NOTE ON THE SITUATION OF ASYLUM SEEKERS, REFUGEES AND CONVENTION AGAINST TORTURE ("CAT") CLAIMANTS IN THE HONG KONG SAR prepared for the Panel on Security Meeting 3rd February 2009

Summary of Main Points for Consideration

1. Since 1992 the Convention Against Torture was extended to the HKSAR although it wasn't until the case of *Prabakar* (Court of Appeal 2002) (Court of Final Appeal 2004) that the HKSAR actually began to consider its obligations to screen persons claiming to face torture if returned to their country (Article 3, CAT)

2. The recent Concluding Observations of the CAT Committee are only the latest in a long list of criticisms from the UN bodies and human rights advocates over the years. The latest key criticisms are the concern that "*there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure*" and "*The Committee is also concerned that there are no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol*". Further, the Committee recommends that the HKSAR should:
    a) *incorporate the provisions contained in article 3 of the Convention under the Crimes (Torture) Ordinance;*
    b) *consider adopting a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of its obligations under article 3 of the Convention, the merits of each individual case;*
    …
3. Yet despite the importance of this matter for the individuals concerned and for the interests of the HKSAR there has still been no legislative response in the areas of screening, detention, social welfare, prosecution policy, education, medical etc and in 2007 it was reported that "*just 7 immigration officers are officially processing claims made under UN's Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), while 19 have been temporarily borrowed from other units, Mr. Chan said*."[1]

4. The UN CAT Committee was intrigued by the attached article, "*Pets better served than refugees, say lawyers*" [2]. Although I overuse the article it is regrettable that it remains applicable.

FB and Others v DOI and Secretary for Security, HCAL 51/2007, Judgment 5th December 2008, High Court

5. To this history mismanagement and the lack of a comprehensive response by the HKSAR the High Court has recently found that the "discretionary" and "non statutory" procedures set up by the DOI and the Secretary for Security were unfair and unlawful. *Inter alia,* the Court found: the decision makers were insufficiently trained or instructed; no provision was made for an oral hearing on petition; lawyers were not permitted to be present at the interviews or during the completion of the questionnaire; and there was no provision to provide legal representation for those unable to afford a lawyer. See attached article,

[1] SCMP, 18 May 2007
[2] SCMP, 5 December 2004

"*Court rules fear of torture not taken seriously*".[3] The Court was also critical of the fact that the Respondents did not provide relevant policy documents to the Court.

6. If the judgment is not appealed then the HKSAR and the legislators must consider the waste of time and resources in mismanaging this screening process including the spinoff waste relating to social welfare, unnecessary prosecutions, litigation, detention (see below) and potential abuses.

Detention and the Case of A and Others v DOI, CACV 314/2008, judgment July 2008

7. In the cases of *A, F, AS and YA and Director of Immigration, CACV 314-317 of 2007,* judgment 18 July 2008, CAT claimants and asylum seekers administratively detained for periods between 3 and 22 months, the Hong Kong Court of Appeal found that the DOI's policy on detention was not sufficient and accessible and therefore did not meet the requirements of Article 5(1) of the Hong Kong Bill of Rights (arbitrary detention). The Court stated:

Mr. Chow's primary submission is that the Director does not have a policy, and that the law does not require him to have one. We have already dealt with these submissions. We add only that it is inconceivable that the Director has no policy at all.

8. The alternative submission of the HKSAR was that the policy is said to be contained in a document headed "Supplementary information in relation to situation of refugees, asylum seekers, and torture claimants" supplied to the Legislative Council. The paper, found to be cursory in nature, was not produced before the judge at the Court of First Instance[4]. Moreover, the supposed policy paper was dated 1 December 2006 and therefore was not in existence when A, F, and AS were detained. The Court stated: "In any event, we are not satisfied that it was accessible." The Court continued:

We do not believe such piecemeal disclosure of policies would satisfy Article 5(1)'s requirement that the grounds be certain and accessible.

9. Widely reported as a success[5] it is regrettable from one perspective that the HKSAR did not appeal which would have allowed the Court of Final Appeal an opportunity to consider the wider, and primary argument, rejected by the Court of Appeal, that, in general terms, *Prabakar* and the post *Prabakar* developments did not neatly fit within the existing immigration legislation. Part of the problem with judicial review is that in the egregious cases of legislative inaction, as in this area of the law, the courts may not be able to see the problems in any holistic way and in any event cannot legislate to make up for the lack of legislation.

10. Subsequent to the Court of Appeal judgment it appears that the HKSAR still had not sorted out its detention policy. In the case of *Hashimi Habib Halim and Director of Immigration,* HCAL 139/2007, 15th October 2008, Saunders J. criticized the DOI for not

[3] SCMP, 6 December 2008
[4] On 15 June 2007 Hartmann J. in the High Court had dismissed all the applications.
[5] See, South China Morning Post, "No clear policy for jailing asylum and torture claimants, court finds. Ruling may bring freedom for refugees." 19 July 2008. SCMP, "Clearer detention policy sought. Rights groups applaud ruling on refugees." 19 July 2008. SCMP, "Ex-prisoner says up to 200 released since judgment. Immigration detainees 'set free after court's ruling' 3rd September 2008.

carefully examining what might constitute an appropriate policy despite "having been given the advantage of knowing of the policy adopted by the Home Secretary in N (Kenya)" and stated:

It is unfortunate that more careful consideration was not apparently given to that policy by the Director.
(para. 48)

11. On 5th February 2009 the 4 test cases will be heard on the issue of quantum of damages. Again the HKSAR has to consider the cost consequences of legislative inaction on this issue.

Refugee and CAT Claimant Overlap—The Way Forward

12. I refer to my 2006 paper and the well-known procedural problems with the UNHCR process—which is outside the control of the HKSAR.

13. Given that the HKSAR has an obligation to screen CAT claimants and by its own numbers there are more persons availing themselves of that process than the procedurally unfair UNHCR process (3,196 vs 1,591) and given the similarity in the nature of the processes it is clearly time for the HKSAR to respond favourably to the recommendations of the UN CAT and put in place comprehensive legislation for refugee status determination ("RSD") and CAT screening (the majority will claim both). Given that the HKSAR must interview for CAT, and if increasing resources and money are to be spent on the process, and a decision on refugee status can be made based on the same interview process, (as is done in other developed jurisdictions) there does not seem to be any impediment to the HKSAR taking control, in a fair and efficient way, of the entire process and putting in place all ancillary legislation.[6] This would include, *inter alia*, basic screening legislation, including the setting up of an independent tribunal, legislation governing status while waiting for a decision and legislation for related issues such as provision of social assistance during the process, all of which are presently lacking.

Mark Daly
Partner, Barnes & Daly
2nd February 2009

[6] Note that the Macau SAR has done so as of 2004.

SCMP

Sunday, December 5, 2004 (p.3)

Experts say asylum seekers have almost no protection in HK law

Pets better served than refugees, say lawyers

Nick Gentle

Cats and dogs have more protection under Hong Kong law than refugees do.

In fact, no legislation exists dealing specifically with asylum seekers – who are lumped in with everyone else under the general provisions of the Immigration Ordinance – a seminar on refugee and migrant issues heard yesterday.

"That body of law does not exist in some ways in Hong Kong," said Mark Daly, a lawyer who has represented refugees in Hong Kong for almost a decade.

"Dogs and cats are in a better position than refugees in Hong Kong," Mr Daly said, pointing to the existence of the Dogs and Cats Ordinance.

It allows people upset about decisions handed down regarding their dogs or cats – a destruction order, for example – 28 days to lodge an appeal with the Administrative Appeals Tribunal.

People refused approval to enter Hong Kong by the Immigration Department, however, must appeal within 14 days, and then only to the Chief Executive in Council, which effectively rubber-stamps the immigration director's decisions, he said.

"For dogs and cats there is a statute. You can appeal to an independent board; further, there are specific provisions on detention – you can appeal against a decision to vary the length of that detention.

"That can be challenged on its merits," Mr Daly said, "whereas for an asylum seeker in detention pending removal, there is no independent appeal on the merits for that decision."

Asylum seekers subject to a removal order do have recourse to an immigration tribunal, noted Philip Dykes, another speaker at the event organised by Amnesty International. But, he said, the ordinance "restricts the grounds of appeal to jurisdictional matters only, and does not permit the tribunal to review the intrinsic merits of the director's decision".

He also pointed out that even if an appeal were under way, nothing in the law prevented the removal of the applicant from Hong Kong as the review is heard.

"If the director of immigration decides to remove a person who is, or may be, a refugee, there is no tribunal, independent or otherwise, that is competent to reverse that decision on its merits," Mr Dykes said.

"That leaves judicial review as the only effective remedy. It is the only means of having the decision set aside and quashed.

"The only claim they have w in the system is asserting their p tion as a legal right ... the only p vision that a refugee might clai that of customary international – that you do not send back a p son to a place where they may further persecuted."

Concerns have been voic both in Hong Kong and abro that the current situation may be in strict accordance with Ho Kong's obligations under inter tional treaties.

In late 2000, the UN High Co missioner for Refugees' Commit Against Torture said that practi in Hong Kong relating to refug may not fully conform with Arti 3 of the Convention Against T ture.

That article prevents memb jurisdictions from returning peo to a place where they are likely to in danger of being tortured.

"There is getting to be more i ternational attention to the lack proper procedures in Hong Kong this area," Mr Daly said.

PETS VS PEOPLE	CATS AND DOGS	REFUGEES
Time to appeal	28 days	14 days
Independent review	YES	NO
Specific legislation	YES	NO
Can appeal case on merits	YES	NO
Subject of international conventions	NO	YES
Decisions stay in effect during appeal process	YES, except destruction order	YES, including removal orde

Policy on asylum seekers violates international duties, says judge

Court rules fear of torture not taken seriously

Nick Gentle

Hong Kong was in violation of its international obligations to fairly assess asylum seekers' claims that they might face torture if returned to their home countries, the High Court ruled yesterday.

In a stinging rebuke to the way the Immigration Department had been reviewing torture claims, Mr Justice John Saunders in the Court of First Instance struck down a process that had seen not a single claim succeed of about 200 so far assessed.

The judgment resulted from a judicial review application by six people to facets of the policy they said were so unfair as to render the system unlawful under the international Convention Against Torture, to which Hong Kong is a signatory.

Mr Justice Saunders ruled the policy was illegal because:

- Claimants were not allowed to have legal representation with them at any stage of the process;
- Applicants were denied Legal Aid;
- The person examining the claim did not make the final decision;
- The people making the decisions about claims, and later appeals, were insufficiently trained in regard to assessing torture claims;
- There was no provision for claimants to appeal at an oral hearing.

Only two of the six claimants had got to the stage where their cases had been rejected, and the government had argued that a challenge to the entire system based on cases that had not been decided was premature.

However, Mr Justice Saunders noted that with some 2,600 applications under the convention outstanding, it was only prudent the system be reviewed if there was an arguable case it might be unfair or flawed.

The assessment policy was put in place after a 2004 case in which the Court of Final Appeal found that given the terrible consequences if a person was wrongly sent back to a country where they faced torture, the government was obliged to subject every claim to a rigorous assessment.

Indeed, policy documents prepared by the department had acknowledged the need for such a process and also the difficulty of requiring claimants to provide proof substantiating their fears. However – and Mr Justice Saunders reserved special criticism for the Department of Justice on this point – the existence of those documents was not revealed to the six applicants until the judicial review had reached the court room.

It was especially concerning because the documents tended to prove that the government had – as contended by the applicants – adopted a blanket policy of not allowing legal representation for claimants.

Also of concern to the judge was the fact it appeared the department might not consider a claim to come under the convention unless certain "magic words" invoking the treaty were uttered. It should not "sit back and wait silently until a potential claimant specifically mentions the convention, or the word 'torture' ".

It was also incumbent on the department to give full reasons for its decision to applicants so they might know the grounds on which they were refused and possible avenues of appeal or review.

"A bare assertion that 'the case has been reviewed' or that 'all information has been considered' falls far short of satisfying the requirements of natural justice," the judge said.

Human rights lawyer Mark Daly, who ran the cases as a test case for about 70 other claimants he represents, described Mr Justice Saunders' ruling as a "slam dunk".

"Further proof that the city needs coherent legislation and firm regulations to deal with its obligations under international human rights law."

The decision also reinforced comments last month by the United Nations about Hong Kong's implementation of the torture convention.

The committee had also recommended a legislative approach.

"This is too important to leave to bureaucrats alone," Mr Daly said. "At least if it goes through the legislature, the process is transparent and they are forced to look at the issue as a whole."

The Immigration Department said it was reviewing the judgment.

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Schools promised more flexibility on teaching in English or Chinese