香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR
香港上環文咸西街44-46號南北行商業中心602室
Room 602, Bonham Commercial Centre, 44-46 Bonham Strand West, Sheung Wan.
電話 Phone: (852) 2811-4488 傳真 Fax: (852) 2802-6012

Submission to Bills Committee on Immigration (Amendment) Bill 2011

November 2011

Introduction

1. Hong Kong Human Rights Monitor (the Monitor) welcomes the Government's decision finally to introduce legislation to deal with the torture claim assessment process. The legislation – in the form of Immigration (Amendment) Bill 2011 (the Bill) – sets out specific provisions dealing with this process, but notably fails to deal with vital elements and falls short in key aspects.

2. Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) stipulates the principle that "Torture as a ground for refusal to expel, return or extradite".[1] Hong Kong, as part of China and to which the CAT has been specifically extended, has the responsibility to fulfill all obligations under the Convention.

3. Among the defects to be found in the Bill is the lack of concrete criteria on how claims are to be substantiated. Clause 7 of the Bill suggests the addition of a new section 37ZI(3) to the Immigration Ordinance to state that "A torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant were removed or surrendered to a torture risk State", without providing any details on the criteria on assessing the applications.

Screening criteria should be specified in the Bill

4. General Comment No. 1 on the CAT stipulates the implementation of article 3 of the CAT. It sets out the non-exhaustive criteria when assessing each application from an "author" (who are renamed "claimant" in square brackets in the quotations below):
   - Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?
   - Has the [claimant] been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

[1] Article 3 of the CAT: (1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; (2) For the purpose of determining whether there such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass.

- Is there medical or other independent evidence to support a claim by the [claimant] that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- Has the situation of consistent pattern of gross, flagrant or mass violations of human rights changed? Has the internal situation in respect of human rights altered?
- Has the [claimant] engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- Is there any evidence as to the credibility of the [claimant]?
- Are there factual inconsistencies in the claim of the [claimant]? If so, are they relevant?

5. The Monitor opines that the criteria above are important for the Immigration Officers and members of the Torture Claims Appeal Board to make decisions on the applications. This non-exhaustive list of criteria should be included in the Bill.

Right to appeal for all claimants

6. Another problem with the present Bill is in clause 7 where it is proposed to add a new section 37ZI(3) to specify that a decision of the Director not allowing a withdrawn claim to be reopened or, alternatively, not allowing a subsequent claim to be made, is to be final. Applicants cannot appeal to the Torture Claims Appeal Board or lodge a statutory objection under the Immigration Ordinance.

7. The Monitor opines that this requirement is unnecessary and questionable, It may well lead to a multiplicity of judicial reviews against such decisions on the ground of fairness. It is at least doubtful that such provision sufficiently reflects and satisfies the *non-refoulement* obligation under the Convention and probably the CFA's requirement of "high standards of fairness".

8. It is easy to envisage a situation where a change of circumstances in the home country may render such a decision to "close" a case inappropriate. The Monitor respectfully reminds the Administration that the test is whether there is a risk of refoulement to torture is to be determined at the time *when the removal or deportation is to take place*, rather than whether in the past torture has occurred, although the latter of course is relevant. The overriding principle must be to secure against return to torture, irrespective of whether a claimant has not complied with time limits artificially imposed by statute.

Visa regime and the opportunity to work on compassionate grounds

9. One of the requirements for claiming non-refoulement protection set out in the proposed section 37W(1) is that a claimant has to be "subject or liable to removal". That is, all persons lawfully staying in Hong Kong would not have the legal right to apply for protection until they have overstayed and subject to a removal order. This would unnecessarily extend the stay in Hong Kong of those who intend to make non-refoulement protection claims.

10. Persons who have already suffered torture or would face torture if sent back to his home country are under tremendous emotional stress. It would be more

humane and reasonable to give such persons some sorts of proper immigration statuses rather than forcing and leaving them to become overstayers.

11. The Government should put in place a proper visa regime so that CAT claimants can be given a proper visa status during their stay in Hong Kong in pursuing their application. The visa regime would at least enable the Government, in deserving cases, exercise the discretion to issue visas to claimants on compassionate grounds, say on the recommendation of medical doctors.

12. The Monitor opines that if the decision on the claim is delayed and if the claimant is not responsible for such delay, a claimant, especially those who are proven to be destitute, should be allowed to work to maintain his/her basic living in Hong Kong.

13. Claimants are routinely released on recognizance pending a decision on the respective claims. There is no mechanism under the Immigration Ordinance to guarantee that torture claimants are granted the same rights with regard to wage-earning employment as those of nationals. The Monitor opines that a specialized visa system should be explored to guarantee their basic rights, in accord with international standards and guidelines promulgated elsewhere, such as those by the European Union.

14. 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 6 regarding documentation states that:

> "1. Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined. If the holder is not free to move within all or a part of the territory of the Member State the document shall also certify this fact.
> 2. Member States may exclude application of this Article when the asylum seeker is in detention and during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State. In specific cases, during the examination of an application for asylum, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.
> 3. The document referred to in paragraph 1 need not certify the identity of the asylum seeker.
> 4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorized to remain in the territory of the Member State concerned or at the border thereof.
> 5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State."

15. Article 11 regarding employment of the above European Directive 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."

16. In a proposal to recast the above Directive further, it is suggested 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.[2] The Monitor opines that these principles can be extended to torture claimants.

17. 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.[3] Before July 2002 asylum seekers in the UK 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 British 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.[4]

18. 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.[5] Canada also has a rather liberal policy in dealing with refugees' need to work. Refugees may be able to apply for employment authorization to work while they are waiting for a decision on their claims. Usually, only people who cannot live without public assistance are eligible for employment authorization.[6]

---

[2] 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.
[3] Overview of Canada's asylum system at http://www.uniya.org/research/asylum_canada.pdf.
[4] Refugee Council, "Social Exclusion, Refugee Integration, and the Right to Work for Asylum Seekers", September 2006, pp. 3-4.
[5] Refugee Council, "Social Exclusion, Refugee Integration, and the Right to Work for Asylum Seekers", September 2006, pp. 3-4.
[6] Citizenship and Immigration Canada, "Refugee claims in Canada – Refugee rights", http://www.cic.gc.ca/english/refugees/outside/arriving-rights.asp.

19. 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.

Other administrative work to facilitate the whole procedure

20. Besides the statutory requirements, the Government should also pay attention to administrative arrangements to facilitate the fairness and impartiality of the whole procedure. Some of them have been mentioned in our previous submission to the Government.

21. **Border control**: The border is probably the most critical area in the whole torture claimant procedure. As the United Nations High Commissioner for Refugee (UNHCR) noted, it is the stage which "abuses are most likely to occur" because of the fact that "applicant may be fearful, fatigued, lacking documentation, or unable to articulate clearly a claim", and "the border authority may be incompetent, insensitive, or biased" or even that "a language barrier may exist between the two".[7]

22. To prevent such difficulties, the immigration officers at the border should be competent, sensitive and with a clear mission to inform all possible non-refoulement claimants of their right to make a proper and timely claim. They should provide all useful information to a possible claimant in his or her mother language, e.g. a sheet of information produced in his or her mother language. These officers should also be given a clear instruction to refer all possible claimant applicants to the immigration officers who are responsible for the torture claimants, and/or the UNHCR, for further actions and decisions.

23. **Training of officers**: In accordance with the ruling in *FB*, Immigration officers involved in screening of torture claimants must first receive training so as to enable fair and just decisions to be made, in accord with the high standards of fairness required by *Prabakar*. The Monitor contends that all officers within the Immigration Department, particularly those at the border control points, should receive training in respect of persons who may be seeking protection under CAT. This will ensure that they have the necessary knowledge and understanding of a torture victim's particular difficulties and needs. There must also be a mechanism for evaluation of the performance of the officers from time to time.

24. **Information sources:** It is important for there to be a comprehensive documentation and information database so as to provide the officers with access to useful and updated information during the decision-making process during or even after the interview has been completed. The information database should hold all relevant information, including balanced country information from the Government and the NGOs, international law and updated international human rights reports. A capable supporting team should

[7] Christopher L. Avery, "Refugee Status Decision-Making: The Systems of Ten Countries", HeinOnline – 19 Stan. J. Int'l L. 235 1983, p. 238.

be established to manage the information database and keep its information updated. Naturally, in accordance with the high level of fairness, such material must be accessible to the claimant and his/her advisors.

25. **Appropriate interpretation**: The provision of appropriate interpretation can minimize the misunderstanding between the administrative tribunal/appeal board and the applicants, and shorten the time for processing. The Government has the responsibility to provide appropriate interpretation by recruiting qualified interpreters and providing them with intensive training. It is also important to ensure the quality of the interpretation service.

Refugee Convention and RSD procedure

26. Hong Kong has long been criticized for its lack of a coherent policy towards refugee and torture claimants and the absence of a fair and comprehensive legal framework to screen such claimants. Setting up a system for handling non-refoulement claims only under Article 3(1) of the CAT but not those under the Refugee Convention is clearly inadequate.

27. Various UN human rights treaty bodies and the UNHCR have criticized the lack of comprehensive legislation dealing with refugees and urged the HKSAR to put in place a comprehensive refugee status determination procedure (RSD).

28. The UN Committee on Economic, Social and Cultural Rights expressed concern that "HKSAR lacks a clear asylum policy and that the Convention relating to the Status of Refugees of 1951 and the Protocol thereto of 1967, to which China is a party, are not extended to HKSAR". The Committee has also expressed the regret that Hong Kong Government "does not foresee any necessity to have the Convention and the Protocol extended to its territorial jurisdiction". It thus recommended Hong Kong Government to reconsider "its (HKSAR's) position regarding the extension of the Convention relating to the Status of Refugees and its Protocol to its territorial jurisdiction, and that it strengthen its cooperation with UNHCR, in particular in the formulation of a clear and coherent asylum policy based on the principle of non-discrimination".

29. The UN Committee Against Torture expressed concerns on Hong Kong in its Concluding Observations in November 2008 that there was no legal regime governing asylum seekers so as to ensure a fair and efficient refugee status determination procedure and recommended that the HKSAR should "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". The Committee Against Torture further expressed its concern at the position taken by the Government that there were "no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol."

30. The Government insists on maintaining the position not to seek the extension of the Refugee Convention to Hong Kong. The Government's explanation is that "Hong Kong is small in size and has a dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if

the Convention were to be extended to Hong Kong".[8] Notwithstanding the fact that the Monitor, human rights lawyers and other NGOs are maintaining the call for the Government to establish a single, integrated mechanism to screen cases under the Refugee Convention and the CAT, the Government's position remains intractable.

31. The lack of a fair and open refugee status determination procedure (RSD) is an anomaly which has led to and will continue to engender abuse of the system. As at end of June 2008, there were 105 refugees, 1671 asylum-seekers and 3279 torture claimants remaining in Hong Kong. The number of cases being considered by the UNHCR Hong Kong sub-office is very low, and, for obvious reasons, entirely outside the control of the Government. This enables non-genuine claimants to perpetuate their stay in Hong Kong, while depriving genuine claimants of the benefits of an efficient and speedy processing of their claims. A number of asylum-seekers also make claims under CAT. Even after a CAT claims is determined, there remains the possibility of the refugee claim being re-raised. The Monitor once again urges the Government to accept the extension of the Refugee Convention to Hong Kong and develop a fair RSD procedure.

[8] Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong (CAT/C/HKG/4).