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Panel on Security

Background brief prepared by the Legislative Council Secretariat for the meeting on 12 April 2011

Torture claim screening mechanism

Purpose

This paper provides background information and summarizes past discussions of the Panel on Security ("the Panel") on the Administration's review of the torture claim screening mechanism.

Background

Torture claims made under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

2. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") has been applied to Hong Kong since 1992. Torture claims made under Article 3 of CAT are dealt with by the Immigration Department ("ImmD"), and the Government of the Hong Kong Special Administrative Region ("HKSAR") has put in place a set of administrative procedures for handling torture claims.

3. For a torture claimant who has failed to establish his claim, he will be removed from Hong Kong in accordance with the law. For a torture claimant who has established his claim, he will not be removed to the country where there are substantial grounds for believing that he would be in danger of being subjected to torture. However, his removal to another country to which he may be admitted without the danger of being subjected to torture will be considered. Furthermore, if country conditions subsequently change such that a torture claim established earlier in respect of a particular country can no longer be substantiated, removal to that country will be considered.

4. The administrative procedures allow a screened-out torture claimant to appeal against refusal decision made against him, and the Secretary for Security will consider the appeal. As legal proceedings are not involved in the screening and appeal processes, no legal aid is available. However, the decision on a torture claim, including the decision on appeal, is subject to judicial review, and legal aid may be available for the judicial review proceedings. Similarly, if a deportation or removal order is made against a torture claimant, he may seek judicial review against the decision to deport or remove, and legal aid may again be available for such judicial review proceedings.

Number of torture claims lodged

5. According to information provided by the Administration to the Panel in September 2009, only a small number of torture claims were lodged pursuant to Article 3 of CAT in the past. From 1992 to 2004, the HKSAR Government received 44 claims in total.

6. In June 2004, the Court of Final Appeal decided in a judicial review case that the procedures for screening torture claims should meet high standards of fairness and allow every reasonable opportunity for the claimant to establish his claim. Thereafter, the number of torture claims has surged. The number of claims received were 186, 541, 1 583 and 2 198 respectively from 2005 to 2008, and 2 132 claims were received in the first eight months of 2009. The majority of claimants are South Asians, mostly from Pakistan, India, Bangladesh and Sri Lanka. About half of the claimants are illegal immigrants ("IIs") and the other half overstayers. According to the Administration, about 90% of the claimants lodged their claims upon arrest or when facing repatriation by the law enforcement agencies, and their claims were lodged after remaining in Hong Kong for a long time in order to prolong their stay.

The Court of First Instance's judgment

7. The Administration advised that it had been reviewing the torture claim screening mechanism from time to time, with a view to achieving effective screening, ensuring procedural fairness and preventing abuses. Nevertheless, the Court of First Instance ("CFI") decided in December 2008 in another judicial review case that the screening procedures put in place by the Administration were unable to meet the high standards of fairness, for reasons including the following -

(a) the Administration had not provided publicly-funded legal assistance to needy claimants;

(b) the officer who decided whether a claim was substantiated was not the one who interviewed the claimant; and

(c) the Administration had not arranged for oral hearings of the petitions lodged by claimants who were dissatisfied with the result of the screening.

8. The screening process was suspended following CFI's judgment. In the light of the judgment, the Administration decided to improve the appeal mechanism by appointing retired judges and magistrates to handle petitions lodged against the decisions made in relation to screening by decision makers with a legal background and relevant experience.

Deliberations of the Panel

9. At the Panel meetings on 6 July, 29 September and 1 December 2009, the Administration briefed members on the progress of its review of the torture claim screening mechanism.

10. The Administration informed members that -

(a) after the enactment on 14 November 2009 of the Immigration (Amendment) Ordinance 2009 ("the Amendment Ordinance") which specified that it was a criminal offence for IIs and other persons not lawfully employable to take up employment, establish or join any business, the number of non-ethnic Chinese IIs intercepted at sea had dropped significantly by more than 60%, from 24 in the first two weeks of November 2009 to eight in the latter half of the same month;

(b) in the first two weeks following the commencement of the Amendment Ordinance, 116 torture claimants withdrew their applications made under CAT and expressed willingness to be removed;

(c) there were about 300 new torture claims per month. As at the end of October 2009, there were a total of 6 203 outstanding claims pending screening. To deal with the backlog of claims, the

Administration saw a need to resume screening as soon as possible. It had reviewed the torture claim screening mechanism with reference to the experiences of other common law jurisdictions, and planned to enhance the existing screening mechanism by implementing a series of improvement measures by the end of 2009, with a view to achieving effective screening, ensuring procedural fairness and preventing abuses;

(d) the screening of torture claims would resume before the end of 2009. The Administration and the Duty Lawyer Service ("DLS") had reached agreement in principle on launching a pilot scheme in December 2009 for a period of 12 months. Duty lawyers would provide legal advice in the screening process in respect of the grounds of claims and petitions as appropriate, and would represent eligible claimants at petition hearings. DLS had started the recruitment of qualified lawyers for the pilot scheme. As at 20 November 2009, about 400 lawyers, among whom over 50% were barristers having substantial experience in the field, had indicated interest to be enrolled as duty lawyers for the new scheme. The Administration hoped that more lawyers with the requisite qualifications and experience would join the scheme at a later stage;

(e) the proposed fee rate, which was revised to $720 per hour in line with the revision made to the duty lawyer rates, had been the fee rates adopted by DLS for its duty lawyer services;

(f) the Administration would review the enhanced mechanism including the pilot scheme having regard to the practical experience gained and the views of relevant stakeholders, including those of the two legal professional bodies, namely, the Law Society of Hong Kong ("the Law Society") and the Hong Kong Bar Association ("the Bar"). The lawyer fees might also be reviewed in that context, including the issue on whether the fees were sufficiently attractive to lawyers with relevant qualifications to provide service as highlighted by the legal profession;

(g) after considering the views expressed by the two legal professional bodies, the Administration had agreed to extend the time permitted for returning the completed questionnaire from 14 days to 28 days. The Administration was of the view that the 28-day time limit was a reasonable period that struck a balance between the need to

ensure that a claimant was given a reasonable opportunity to establish his case and the requirement for early screening of a case without undue delay. This was in line with the Canadian practice in that an asylum claimant in Canada would be given 28 days to return the specified form containing the required information in support of his claim for assessment by the relevant authority and was longer than the United Kingdom practice where a claimant was given only 10 working days to complete a standard form in lodging his asylum claim. The Administration was prepared to allow for a time extension for returning the completed questionnaire, if the issues involved in a particular case were complicated and circumstances so justified; and

(h) the Administration proposed to put in place a statutory regime for handling torture claims lodged under Article 3 of CAT.

11. Regarding the pilot scheme, representatives of the Law Society and the Bar pointed out that there were still a number of outstanding issues, including the guidelines on the scheme, the training arrangement for duty lawyers, the role of the United Nations High Commissioner for Refugees ("UNHCR") in screening of CAT claims and the proposed fees rates for torture claim related work, which were not well addressed. The two legal professional bodies had reservations about implementing the pilot scheme from December 2009.

12. Some members noted with concern that, according to two surveys conducted by the Law Society and the Bar in October 2009, only a small number of lawyers had expressed their willingness to undertake torture claim related work at the rate of $670 per hour.

13. The Administration advised that it noted the results of the two surveys conducted by the Law Society and the Bar in October 2009. Regarding the contention that remuneration paid to lawyers undertaking torture claim related work should be sufficient for attracting lawyers of the calibre and experience needed to competently handle the claims, the Administration considered that the adoption of the current payment rates under the Duty Lawyer Scheme, i.e. at $670 per hour or $2,710 per half day, was appropriate. It was because legal assistance was available to virtually all torture claimants, whether or not their claims involved legal issues or disputes in fact. The assistance to be provided in the screening process was not of the same nature as litigation work in High Court or District Court cases. Based on the existing duty lawyer rates and the proposed scope of assistance agreed by the legal professional bodies, the Administration estimated that the legal cost alone to assist a torture claimant in

making his case up to the petition stage was in the region of $51,000 for a simple case. Bearing in mind the current influx of 300 new claims per month and 6 203 outstanding cases pending screening as at the end of October 2009, the proposed adoption of the current payment rates under the Duty Lawyer Scheme would already pose a significant financial burden to the Administration.

14. A member was concerned about the legal cost for processing a single claim, if the rates for civil cases as proposed by the two legal professional bodies were to be adopted. The Administration explained that if the rates for civil cases, ranging from $1,600 to $4,000 per hour depending on the years of practice, proposed by the legal professional bodies were to be applied, the legal cost would shoot up to the region of $120,000 to $300,000 per case, which would not be viable and sustainable in the long term.

15. Some members expressed concern about the suitability of extending the Duty Lawyer Scheme to undertake legal representation work for CAT claimants. They asked whether specialized training would be provided for lawyers before they participated in the new legal assistance scheme for torture claimants.

16. The Administration advised that DLS would generally require and recruit qualified lawyers with a minimum of three years' post-qualification experience to be enrolled as duty lawyers for the new legal assistance scheme for torture claimants. They would also take into account the practical experience and training of the lawyers in the field in considering individual cases. It was noteworthy that this experience requirement was comparable to that of other common law jurisdictions. In New Zealand, for example, the experience required was one year. Separately, with funding from the Administration's Professional Services Development Assistance Scheme, the Law Academy (set up by the Law Society) had organized a training programme in mid-December 2009 for lawyers interested in joining the scheme.

17. Some members expressed concern about the lengthy procedures and time required for determination of torture claims. They called on the Administration to speed up the process of determining torture claims.

18. The Administration advised that the time needed for assessing each case varied with factors such as the individual circumstances of the case. Statistics of the assessed torture claim cases showed that it took about 14 months on average to complete the processing of a case. The Administration stressed that it attached great importance to improving the torture claim screening mechanism. In reviewing the procedures under the existing mechanism, the Administration had made reference to the procedures of UNHCR and other

jurisdictions for handling refugee claims. According to its plan, the screening workflow would be streamlined and specific time limits would be laid down for various steps in the process. The Administration envisaged that with such enhancements, the screening of claims would be expedited significantly in future.

19. Some members noted with concern that there were cases where the claimants had made both refugee and torture claims. They sought information on the number of these cases, and considered that if a considerable number of asylum seekers lodged both refugee and torture claims, the Administration should consider introducing a coherent and comprehensive system for contemporaneous assessment of both torture claims made under CAT and claims for refugee status filed with UNHCR under the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention").

20. The Administration explained that among the torture claim cases received over the years, about 44% of the claimants were known to have lodged both refugee and torture claims, with the remaining of them only lodged torture claims. Regarding the application of the Refugee Convention, the Administration advised that the HKSAR Government's established position on the Refugee Convention remained unchanged, i.e., the Convention did not apply to Hong Kong and the Government had no obligation to admit persons seeking refugee status or to handle refugee status determination. Despite the non-application of the Refugee Convention to Hong Kong, asylum seekers might approach the Hong Kong Sub-office of UNHCR to lodge asylum/refugee claims. The HKSAR Government had all along been supporting the operation of UNHCR's Hong Kong Sub-office through provision of office accommodation at nominal rent.

21. Some members asked why the Refugee Convention, to which China and Macao had already ratified, was not extended to Hong Kong. They held the view that the Administration should reconsider its position regarding the extension of the Convention so as to speed up the refugee status determination process, since UNHCR was in lack of resources to assess the refugee claims speedily. These members suggested that the Administration should provide manpower resources, as a part of government recurrent expenditure, to UNHCR to assist the latter in refugee status determination.

22. The Administration explained that Hong Kong's relative economic prosperity in the region and its liberal visa regime made the territory vulnerable to possible abuses if the Refugee Convention was to be extended to Hong Kong. Hence, the Government had a firm policy of not granting asylum. It also

advised that ImmD had entered into a Memorandum of Understanding with UNHCR to enhance cooperation. Under the existing cooperation framework, a number of ImmD officers were seconded to the Hong Kong Sub-office of UNHCR for the purpose of staff training.

23. Expressing concern that HKSAR lacked a clear asylum policy, some members sought information on how people who sought refugee status or made torture claim came to Hong Kong. They questioned whether the refugee or torture claim lodged by a person should be processed by the country/place of his first landing.

24. The Administration advised that a great majority of torture claimants were South Asians, mostly from Pakistan, India, Bangladesh and Sri Lanka. About half of the claimants were IIs and the other half overstayers. Most of these IIs came to Hong Kong en rounte from the Mainland and many of them did not lodge any claim, including claim for refugee status, until after having arrived in Hong Kong. The Administration explained that the People's Republic of China was a State Party to CAT. It was understood that under CAT, the People's Republic of China and HKSAR were regarded as one single country and there was no clear definition for the term "place of first landing". Notwithstanding this, the HKSAR Government would explore with the Mainland authorities as to whether IIs sneaked into the territory from the Mainland and making refugee or CAT claims afterwards should be sent back to the Mainland, such that their refugee or CAT claims could be processed by the Mainland, which was the place of their first landing. The Administration noted that some countries in Europe, as well as the United States and Canada, had entered into agreements on refugee status determination which stipulated that claims for refugee status had to be dealt with by the country where the claimants first landed. The Administration would make reference to overseas practices in considering whether similar arrangements might be applied locally. In drawing up the relevant legislative framework for handling torture claims lodged under Article 3 of CAT, the Administration would make reference to international practices and take into account views expressed by relevant parties.

25. A member considered that a long term solution to address the problem was to reach an agreement with the Mainland on handling IIs sneaking into the territory from the Mainland and making refugee or CAT claims afterwards. The member asked whether the Administration had set a timetable to achieve a consensus with the Mainland on this matter. The Administration advised that it had ongoing discussions with the Mainland authorities on cooperation on intercepting non-ethnic Chinese IIs and their repatriation.

26. Some members were concerned about the livelihood of torture claimants. They requested the Administration to provide more detailed information on humanitarian assistance currently provided to torture claimants and asylum seekers released on recognizance, including the nature, level and form of support for these people. The information provided by the Administration is in **Appendix I**.

27. In view of the reservation expressed at the Panel meeting on 29 September 2009 by the representatives of the Law Society and the Bar about the proposed arrangements for the legal representation scheme, the Administration was asked to continue discussion with the two legal professional bodies on various issues of concern, including the guidelines on the scheme, the training arrangement for duty lawyers, the role of UNHCR in screening of CAT claims and the proposed fees rates for torture claim related work. The Administration's response on the legal representation for CAT claimants is in **Appendix II**.

28. A member requested the legal adviser to the Panel to provide advice on whether the required standard of fairness would be met if the Government failed to provide experienced lawyers in the provision of free legal assistance to torture claimants. The information provided by the legal adviser is in **Appendix III**.

Latest developments

29. According to a letter dated 29 June 2010 from the Administration to the Panel, the screening of torture claims under the enhanced administrative mechanism resumed on 24 December 2009. The original forecast was to handle some 400 cases in the first twelve months after the commencement of DLS pilot scheme. However, as at 23 June 2010, only 107 claimants had submitted the grounds of their claims with assistance from duty lawyers under the pilot scheme; among these cases, the Administration had completed screening interviews for 64, and made decisions for nine.

30. The Administration advised that, given the small number of screened cases, it was only prudent and essential that more practical experience of the screening process be gained before casting the screening procedures into legislative proposals. It was also worthy to note that, up till June 2010, no petition case had been decided. In this light, it would be more practical and meaningful to assess the overall effectiveness of the screening mechanism in the end of 2010, by which time it was anticipated the Administration should have

made first-tier decisions for about 200 cases and completed a fair number of petition cases.

Relevant papers

31. Members may wish to refer to the following documents for details of the relevant discussions of the Panel on Security -

(a) Administration's paper for the meeting of the Panel on Security on 6 July 2009 [LC Paper No. CB(2)2054/08-09(01)];

(b) Administration's paper for the special meeting of the Panel on Security on 29 September 2009 [LC Paper No. CB(2)2514/08-09(01)];

(c) Administration's paper for the meeting of the Panel on Security on 1 December 2009 [LC Paper No. CB(2)370/09-10(03)];

(d) Joint submissions from the Law Society of Hong Kong and the Hong Kong Bar Association [LC Paper Nos. CB(2)2524/08-09(01) & CB(2)391/09-10(01)];

(e) Administration's response to the joint submission of the Law Society of Hong Kong and the Hong Kong Bar Association dated 24 September 2009 on legal representation for CAT claimants [LC Paper No. CB(2)33/09-10(01)];

(f) Paper prepared by the Legal Service Division of the Legislative Council Secretariat on issues relating to the provision of free legal assistance to torture claimants [LC Paper No. LS32/09-10];

(g) Minutes of the meeting of the Panel on Security on 6 July 2009 [LC Paper No. CB(2)2495/08-09];

(h) Minutes of the special meeting of the Panel on Security on 29 September 2009 [LC Paper No. CB(2)912/09-10]; and

(i) Minutes of the meeting of the Panel on Security on 1 December 2009 [LC Paper No. CB(2)816/09-10].

Council Business Division 2
Legislative Council Secretariat
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Provision of Humanitarian Assistance to Torture Claimants

Rationale of the assistance

1. On humanitarian grounds, the Administration, in collaboration with non-governmental organisations (NGOs) and on a case-by-case basis, offers assistance-in-kind to torture claimants who are deprived of basic needs during their presence in Hong Kong.

2. The in-kind assistance provided to torture claimants is a form of tide-over support provided on humanitarian grounds. It is **not welfare assistance** provided to eligible Hong Kong residents. Its aim is to provide support which is considered sufficient to prevent a person from becoming destitute while at the same time not creating a magnet effect which can have serious implications on the sustainability of our current support systems.

Scope of assistance

Accommodation

3. Torture claimants in genuine need are provided with temporary accommodation together with the supply of electricity, water and other basic utilities. The types of accommodation assistance offered include -

(i) private flats in Yuen Long rented by International Social Service Hong Kong Branch (ISS). The flats are equipped with basic furniture, beddings, household utensils and cooking facilities;

(ii) accommodation self-arranged by the service users. ISS will enter into a direct payment arrangement with the legitimate landlord. The tenancy agreement will be renewable on a monthly basis; and

(iii) the ISS's Anthony Lawrence International Refuge for Newcomers to Hong Kong. Service users in need of supervised housing, including women or minors, are arranged to stay in this shelter.

Food

4. Service users are provided with a variety of food items, including vegetables, fruit, meat as well as baby/children food where applicable. Nutritious, cultural, religious and other specific needs of individual service

users are catered for as appropriate. Service users collect the food items at six food suppliers' shops located in different districts on Hong Kong Island, Kowloon and the New Territories.

Clothing and basic necessities

5. Clothing, and other basic necessities, including personal toiletries, household cleansing articles, women sanitary items and baby/children items, if applicable, are provided as necessary.

Transport allowance

6. Service users with genuine travelling need for various purposes, including reporting to the Immigration Department, attending medical appointments, attending spiritual worship, meeting with lawyers, collecting food and basic necessities as well as meeting with ISS's workers etc. are provided with petty cash to meet the travelling expenses by the cheapest means of transportation.

Medical services

7. In accordance with the current practice for waiving of medical charges for non-eligible persons, recommendations for one-off waiver of medical expenses at public clinics or hospitals will be given to torture claimants on a case-by-case basis subject to the assessment by service units of the Social Welfare Department.

Level of assistance

8. The in-kind assistance provided to the individual varies according to the needs and personal situations of the person concerned, including the availability of his own resources and the resources available to him from other sources. There is **no monetary-equivalent ceiling** on how much an individual service user in genuine need may receive.

LC Paper No. CB(2)33/09-10(01)

The Administration's Response to the Joint Submission of the Law Society and the Bar Association to the LegCo Panel on Security on Legal Representation for CAT Claimants Dated 24.9.2009

Guidelines on the new scheme (Paras. 6 & 7)

1. Allegation that the Administration does not truly appreciate the difficulties faced by claimants, and the heavy burden on the legal practitioner to present the claimant's case.

   There is no basis for such an allegation by the legal professional bodies ("LPBs"). The fact that the Administration is willing to accept the *FB judgment* without lodging any appeal and to revise the torture claim screening mechanism to remedy those systemic flaws as declared by the court to be unlawful together with the negotiations with the Duty Lawyer Service ("DLS") in setting up a publicly-funded legal assistance scheme for torture claimants are clear indications that the Administration has every intention to conduct torture claim screening in accordance with the requirement of high standards of fairness. Indeed, the Administration's concession that there will be no cap on the number of sessions of legal service to be provided by DLS lawyers under the proposed legal assistance scheme has demonstrated the Administration's willingness to accommodate the need of torture claimants and their legal representatives where the particular facts of a case or the issues involved are complicated which would require further advice on the matter.

2. Time permitted for completion of the questionnaire is insufficient.

   The Administration has agreed to extend the time for returning the completed questionnaire from 14 days to **28 days**. We consider that it is a reasonable period that strikes a balance between the need to ensure a claimant is given a reasonable opportunity to establish his case and the requirement for early screening of a case with no undue delay. This is in line with the Canadian practice in that an asylum claimant in Canada will be given 28 days to return the specified form containing the required information in support of his claim for assessment by the relevant authority and is longer than the previous UK practice where a

claimant was given only 10 days to complete a standard form to lodge his asylum claim.

Indeed, the information required to be given in the questionnaire in a torture claim relate to personal information about the claimant himself and factual information about his past experience of having been tortured which a claimant should have personal knowledge thereof; and thus there should not be any difficulty for him to give the required information which is within his own knowledge. Neither is it necessary for a claimant or his legal representative to make data access request etc. for information from authority in Hong Kong before he is in a position to complete the questionnaire. In this respect, the submission that a misplaced word or incorrect statement would cause serious prejudice to a claimant's case as damaging his credibility is misconceived as a case officer is required to take into account all the relevant information of the case which includes objective information e.g. the relevant country of origin information etc. in deciding the credibility issue; and that mistakes made in the questionnaire may always be rectified/clarified at the subsequent interview or by way of supplementary information given in writing.

As regards the difficulties faced by a claimant in obtaining documentary proof, the fact that he has no such proof or is unable to obtain it would not necessarily cause prejudice to his claim given that the authority determining his claim is required to take into account the fact that a claimant who has fled from the country concerned would have few belongings and document with him; and that the authority could not adopt an attitude of sitting back and putting him to strict proof of his claim (CFA in *Prabakar (2004) at paras. 53 & 54*). Where necessary, a claimant may request for an extension for a reasonable period of time to submit any crucial documentary proof which is temporary unavailable.

In any case, given that there is an element of flexibility on the timing to return the completed questionnaire as a case officer may allow for a time extension on justifications (para. 16 of the draft Guidelines), the 28-day period as now allowed by the Administration for returning a questionnaire cannot be said to be grossly inadequate.

3. Prosecutions

Para. 48 of the draft Guidelines states that, "*The claimant must be informed that the information he/she provided will be treated in confidence…… In addition, nothing at all said by the claimant in either the questionnaire or at the interview will be used against the claimant in any subsequent criminal proceedings of any nature save an attempt to pervert the course of justice,* ***and/or making of false reports, etc. to member of Immigration Service****."* The LPB alleges that the prosecution of torture claimant for providing false information is contrary to *FB judgment*.

The CFI in *FB judgment* only dealt with the issue concerning a torture claimant giving incriminating answers in the questionnaire or at the interview in relation to immigration or other offences which he has committed when fleeing from his country e.g. being an overstayer, illegal immigrant etc. in Hong Kong (paras. 147-151 of the judgment). The said judgment does not appear to support a case to condone a torture claimant giving any false information to an immigration officer or the authority when lodging a claim where there is a duty on him to tell the truth and thus the court expressly mentions that the immunity is subject to the exception of "an attempt to pervert the course of justice" (para. 151).

Given the above, notwithstanding that there is no mention of any possible prosecution for making false report or information in the course of making a claim in *FB judgment*, it does not appear to have any objection to warn a claimant of any possible risks of such prosecution if he deliberately gives false information in the screening process where he is expected to tell the truth in the circumstances. Indeed, depending on the circumstances of a case, a claimant's deliberate act to give false report or information to a case officer handling his claim may be one of those facts upon which a prosecution for an attempt to pervert the course of justice may be initiated. Viewed in this light, it could not be said that the giving of any such warning to a claimant is contrary to *FB judgment*.

4. Medical examinations

Paras. 43 & 44 of the Draft Guidelines provide that a case officer may request a torture claimant to undergo medical examination if it appears to him that such may shed light on the credibility of the claim. The CFA in *Prabakar* held that the authority in the screening process should not adopt an attitude of sitting back and that it is appropriate for it to draw attention to matters which obviously require clarification or elaboration so that they could be addressed by the claimant (para. 54 of the judgment). Therefore, it seems that there is nothing wrong with the authority or a case officer in requesting a claimant to undergo a medical examination or submit medical evidence if such is relevant to the claim. On the question of drawing adverse inference (where the claimant refuses to consent to having such medical examination), any such inference may only be made after the claimant is given a chance to explain why consent is not forthcoming in the circumstances. Provided that such a safeguard is in place, it does not seem to have any objection to requesting a claimant to undergo medical examination for the purpose of verifying his claim.

LPBs' submission is effectively made on the basis that a torture claimant has a right to have private medical examination to be conducted at public expenses for the purpose of obtaining evidence in support of his claim. This is not in line with the *Prabakar judgment* as it is clear that the burden of proof is on a claimant to substantiate his claim albeit that the authority should not take an attitude of sitting back and put the claimant to strict proof thereof. While a torture claimant is not prevented from producing his own medical evidence in support of his case e.g. from private practitioners at his own expenses or those offering their service voluntarily, the Administration has no such obligation to pay for expenses incurred by him in having such private medical examination if the examination is not relevant to the decision on the claim, as we should secure that public resources be used reasonably.

Training and Commencement of screening (Paras. 8-11)

5. The Administration appreciates the arrangement of training for duty lawyers initiated by LPBs in ensuring the quality of legal services to torture claimants. It has offered to assist in liaison work with the Office of the United Nations High Commissioner for Refugees (UNHCR)/Office of the High Commissioner for Human Rights (OHCHR) for trainers or logistic arrangements relating to venue and will provide further assistance as appropriate.

6. We agree that lawyers acting for torture claimants should be competent to do the work through training or have the relevant experience for undertaking such work. That said, this does not necessarily mean that lawyers must attend the training course conducted by the Academy of Law before they may act for torture claimants. Whether a lawyer is competent to do the work depends on what training he has received or the relevant experience which he has had on the subject whether in Hong Kong or elsewhere. While it would be incumbent upon the Administration to further negotiate with the two professional bodies with a view to securing their blessing to permit a small number of lawyers with the relevant experience to take up the work before the commencement of the training by the Academy of Law in December, it is unfair for the LPBs to say that the Administration is not aware of any lawyers who are able to handle these cases competently without proper training if the training here refers to the training course to be conducted by the Academy of Law. It seems that there are some lawyers in Hong Kong who are competent to do torture claim related work without attending the forthcoming training course e.g. those who have been actively involved in the relevant torture claim litigation cases in Hong Kong etc. Indeed, it does not seem that LPBs may prevent any of their members from acting for a torture claimant (at his own expenses) or to act for him on pro bono basis, except that a member who has no such training or experience may be liable to be disciplined for misconduct if he/she acts negligently in the matter and/or not up to the required professional standard having regard to the strong views expressed by the LPBs that only members with the relevant training or experience are competent to do torture claim related work.

Role of the UNHCR (Paras. 12-16)

7. Given that the Refugee Convention does not apply to Hong Kong, and subject to the outcome of the appeal in "C" (CACV 132/2008) which will soon be heard by the Court of Appeal, the Administration has no obligation to conduct asylum screening in Hong Kong and that refugee matters will remain the responsibility of UNHCR - Hong Kong Office. It remains the Administration's firm policy not to conduct any asylum screening in Hong Kong or to extend the application of the Refugee Convention to Hong Kong.

8. Subject to those procedural safeguards and the requirement of fairness, and also with consent from the claimant, it seems that the "interface" with the UNHCR and use of their materials (in the asylum screening process) by a case officer in CAT screening is permissible in those circumstances as sanctioned by the CFA in *Prabakar (at paras. 56-60 of the judgment)* which is reflected in paras. 41 & 42 of the draft Guidelines. As such, it does not seem that the relevant guidelines are in breach of the requirement of high standards of fairness.

9. Secondment of officers from Immigration Department to work in the UNHCR - Hong Kong Office under the Memorandum of Understanding signed between the HKSARG and the UNHCR is solely for the purpose of staff training. As such, the fact that government officers are seconded to work in UNHCR - Hong Kong Office should not be taken as a factor which will undermine the Administration's position that the HKSARG will not conduct asylum screening as it has no such obligation to do so.

Fees (Paras. 17-22)

10. The LPBs' submission is focused on the contention that remuneration paid to lawyers doing torture claim related work should be sufficient to attract lawyers of the calibre and experience that is needed to competently handle the claims and that a comparison with overseas rates is unrealistic as Hong Kong practitioners have higher overheads costs.

11. Nevertheless, we consider that the adoption of the current duty lawyer rate (i.e. around $677 per hour) is appropriate based on the following reasons:-

    The legal assistance is available to virtually all torture claimants, whether or not their claims involve legal issues or facts disputed. The assistance to be provided in the screening process is not of the same nature as litigation work in High Court/District Court cases.

    Having due regard to the views of the LPBs as well as DLS, the Administration has stretched reasonable flexibility and accepted the suggestion from the profession that no cap should be imposed on the number of sessions for a case, which will duly take into account the individual circumstances. In this regard, the package proposed by the Administration compares favourably to the remuneration in other countries for lawyers assisting asylum seekers.

    The proposed fee rates have been endorsed by the DLS Council after full deliberations and its meeting with legal profession.

    The arrangements are made under a pilot scheme, which will last for 12 months. A review will be conducted to make necessary adjustments in the light of practical experience. The fees may be reviewed in that context, including the issue about sufficient attraction for lawyers with relevant qualifications to provide service as highlighted by the legal profession.

12. Basing on the existing duty lawyer rates and the proposed scope of assistance agreed by the LPBs, we estimate that the legal cost alone to assist a torture claimant in making their case up to the petition stage is in the region of $51,000 for a simple case (apart from other incidental expenses, e.g. interpreter's cost and translation). Bearing in mind the current influx of 300 new claims per month and we have over 5 600 cases pending determination as at end August 2009, the proposed adoption of duty lawyer rate would already pose a great financial burden to the public purse. If the rates for civil cases (ranging from $1,600 to $4,000 per hour depending on the years of practice) proposed by the LPBs are to be applied, the legal cost would shoot up

to $120,000-$300,000 per case, which we believe, will not be viable and sustainable in the long term.

13. Last but not least, for meritorious cases, claimants who have been refused at the petition stage will still be able to put forward their cases to the court through judicial review. Civil litigation fee rates ($1,600-$4,000 per hour) will be applicable upon granting of legal aid.

Security Bureau
9 October 2009

Appendix III

立法會
Legislative Council

LC Paper No. LS32/09-10

Panel on Security

Provision of free legal assistance to torture claimants under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Purpose

At the meeting of the Panel on Security on 1 December 2009, members requested the legal adviser to the Panel to advise whether the free legal assistance scheme provided by the Government would meet the high standards of fairness in the determination of claims under CAT if lawyers of the right calibre and/or experience are not available to CAT claimants under the scheme. This paper seeks to provide an analysis on the issue based on information available.

Requirement for a high standard of fairness in the determination of CAT claims

2. The requirement for a high standard of fairness in the determination of CAT claims is laid down by the Court of Final Appeal in *Secretary for Security v Sakthevel Prabakar (Prabakar)*[1]. The Court of Final Appeal held that high standards of fairness must be demanded in the making of such determination which may put a person's life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture. However, it did not decide whether high standards of fairness would require the provision of free legal advice as this issue did not arise in *Prabakar*. In *FB v Director of Immigration and Secretary for Security (FB)*[2], the Court of First Instance, in considering the fairness of the procedures for dealing with torture claimants, held that the Director of Immigration's blanket policy of denying legal representation to torture claimants was unlawful and failed to meet the high standards of fairness required. It was further held that the Government has a duty to provide free legal assistance to torture claimants given the seriousness and complexity of the issues involved in a torture claim and that vast majority of torture claimants would not be able to pay for their own legal representation.

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[1] (2004) 7 HKCFAR 187.
[2] HCAL 51/2007.

Whether a high standard of fairness would require legal assistance to be provided by lawyers with relevant expertise or experience

4. While it was decided in *FB* that a high standard of fairness would require legal representation to a torture claimant and that free legal assistance, whether it be through the Duty Lawyer Scheme (DLS), or the Legal Aid Department, should be provided to torture claimants, matters relating to the seniority (e.g. the minimum number of years of post-qualification experience required), experience and/or calibre of lawyers required to be made available by the Government to torture claimants were not issues before the Court of First Instance.

5. According to our research, we are not aware of any decisions regarding the quality of legal assistance which State authorities are required to provide to torture claimants who lack the means to pay for their own legal representation. However, since the issue relates to the right to legal assistance, it may be useful to refer to judicial authorities on this subject. There are cases in which the courts have considered the right to legal assistance in the context of Article 14(3)(d) of the International Covenant on Civil and Political Rights[3] (ICCPR). The following principles derived from these cases may be relevant:

(a) While the right to legal assistance protected by Article 14(3)(d) of ICCPR does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that the assigned counsel provide effective representation in the interest of justice[4];

(b) the responsibility on the State party in providing legal counsel may not go beyond the responsibility to act in good faith in assigning legal counsel to the accused[5]; and

(c) the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it is or should have been manifest to the judge that the lawyer's conduct is incompatible with the interests of justice[6].

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[3] Article 14 of ICCPR guarantees equality before courts and tribunals and the right to a fair trial. Article 14(3)(d) provides, among others, that everyone charged with a criminal offence shall be entitled to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. Article 14 of ICCPR is implemented in Hong Kong through Articles 10 and 11 of the Hong Kong Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap. 383).

[4] *Kelly v Jamaica* (253/87), Human Rights Committee, United Nations.

[5] Ibid.

[6] *Campell v Jamaica* (618/95), Human Rights Committee, United Nations.

6. In the United States, the Supreme Court has defined the right to counsel enjoyed by defendants facing felony charges as the right to the effective assistance of counsel to ensure that the defendants have a fair trial[7]. It has also decided that counsel's obligation to provide effective assistance includes advocating for the defendant's cause, conducting reasonable factual and legal investigations, and applying the necessary skills and knowledge[8].

7. If the above principles are to apply to the present case, to decide whether the free legal assistance scheme would meet the high standard of fairness in the determination of torture claims, it is necessary to consider whether the Government has acted in good faith in assigning counsel and whether it has taken measures to ensure that effective legal representation or assistance will be provided to torture claimants. It is noted that the Administration has decided to provide free legal assistance to torture claimants through DLS. In making this decision, the Government has considered that DLS should be in a position to provide the legal assistance given that it is an independent legal professional organisation and possesses relevant experience[9]. It is further noted that the Administration and DLS will sign a memorandum of administrative arrangements for the implementation of the free legal assistance scheme. Subject to further information that may be provided by the Administration on these arrangements, it is arguable that the Government is acting in good faith in deciding to entrust DLS with the responsibility of providing legal assistance to torture claimants. Indeed, provision of free legal assistance through DLS is one of the options suggested in *FB*[10].

8. Further, by providing public funding to the Hong Kong Academy of Law, an institute under the Law Society, to organise a four-day training programme for duty lawyers participating in the new scheme[11], it can be said that the Government is taking a positive measure to ensure that the lawyers concerned will at least be equipped with some knowledge about CAT claims before they are assigned to advise torture claimants. Whether the training is sufficient to enable lawyers to provide effective assistance or representation to torture claimants should be a question of fact to be decided with reference to matters such as the content and frequency of the training. Indeed, the issue of training given to examining officers and decision-makers in relation to CAT claims has also been considered by the Court of First Instance in *FB.*

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[7] *McMann v Richardson,* 397 U.S. 759, at 771 (1970).

[8] *Strickland v Washington*, 466 U.S. 668 at 688-91 (1984).

[9] Refer to paragraph 8 of the paper "Torture Claim Screening Mechanism: Latest Progress" issued by the Security Bureau in September 2009 (LC Paper No. CB(2)2514/08-09(01).

[10] HCAL 51/2007, para. 161.

[11] The four-day training programme covers a range of topics including the procedures for handling refugee and torture claims, the various legal issues involved, technical and procedural aspects of adjudication, practical skills in conducting interviews, assessing the risk of torture, etc.

That the decision-makers concerned were insufficiently trained or instructed is one of the grounds for the Court to hold that the screening process for CAT claims failed to meet the high standards of fairness required by *Prabakar*[12]. Based on this decision in *FB*, it is possible that the courts will take into account the adequacy of the training provided to DLS lawyers who have no previous experience in handing torture claims or claims of similar nature in considering the fairness of the screening procedures for torture claims.

Conclusion

9. Based on the decided cases on the provision of free legal assistance by State authorities mentioned above, it is likely that the courts in Hong Kong will consider whether the assistance provided by the lawyers assigned by DLS would constitute effective assistance if they are asked to decide whether the free legal assistance scheme provided to torture claimants would meet the required high standards of fairness. To determine this issue, the courts may find it necessary to look at factors such as the skills and knowledge of the assigned lawyers in handling torture claims, as well as the adequacy of training provided to the lawyers concerned.

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[12] *FB v Director of Immigration and Secretary for Security*, HCAL 51/2007, paras. 176 to 190.