong Kong. Article 11 states that:

> "1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

> 2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.
> 3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.
> 4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals."

28. The proposal to recast the above Directive further stated that asylum seekers should be ensured access to the labour market no later than 6 months following the date when the application for international protection was lodged.[1]

29. The Government claimed that after the judgment there was an upsurge of non-ethnic Chinese IIs, and the proposed amendments aim to prevent IIs from believing that there is any loophole to exploit, thus exacerbating the problems of illegal immigration and illegal employment. The Human Rights Monitor has considered the claim and studied the mechanism used by Canada, the UK and Australia to deal with the issue.

30. In the UK, each asylum seeker arriving in Britain is given an application registration card issued by the Home Office to show that the card holder has applied for refugee status, and confirming his/her right to stay while his/her case is being considered.[2] Before July 2002 asylum seekers who had been waiting for more than six months for an initial decision from the Home Office were allowed to apply for permission to work. However, this employment concession was removed in July 2002, because the Government stated that most of the asylum seekers would receive decisions within six months, and to protect the asylum process from abuse by ensuring that it was not open to those who only wanted to come to work.[3]

31. The UK then allowed asylum seekers to apply for permission to work if they had not received an initial decision on their asylum claim from the Home Office after 12 months in February 2005, which is 6 months longer than the period proposed by the European Directive. In general, the Home Office will grant permission to work if the main applicant is not responsible for the delay in making the decision.[4] Canada also has a rather liberal policy in dealing with asylum seekers' need to work. [5]

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[1] Commission of the European Community, "Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers", 3 December 2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0815:FIN:EN:PDF.
[2] Overview of Canada's asylum system at http://www.uniya.org/research/asylum_canada.pdf.
[3] Refugee Council, "Social Exclusion, Refugee Integration, and the Right to Work for Asylum Seekers", September 2006, pp. 3-4.
[4] Ibid.
[5] Home Office, UK Border Agency at http://www.bia.homeoffice.gov.uk/asylum/.

32. The mechanism in Australia is more comprehensive since it provides different kinds of visas to different people in need. A bridging visa is a temporary visa that provides for a non-citizen to remain lawfully in certain circumstances where they do not hold a substantive visa. Different kinds of bridging visas, from Bridging visa A to E will be given to asylum seekers pending their status determination results. Holders of Bridging visas A, B, C and E with work restrictions can apply for another bridging visa with unlimited permission to work if they could demonstrate that they are either facing financial hardship, or nominated or sponsored by an employer for a substantive visa on the basis of their skills.

The need of a more comprehensive legislation

33. The Human Rights Monitor believes that the upsurge of non ethnic Chinese IIs is mainly due to the long delays in the torture claim and asylum determining processes. The possibility to work in Hong Kong without legal sanction has not been established as a factor, and would likely be only a **minor** factor. The proposal to create a new offence in the Immigration Ordinance is not addressing the root of the problem.

34. A lot of asylum cases are being accumulated in the UNHCR Hong Kong sub-office. According to the Government's reply to a Legislative Council (LegCo) question, there were in total 4,840 asylum seekers in 2006-2008. Among them, 131 were recognized refugees, 210 are staying in Hong Kong pending the appeal results and about 1,200 were deported from Hong Kong.[6] According to these numbers, we can estimate that in 2006-2008 the UNHCR HK sub-office could only handle around 500 cases each year, which is much lower than the number of asylum seekers coming to Hong Kong.

35. Although the UNHCR HK sub-office has claimed that an application for refugee status normally takes two to eight months to process, the Human Rights Monitor estimates that this figure only reflects those cases which have been completed.[7] There are still many pending cases which have been dealt with for more than a year and the cases are accumulating. According to a survey conducted by Society of Community Organizations (SoCO) in 2006, 43% of the interviewees had waited for 7 months for a decision and 22% had been waiting for 13 to 24 months for a decision. The delay of the screening process provides chances to abuse.

36. Regarding the torture claim cases, according to the information provided by the Director of Immigration to the Legislative Council, "The time needed for assessing each case varies with factors such as the individual circumstances of the case, the dialect and cooperativeness of the claimant. Statistics of the assessed torture claim cases show that it takes about 14 months on average to complete the processing of each case."[8] Currently with the screening for CAT claimants suspended the waiting time is almost indeterminate. The earliest

[6] Government press release: LQ 19: Asylum seekers at http://www.info.gov.hk/gia/general/200904/01/P200904010219.htm.
[7] Government press release: LQ 19: Asylum seekers.
[8] Director of Immigration, Controlling Officer's Reply to Initial Written Question, Examination of Estimates of Expenditure 2009-10, Reply Serial No. SB128, 17 March 2009.

possible time for an improved system to be established and brought into operation will likely be in October or probably later.

37. If Hong Kong continues to have a system in which the screening process for asylum and CAT cases will last for a substantial period of time or even be brought to a standstill there are strong incentives for bogus claimants to come to Hong Kong to make false claims and to take advantage of the lengthy waiting and processing time to work illegally in the territory. So a fair and efficient system run by the Government dealing with both the CAT screening and refugee status determination should be introduced as soon as possible to end the current unsatisfactory situation. But no matter how fair and efficient the system for CAT claims under the Government, if the refugee determination process is still dependent on the UNHCR, the incentive for bogus claimants to rush in will continue. There will still be a long processing time needed by the UNHCR for the refugee determination process. It is still possible for a bogus claimant to extend his stay in Hong Kong for a significant period of time by first exhausting the CAT claim procedures (until he is notified of his failure in appealing against a negative decision by the Director of Immigration) and then making a last minute refugee claim to the UNHCR to take advantage of its lengthy refugee status determination.

38. The Human Rights Monitor strongly **recommends** the Government to establish a comprehensive legal framework to process both the torture claims and application for asylum with improved visa arrangements. The Government should take the responsibility to screen the asylum claimants from the UNHCR HK sub-office. In addition, we **recommend** that the procedures should incorporate standards which implement the right to *non-refoulement* in articles 6 and 7 of the ICCPR and the broad principle of *non-refoulement* in customary international law.[9] These standards in the ICCPR and customary international law go beyond the requirements of the Torture Convention and the Refugee Convention and include non-return to violations of a right to not to face arbitrary deprivation of life and right to be free from cruel, inhuman and degrading treatment of punishment. A number of other jurisdictions have incorporated these standards into their current refugee status determination procedures. The Government should integrate consideration of all claimants fearing a return to serious human rights violations – including persecution - within one statutory mechanism. It should establish a fair and efficient screening procedure, and provide adequate resources to prevent undue delays. Initial decisions should be issued within one month following the interviews in line with UNHCR guidelines.[10] We **recommend** that under this mechanism, a special visa should be granted to persons who are waiting for the results of their asylum application or torture claim.

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[9] See *Ubamaka Edward Wilson v Secretary for Security* [2009] HKEC 710, para 111. The Human Rights Committee has held that the ICCPR includes an implicit right to *non-refoulement* when "there is a real risk that [an individual's] rights under the Covenant will be violated in another jurisdiction". See Human Rights Committee, *A.R.J. v Australia*, Communication No. 692/1996, UN doc. CCPR/C/60/D/692/1996, 11 Aug. 1997, para. 6.8. See also Human Rights Committee, General Comment 20.

[10] See Part 4.5 of *Procedural Standards for Refugee Status Determination under the UNHCR's Mandate.*

39. Employment is one key way for asylum seekers and torture claimants to maintain their financial needs as well as their working skills, communication skills, self worth and awareness of membership in society. It is also an important means of participation in the local community.

40. The Human Rights Monitor proposes that all refugees, successful CAT claimants and at least the asylum seekers and torture claimants whose applications are delayed for a long time without fault should be given the right to work. We **recommend** that asylum seekers and torture claimants should be permitted to work if they have waited for more than 6 months for an initial decision on their asylum or torture claims, and they have not been responsible for such a delay. This proposal would maintain a balance between the right of asylum seekers and torture claimants to work and the prevention against abuse of the system.

41. The Government should provide all forms of adequate assistance to those asylum seekers and torture claimants with insufficient means who are disallowed to work or fail to earn enough to maintain their basic needs. Since the surveys conducted on asylum seekers and torture claimants are inconsistent with the Government's claim that the provision of welfare to them is not sufficient to meet their basic needs, we **recommend** that the Government commissions an in-depth study on the adequacy of the support, the services provided by both the Government and NGOs, and the lives of asylum seekers and torture claimants with a view to meeting any shortfalls.

42. The Human Rights Monitor thus **recommends** that the Government conduct a comprehensive study on existing laws and policies affecting asylum seekers and torture claimants, including the right to work and the visa framework.