

# 立法會 *Legislative Council*

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## **Panel on Security**

**Updated background brief prepared by the Legislative Council Secretariat  
for the meeting on 3 June 2014**

### **Unified Screening Mechanism**

#### **Purpose**

This paper provides background information and summarises past discussions of the Panel on Security ("the Panel") on the unified mechanism for screening non-refoulement claims.

#### **Background**

2. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") has been applied to Hong Kong since 1992. Article 3 of CAT provides that no State Party shall expel, return 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.

#### **Administrative mechanism for handling torture claims**

3. In the past, torture claims made under Article 3 of CAT were handled by the Immigration Department ("ImmD") in accordance with a set of administrative procedures. The administrative mechanism had been subject to challenge in courts. In *Sakthevel Prabakar v Secretary for Security* ((2004) 7 HKCFAR 187), the Court of Final Appeal ("CFA") held that high standards of fairness must be demanded in the determination of CAT claims as such determination 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. In *FB v Director of Immigration and Secretary for Security* ((2009) 2 HKLRD 346), the

Court of First Instance ("CFI"), in considering the fairness of the procedures for dealing with torture claimants, held, *inter alia*, that the Director of Immigration's blanket policy of denying legal representation to torture claimants was unlawful and failed to meet the required high standards of fairness.

4. In December 2008, CFI decided in a 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.

5. The screening process was suspended following the CFI's 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.

6. The Administration subsequently implemented the enhanced mechanism in December 2009. The enhanced mechanism incorporated the provision of publicly-funded legal assistance to torture claimants through the Duty Lawyer Service ("DLS"), enhanced training for decision makers and the establishment of a new petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

### **Establishment of a legislative regime for handling torture claims**

7. In the concluding observations of the United Nations Committee Against Torture ("the CAT Committee") on the "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two : Hong Kong Special Administrative Region", the CAT Committee recommended, among others, that the Hong Kong Special Administrative Region Government should incorporate the provisions in Article 3 of CAT under the Crimes (Torture)

Ordinance (Cap. 427) and consider adopting a legal regime with a view to establishing a comprehensive and effective procedure to examine thoroughly the merits of each torture claim when determining the applicability of its obligations under Article 3 of CAT.

8. When the review of the torture claim screening mechanism was discussed by the Panel, some members called for the establishment of a proper regime for handling torture claims. According to the Administration, it was considering the CAT Committee's recommendations of putting in place a legislative regime for handling torture claimants and covering the non-refoulement principle under Article 3 of CAT. The Panel noted at its meeting on 6 July 2009 that the Administration planned to introduce legislation on torture claim screening procedures, such that the procedures would be based on clear statutory provisions.

9. Following the introduction of the Immigration (Amendment) Bill 2011 into the Legislative Council ("LegCo") on 13 July 2011 and the scrutiny by a Bills Committee, the Immigration (Amendment) Ordinance 2012 ("the Amendment Ordinance") was enacted in July 2012 and came into operation on 3 December 2012. The Amendment Ordinance provides for a statutory process for making and determining claims, including how a torture claim is made, the time limit for a claimant to return the torture claim form, the requirements for ImmD to arrange screening interviews and issue written notices of decision, etc. It also provides that a claimant who was aggrieved by the decision might lodge an appeal, which would be handled by a statutory Torture Claims Appeal Board.

### **Unified Screening Mechanism ("USM")**

10. At its meeting on 2 July 2013, the Panel was briefed on the Administration's plan to introduce USM to assess claims for non-refoulement protection lodged by persons not having the right to enter and remain in Hong Kong on the basis that removing them to another country would expose them to a risk of torture as defined under CAT, a risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights ("BOR"), and/or a persecution claim with reference to Article 33 of the 1951 Refugee Convention relating to the Status of Refugees ("the Refugee Convention"). Members noted that in view of the judgment of CFA in *Ubamaka and C*, ImmD would withhold removing or deporting any person to another country where the person had made such a non-refoulement claim.

Where any of these claims was substantiated, ImmD would provide non-refoulement protection to the claimant.

11. According to the Administration, USM would be based on the statutory CAT claim screening mechanism. After a completed claim form was returned by claimants, ImmD would arrange for them to attend an interview to provide information and answer questions relating to their non-refoulement claims. Claimants must provide all information or all available documentary evidence relating to their claims for ImmD's assessment in one go.

## **Deliberations of the Panel**

### Training for lawyers on USM

12. There was a view that the existing four-day training programme for duty lawyers on CAT claims was inadequate and the Administration should strengthen its training for duty lawyers, especially on USM. According to the Administration, it had commenced discussions with DLS regarding such training for duty lawyers. It was expected that suitable arrangements would be made by DLS.

### Statistics on different types of non-refoulement claims and the annual expenditure incurred by the Administration

13. Members noted that there were 3 912 outstanding torture claims in July 2013 and there was no information available regarding the number of BOR Article 3 and persecution claims since the screening mechanism for these two claims was not yet in place. It normally took ImmD about one to two months on average to complete processing a claim upon receipt of a completed torture claim form with necessary information provided.

14. Members further noted that there were 1 200 outstanding asylum claims lodged with the United Nations High Commissioner for Refugees ("UNHCR"). However, there was no readily available information on the number among these asylum claimants who had also lodged non-refoulement claims. The annual expenditure on legal assistance for torture claimants was about \$90 million and that on humanitarian assistance was about \$203 million. Together with the annual expenditure incurred in the provision of manpower for handling such claims, including staff of ImmD, the Department of Justice and the Torture Claims Appeal Board, these added up to about \$450 million per annum.

Processing claims lodged under BOR Article 3 and persecution claims

15. Information was sought on whether BOR Article 3 and persecution claims would be processed under USM by the Administration or UNHCR. According to the Administration, asylum claims lodged under the Refugee Convention were processed by UNHCR. Persecution claims drawing reference to the same Convention would be processed by the Administration after USM was implemented.

16. Concern was raised as to whether the Administration had any plans to establish statutory mechanisms to process BOR Article 3 claims and persecution claims. There was a view that uncertainty might arise if some types of non-refoulement claims were processed under a statutory mechanism, while other types of non-refoulement claims were processed under administrative mechanisms.

17. The Administration advised that its intention was to process torture claims under a statutory mechanism, whereas BOR Article 3 claims and persecution claims would be processed under an administrative mechanism in tandem. The administrative mechanism would be much in line with the statutory torture claim screening mechanism. The Administration considered it more appropriate to accumulate more experience in the screening of such cases before considering the way forward.

18. There was a view that the Refugee Convention should be extended to Hong Kong. Concern was raised as to whether the Administration would establish statutory mechanisms to process such claims, if the court so requested. According to the Administration, it had always acted in compliance with the judgment of the court. CFA ruled in *C & Ors v. Director of Immigration* (FACV 18-20/2011) that, as long as the Director of Immigration maintained the prevailing practice of having regard to a claimed fear of persecution as a relevant humanitarian consideration, he was required to independently determine whether the claimed fear of persecution was well-founded, before executing one's removal or deportation to another country. The judgment had no conflict with the Administration's established position that the Refugee Convention did not apply to Hong Kong.

19. Information was sought on whether the Administration was required by CFA to determine independently whether a claimed fear of persecution was well-founded for persecution claims which had been found substantiated by UNHCR. According to the Administration, ImmD was required to determine

persecution claims lodged by persons whose asylum claim was found not substantiated by UNHCR.

#### Time needed for processing non-refoulement claims

20. Concern was expressed about the illegal employment and security problems arising from the lengthy time needed for processing non-refoulement claims. Information was sought on the approximate time taken between the lodging and determination of a claim and whether the time taken would be shortened after implementation of USM.

21. According to the Administration, a torture claimant must return the completed torture claim form with all supporting documents to an immigration officer within 28 days. The time taken between the lodging and determination of a claim varied from one case to another. In cases where the claimant lodged an appeal or applied for a judicial review, the time taken would even be longer.

22. Members noted that the processing of torture claims had taken a longer time when difficulties were encountered, including the claimant's failure to attend a briefing session for commencement of the screening process, failure to contact his lawyer to give instruction for submission of torture claim form and supportive documents, absence without reasonable excuse from an interview scheduled by an immigration officer, request for cancellation of interview scheduled by an immigration officer for health reasons and failure, without reasonable excuse, to attend subsequent interviews, and failure to provide supplementary information after extension of the deadline for submission.

#### Verification of information provided by claimants

23. Information was sought on whether the Administration would take steps to verify information provided by claimants regarding the situation in their countries. Members noted that regardless of the country from which a claimant came, the Administration would determine a claim with high standards of fairness as required by CFA in *Sakthevel Prabakar v. Secretary for Security* ((2004) 7 HKCFAR 187). If there were claims that a certain incident had occurred in a country, the Administration would examine relevant information in the public domain and reports of reputable institutions, such as UNHCR as well as non-governmental organisations. However, the Administration could not write to the country concerned to verify the facts. Members noted that such country information would also be examined by the Torture Claims Appeal Board, if an appeal was lodged by a claimant. In a judicial review, the court would also consider whether ImmD had examined such information.

### **Latest development**

24. The Administration will brief the Panel at the meeting on 3 June 2014 on the implementation of USM which commenced operation on 3 March 2014.

### **Relevant papers**

25. A list of relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
30 May 2014

## Appendix

### Relevant papers on Unified screening mechanism

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Welfare Services and Panel on Security	18.7.2006 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	31.7.2006 (Item I)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2994/05-06(01)</u> <u>LC Paper CB(2)526/06-07(01)</u>
	5.12.2006 (Item V)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2429/07-08(01)</u>
	27.10.2008 (Item IV)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)366/08-09(01)</u> <u>LC Paper CB(2)433/08-09(01)</u>
	3.2.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	6.7.2009 (Item III)	<u>Agenda</u> <u>Minutes</u>
	29.9.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
	1.12.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	12.4.2011 (Item IV)	<u>Agenda</u> <u>Minutes</u>



<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Bills Committee on Immigration (Amendment) Bill 2011	--	<u>Report of the Bills Committee to the Legislative Council</u>
Legislative Council	21.11.2012	<u>Official Record of Proceedings (Question 10)</u>
	20.2.2013	<u>Official Record of Proceedings (Question 14)</u>
Panel on Security	2.7.2013 (Item II)	<u>Agenda Minutes</u>
Legislative Council	7.5.2014	Official Record of Proceedings (Question 4)

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