

**For information on
3 June 2014**

Panel on Security of the Legislative Council

Implementation of the Unified Screening Mechanism

Purpose

This paper reports on the latest progress of the implementation of the unified screening mechanism (USM) for determining non-refoulement claims.

Background

2. Article 3(1) of the Convention Against Torture (CAT)¹, extended to Hong Kong since 1992, provides that “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”. In June 2004, the Court of Final Appeal (CFA) ruled that “high standards of fairness” must be demanded in the making of such a determination². In December 2009, the Immigration Department (ImmD) introduced an enhanced administrative screening mechanism for torture claims to ensure that high standards of fairness are met; the mechanism was subsequently underpinned by statutory provisions under Part VIIC of the Immigration Ordinance (Cap. 115) (the Ordinance) commencing December 2012.

3. In December 2012, the CFA ruled that since the rights guaranteed by Article 3 of Section 8 of the Hong Kong Bill of Rights

¹ The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

² In *Sakthivel Prabakar v. Secretary for Security* [2004] 7 HKCFAR 187, the CFA ruled that “high standards of fairness” require, amongst other things, the potential deportee be given every reasonable opportunity to establish his claim, decision makers to make proper independent assessment taking into account all relevant considerations, and if a claim is rejected reasons sufficient for consideration of subsequent review action be given to the claimant.

Ordinance (Cap. 383) (BOR 3) are absolute and non-derogable, persons not having the right to enter and remain in Hong Kong (e.g. illegal immigrants and overstayers) may claim non-refoulement protection by invoking that Article to resist removal or deportation to another country if he faces a genuine and substantial risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment (CIDTP) in that country³.

4. In March 2013, the CFA ruled that as long as the Director of Immigration maintains the practice of taking into account humanitarian considerations having regard to a person's claimed fear of persecution before executing a person's removal or deportation to another country, he is required to independently determine (*vis-à-vis* relying on a determination by the United Nations High Commissioner for Refugees (UNHCR)) whether that person's claimed fear of persecution is well-founded, despite that the 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol have never been applied to Hong Kong⁴.

5. To implement the rulings in these two further CFA judgments, the Administration announced in July 2013 that it would introduce the USM for determining non-refoulement claims lodged by persons not having the right to enter and remain in Hong Kong against removal or deportation to another country on applicable grounds including risks of, apart from torture under CAT / Part VIIC of the Ordinance, (i) ***torture or CIDTP*** under BOR 3 and (ii) ***persecution*** with reference to the non-refoulement principle under Article 33 of the Refugee Convention in one go. Procedures of the USM follow those of the statutory torture claim screening mechanism, which was enacted following extensive consultation with stakeholders and scrutiny by the Legislative Council (LegCo)⁵, to ensure that they meet the high standards of fairness required by law. The USM commenced operation on 3 March 2014.

³ *Ubamaka Edward Wilson v. Secretary for Security* [2013] 2 HKC 75

⁴ *C & Ors v. Director of Immigration* [2013] 4 HKC 563

⁵ Immigration (Amendment) Ordinance 2012

Latest Development

The screening process

6. As in the statutory torture claim screening mechanism, under the USM claimants will have all reasonable opportunities to establish their claims. Claimants continue to receive publicly-funded legal assistance under the USM⁶. To this end, the Duty Lawyer Service (DLS) agreed to extend its service under the former CAT Scheme implemented since December 2009 to cover non-refoulement claims on all applicable grounds under the USM.

7. At the beginning of the screening process under the USM, a claimant is invited to a briefing session by the ImmD to serve on him a “Notice to Persons Making a Non-refoulement Claim” (the Notice) which summarizes the procedures of the USM as set out in the Guidelines⁷, to explain to him the screening process (with the assistance of a qualified interpreter if necessary), to attend to his special needs (if any), to establish a means of contact with him, to inform him of the availability of publicly-funded legal assistance through the DLS, and to refer him there if he requires such assistance. At the briefing, the claimant will be given a non-refoulement claim form⁸ (which is modelled on the torture claim form but extended to cover other applicable grounds), in which he may submit all grounds of the claim along with supporting information and evidence. The DLS will provide legal assistance and translation and interpretation service (where necessary) to the claimant throughout the

⁶ In December 2008, the Court of First Instance ruled in *FB & Ors v. the Director of Immigration* [2009] 2 HKLRD 346 that the policy of the Government not to provide, at the expense of the Government, legal representation to a (torture) claimant who is unable to afford that legal representation, is unlawful and in breach of the duty of the Government of the Hong Kong Special Administrative Region to assess (torture) claims in accordance with high standards of fairness.

⁷ The internal guideline titled “Determination on Non-refoulement Claims” on the procedures of the USM issued for case officers by the ImmD, which includes as Appendices the Notice, the non-refoulement claim form, etc.

⁸ The non-refoulement claim form must be completed in English or Chinese. A claimant may request assistance from immigration officers of the Removal Assessment Section of the ImmD if he does not speak or write English or Chinese and has no intention to instruct a legal representative to represent him. If an interpreter of the claimant’s preferred dialect / language is not readily available, interpretation service in the official language of the claimant’s country will normally be arranged.

screening process, including the completion of the claim form, submission of supporting documents and evidence, the screening interview, and any appeal⁹.

8. Under the statutory mechanism, torture claimants had 28 days to complete their claim forms. An extension of time would be allowed to the claimant upon his application where there is a justified ground. Claimants could return their completed torture claim forms to the ImmD within 27 days on average. 98% of the applications for extension of time were approved. As requested by the DLS (on grounds that duty lawyers would require more time to handle a non-refoulement claim under the USM), the Administration agreed that claimants would generally be given an **additional** 21 days under the USM (i.e. at least 49 days) to complete their non-refoulement claim forms. This arrangement aims to facilitate the smooth rolling out of the USM and is subject to review one year after implementation.

9. Screening interview(s) with an immigration officer will then be arranged for the claimant to make clarifications and answer questions relating to his claim. Taking into account all information obtained and relevant country information, the ImmD will decide on whether the claim is substantiated having regard to all applicable grounds, including torture, CIDTP and persecution.

10. Claimants aggrieved by the ImmD's decision may lodge an appeal / petition¹⁰, which will be heard by the Torture Claims Appeal Board (TCAB) in one go. To enable the TCAB to consider an appeal / petition in one go, the Chief Executive has delegated his authority under Article 48(13) of the Basic Law to all TCAB Members to handle petitions in regard to grounds other than torture under Part VIIC of the Ordinance.

⁹ Subject to a merits test conducted by the DLS.

¹⁰ A claimant's appeal against the ImmD's decision as regards torture risks as defined under Part VIIC of the Ordinance is an appeal under section 37ZR of the Ordinance. For grounds other than torture under Part VIIC of the Ordinance, the second tier assessment is a petition to the Chief Executive under Article 48(13) of the Basic Law.

11. As before, under the USM, an immigration officer may require a claimant to undergo a medical examination or upon request by the claimant arrange a medical examination, the purpose of which is to verify claims of a physical or mental condition of a claimant where the condition is in dispute and is relevant to the consideration of his non-refoulement claim. In general, cases requiring physical examination are referred to the Department of Health while cases requiring mental examination are referred to the Hospital Authority or local tertiary institutions as appropriate.

Announcements and communication with claimants and duty lawyers

12. As the procedures of the USM follow those of the statutory torture claim screening mechanism, the relevant Guideline (including the Notice and claim form) requires only necessary adaptations to implement the rulings in the aforementioned two CFA judgments. The draft Guideline was circulated to the DLS in October 2013 for views. The finalized Guideline was circulated in advance to all duty lawyers via the DLS in January 2014 to facilitate their preparation for the commencement of the USM. Following the announcement on 7 February 2014 to commence the USM in March 2014, relevant documents relating to the USM, including the updated Notice and the Practice Direction of the TCAB under the USM, have been made available to the public at the respective websites of the ImmD¹¹ and the TCAB¹².

13. Immediately following the announcement of the USM, the ImmD also issued a notification letter to each of the 2 520 claimants whose torture claim has not yet been determined by the ImmD at the time, informing them of the commencement of the USM (including referring them to the Notice on the ImmD's website for details of the procedures) and the transitional arrangements applicable depending on the respective stages of screening of their claims. Claimants with a pending claim who

¹¹ <http://www.immd.gov.hk/>

¹² <http://www.sb.gov.hk/eng/links/tcab/>

have already been assigned duty lawyers for their torture claims continue to receive their duty lawyers' assistance under the USM.

14. For those whose torture claims have already been rejected or withdrawn, it is noted that the DLS has contacted more than 3 100 such claimants who are still in Hong Kong, out of which around 2 500 have lodged a non-refoulement claim under the USM on grounds other than torture under Part VIIC of the Ordinance with the ImmD. Again, they will be assisted by duty lawyers in the process.

Statistics

15. From December 2009 to end February 2014, the ImmD has determined 4 755 torture claims under the enhanced administrative mechanism and later the statutory mechanism. On commencement of the USM on 3 March 2014, there were 2 501 outstanding torture claims (which will be screened on all applicable grounds under the USM). Separately, 2 962 rejected or withdrawn torture claimants and 1 236 other persons who have never made a torture claim before have lodged non-refoulement claims on applicable grounds (other than torture), making a total of 6 699 non-refoulement claims pending determination on commencement of the USM. Since then and until end April 2014, the ImmD has received another 1 332 non-refoulement claims (including 1 090 from persons who applied for asylum with the UNHCR but never lodged a non-refoulement claim with the ImmD before). The total number of non-refoulement claims pending determination by the ImmD was therefore 7 960 as at end April 2014¹³. A detailed breakdown of these claims is at **Annex**.

16. The ImmD must screen claims under procedures that meet the high standards of fairness required by the law. As requested by the DLS, the number of claims for which the ImmD would commence the screening process would remain at eight per work day at the beginning of the USM. In the past, most torture claims (nearly 70%) could be

¹³ Two non-refoulement claims have been rejected and 69 claims have been withdrawn between 3 March and end April 2014.

determined within five months of commencing the statutory screening procedures, including submission of claim form and supporting documents by claimants, arranging and conducting screening interviews, and then determination by the ImmD's case officers. If the claimant is uncooperative, the processing time would be longer (e.g. claimant does not contact his assigned duty lawyer, fails to attend scheduled interviews without reasonable excuse, seeks extensions to produce further supporting documents and evidence but submits no such information subsequently, etc.) The ImmD estimates that in the first year of operation of the USM (i.e. in the 2014/15 financial year), determinations on 1 500 claims can be made.

Other matters

Training for decision makers and duty lawyers

17. Before commencement of the USM, the Administration has arranged eight training sessions conducted by qualified and experienced authorities, including the UNHCR and other local and overseas experts, for all decision makers at both the ImmD and the TCAB to ensure that they have a proper understanding of the USM, including relevant and updated local and overseas jurisprudence.

18. In addition, to familiarize duty lawyers with the USM including related local and overseas jurisprudence, the Hong Kong Bar Association and the Law Society of Hong Kong have separately arranged training sessions for duty lawyers in February 2014. The sessions included a briefing conducted by subject officers of the ImmD to explain the procedures under the USM as set out in the Guideline (which was circulated to the duty lawyers via the DLS in January 2014). At present, over 500 barristers and solicitors who have received specialized training are on the roster to provide legal assistance to claimants under the USM.

The UNHCR

19. Following the CFA's judgment in the C Case and the Administration's announcement on the implementation of the USM, the UNHCR decided to cease the screening of asylum claims on the commencement of the USM. Immediately following the Administration's announcement of the commencement date of the USM, the UNHCR has informed in February 2014 all persons with an outstanding asylum claim not yet determined by the UNHCR of the above decision, and that those who would wish to seek non-refoulement protection in Hong Kong instead may approach the ImmD to make non-refoulement claims under the USM.

20. The commencement of the USM does not affect the Government's position that the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong and our firm policy of not determining the refugee status of or granting asylum to anyone. The UNHCR continues to provide protection to refugees in accordance with its mandate. In this connection, persons whose non-refoulement claims are substantiated under the USM on grounds of persecution risks will be referred to the UNHCR for recognition as refugees under its mandate and arrangement of resettlement of them by the UNHCR to a third country.

Humanitarian assistance

21. In February 2014, the CFA affirmed that non-refoulement claimants do not have a constitutional or common law right to work in Hong Kong¹⁴. Nonetheless, the Director of Immigration would continue to grant discretionary permission to substantiated claimants to work in exceptional cases.

22. As regards in-kind humanitarian assistance provided to claimants to prevent them from becoming destitute, as reported to the LegCo Panel on Welfare Services in January 2014, the Administration

¹⁴ *GA & Ors v Director of Immigration*, FACV 7 – 10 of 2013

has implemented enhancements to the in-kind assistance arrangement for claimants since February 2014, including increasing rental allowance, providing rental deposits and property agent fees, increasing the budget for food, as well as improving the payment arrangement of transportation and utilities allowances.

Security Bureau
May 2014

Summary of Non-refoulement Claims

The unified screening mechanism (USM) commenced operation on 3 March 2014. Up to 30 April 2014, there were 7 960 outstanding non-refoulement claims in total. An analysis on the particulars of the claimants is as follows:

(a) <u>Sex</u>		(b) <u>Age</u>	
Male	79%	Under 18	4%
Female	21%	18 to 30	38%
		31 to 40	38%
		Above 40	20%
(c) <u>Nationality</u>		(d) <u>Status in Hong Kong</u>	
Pakistani	28%	Overstayers	51%
Indian	19%	Illegal Immigrants	40%
Bangladeshi	14%	Others*	9%
Indonesian	10%		
Filipino	5%		
Others	24%		
(e) <u>The time lag between entering Hong Kong (including illegal entry) and making a claim</u>			
Under 3 months	40%		
3 to 12 months	22%		
1 to 2 years	15%		
2 years or above	17%		
Pending clarification	6%		

[Note: The average time lag is 14 months]

* Including persons refused entry and persons born in Hong Kong but their right of abode in Hong Kong is not established.