

For discussion on
12 April 2016

Legislative Council Panel on Security

Comprehensive review of the strategy of handling non-refoulement claims:

Proposed amendment to the Immigration (Unauthorized Entrants) Order, Cap.115D

Purpose

This paper seeks Members' support to the proposal to amend the Immigration (Unauthorized Entrants) Order, Cap.115D (the Order) as soon as possible, so as to enhance enforcement against criminal activities of smuggling illegal immigrants (IIs).

Background

2. The number of non-ethnic Chinese illegal immigrants (NECIIs) intercepted has drastically increased in recent years, from 547 in 2011 (monthly average 46) to 3 819 in 2015 (monthly average 318), representing an almost six-fold increase. 99% of these NECIIs originated from Vietnam, Pakistan, Bangladesh, India, and Nepal. See [Annex A](#).

3. During the same period, the number of torture / non-refoulement claimants in Hong Kong has increased from 1 432 in 2011 to 4 634 in 2014 and 5 053 in 2015. At end 2015, amongst the 10 922 claimants in Hong Kong pending screening by the Immigration Department (ImmD), over half (51%) are NECIIs¹. According to the Police's record, in 2015 there were 1 113 counts of arrest of non-ethnic Chinese persons on recognizance (mostly claimants) for serious crimes (such as theft, physical assault, and drug trafficking), an increase of 67% over 2014.

¹ Another 47% are visitors who entered Hong Kong legally but were refused permission to land or subsequently overstayed. Most of them originated from visa-free countries. The remaining few are children born to claimants in Hong Kong whose right of abode is not established.

4. According to intelligence, a vast majority of NECIIs were smuggled into Hong Kong by human trafficking syndicates. During the past four years, the Police have smashed 82 cases of syndicated smuggling of NECIIs in groups. Some IIs paid a smuggling fee of up to \$70,000 to the “snake-heads”.

Existing law

5. Presently, criminal offence and penalty against human smuggling include –

(a) If the IIs were residents of **the Mainland** or **Vietnam** or were from **Macao** (unauthorized entrants (UEs)):

- Carrying or arranging a UE to enter Hong Kong: The captain, other members of the crew, the owner (and his agent) of the ship, any person who participates in enabling the voyage, and any person who arranges or assists the passage of a UE to Hong Kong are liable to imprisonment for 14 years and a fine of \$5,000,000 (sections 37C and 37D of Part VIIA of the Immigration Ordinance, Cap.115 (the Ordinance));
- Assisting a UE to remain in Hong Kong: Any person who assists a UE to remain in Hong Kong is liable to imprisonment for 10 years and a fine of \$500,000 (section 37DA of Part VIIA of the Ordinance);

(b) If the IIs were from **any other country or place**:

- Ships carrying an II: The captain and the owner (and his agent) of the ship commit an offence, which is liable to imprisonment for 7 years and a fine of \$600,000 (sections 38(4) and 39 of the Ordinance);
- Aiding or abetting an II to enter or remain illegally: The maximum penalty is imprisonment for 3 years and a level 4 fine (\$25,000) (section 89 of the Criminal Procedure Ordinance, Cap.221 and section 38(1) of the Ordinance).

6. The provisions referred to in paragraph 5(a) above are stipulated under Part VIIA of the Ordinance, which commenced in 1979, to add to the then existing provisions of the Ordinance in response to the influx of IIs from the Mainland, Macao, and Vietnam at the material time by declaring those IIs as UEs (see **Annex B**). Apart from enhancing sentences against those arranging or assisting UEs to enter or remain illegally, Part VIIA also grants additional powers to law enforcement agencies (LEAs) to enable them to stem the influx of IIs more effectively. Relevant provisions include:

- (a) Forfeiture of properties: the Director of Immigration may forfeit ships carrying UEs to Hong Kong (section 37E). Moreover, the Secretary for Justice may apply to the Court to order the forfeiture of any property other than a ship (e.g. vehicles) that is used or intended to be used to assist a UE to enter Hong Kong, or proceeds of the offences under sections 37C or 37D (section 37G);
- (b) Extra-territorial acts: any person in Hong Kong may be charged and convicted in respect of anything which was done outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong (section 37J); and
- (c) Proof: Where a person is alleged to be (and there are reasonable grounds for believing that he may be) a UE, he shall be presumed to be such in the absence of evidence to the contrary. Where a person is charged with an offence under Part VIIA as being the owner (or his agent) or a member of the crew (including the captain) of a ship, he shall be presumed to be such owner, agent, or member, as the case may be, in the absence of evidence to the contrary (section 37K).

7. As shown in Annex A, over 40% of NECIIs intercepted during the last two years originated from Pakistan, Bangladesh, India, Nepal, etc. Even if the Police successfully arrest the masterminds or members of the human smuggling syndicates which arranged the passage of such NECIIs to Hong Kong, they can only be charged with the lesser offence of aiding or abetting a person to enter or remain illegally, as mentioned in paragraph 5(b) above. The deterrent effect of the punishment is clearly insufficient in comparison with the lucrative profit of smuggling. When adjudicating relevant cases, the Court had expressed some concern that

the same criminal acts of smuggling would engage vastly different penalties on the sole basis of the country of origin of the IIs smuggled. Furthermore, the current wording of the Order (see para. 2(2)(a)) excepts persons holding valid travel documents (generally speaking, this includes those who hold a passport issued by a visa-free country, and those who hold a passport issued by other countries and have obtained a valid visa) from being UEs, even if they smuggle into Hong Kong.

8. Also, Part VIIA stipulates greater enforcement powers for LEAs to combat human smuggling syndicates. At present, such powers are not applicable to cases of smuggling NECIIs from countries such as Pakistan, Bangladesh, India, and Nepal.

Proposal

9. We propose to amend paragraph 2(1)(a) of the Order to expand the definition of UE to include major source countries, other than Vietnam, where NECIIs originate, i.e., Pakistan, Bangladesh, India, Nepal, Sri Lanka, Somalia, Afghanistan, and Nigeria, so as to immediately enhance the penalties against smuggling of IIs from these countries.

10. In addition, under the exception clause of paragraph 2(2)(a) of the present Order, persons holding valid travel document² will not be UEs even if they smuggle into Hong Kong. We propose to amend the Order to stipulate that to be excepted as being UEs, persons covered under paragraph 2(1) of the Order have to hold a valid travel document AND, after entering Hong Kong, submit themselves forthwith to immigration examination under section 4(1)(a) of the Ordinance or for the purpose of verification of identity by an automated means provided under section 4A in accordance with arrangements in that behalf approved by the Director of Immigration. We also propose to take this opportunity to amend paragraph 2(1)(aa) of the Order (in relation to the description of the People's Republic of China) so that it is consistent with the circumstances of Hong Kong Special Administrative Region (HKSAR) after its establishment.

² Including those who hold a valid travel document issued by a visa-free country, and those who hold a valid travel document issued by other countries with a valid visa.

Stepping up enforcement

11. The Police have formed a joint investigation team with other LEAs, including ImmD and the Customs and Excise Department (C&ED), and have taken a series of actions during the last few months to intercept IIs on land and at sea and to combat human trafficking syndicates.

12. At sea, the Police deployed additional speedboats to step up patrol at blackspots such as Sha Tau Kok, Dapeng Bay, Deep Bay, and the Lantau waters. Also, in view of the tendency of human smuggling syndicates to attempt to enter Hong Kong waters from midnight to early morning, the Police and C&ED deployed ships equipped with sophisticated radar systems, including marine patrol launches, sector patrol launches, high speed pursuit crafts, etc. to enhance capability to detect and intercept IIs before they enter Hong Kong waters. The Police also conducted over 100 joint operations with the Government Flying Service where marine patrol launches swept the eastern and western waters of Hong Kong with the support of helicopters.

13. On land, as many NECIIs claimed to have smuggled into Hong Kong inside or under lorry trucks, the Police stepped up patrol at all boundary control points (BCPs). The Police also took joint actions with ImmD and C&ED to conduct more spot checks at BCPs on cross-boundary lorry trucks and deployed mobile X-ray vehicle scanning systems and carbon dioxide detectors to scan the lorry trucks. At the Lok Ma Chau Control Point, which has the highest traffic flow of lorry trucks, we are going to install more closed-circuit television and additional lighting at the vehicle holding area, and motion sensors on the surrounding fences to prevent IIs from escaping from there before the lorry trucks are subject to immigration examination. The Police and C&ED have also enhanced publicity with cross-boundary lorry truck drivers to remind them of the serious legal consequences of assisting IIs to smuggle into Hong Kong, and that they should check their lorry truck in detail before entering Hong Kong from the Mainland.

14. Separately, the Police also stepped up patrol at the frontier area to prevent IIs from seeking to climb over the fences and enter Hong Kong on foot.

Joint actions with the Mainland

15. LEAs of the Mainland also rendered active assistance to the HKSAR Government to intercept NECIIs in the Mainland before they

enter Hong Kong. The Ministry of Public Security (MPS) has commenced dedicated operations (from February 2016 to July 2017) and mobilized its Border Control Department and immigration authorities in Guangdong, Guangxi, Yunnan, and Xinjiang to work jointly with the Hong Kong Police to combat smuggling activities at the Hong Kong-Guangdong boundary by stepping up cooperation on interception, investigation, intelligence exchange and enforcement, in order to combat foreigners smuggling into Hong Kong via the Mainland.

16. The actions above have produced initial results. From 18 to 20 March 2016, the Border Control Department of Guangdong and the Hong Kong Police took parallel actions at Shenzhen, Huichou, and Hong Kong to bust a group smuggling case, arresting 30 members of a human smuggling syndicate (18 in Guangdong and 12 in Hong Kong) and 121 South-Asian IIs (89 in Guangdong and 32 in Hong Kong). Four ships and a vehicle were seized and the syndicate was neutralized. At the same time, ImmD also raided multiple locations in Hong Kong and arrested 18 illegal workers and 11 employers suspected to be employing persons who are not lawfully employable.

17. In the two months since the dedicated operation commenced, the Border Control Departments at Guangdong, Guangxi, and Yunnan have arrested a total of 2 943 NECIIs and 142 members of human smuggling syndicates. In February and March 2016, the Police and ImmD have intercepted 292 and 272 NECIIs in Hong Kong, representing a respective decrease of 30% and 35% over January. LEAs of the Mainland and Hong Kong will continue to step up enforcement actions to stem the influx of NECIIs.

Other measures

18. Presently, 51% of non-refoulement claimants are NECIIs who smuggled into Hong Kong. Interception at the source is a key linchpin of the Government's comprehensive review of the strategy of handling non-refoulement claims. By stepping up enforcement and amending the Order to enhance penalties at the same time, we aim to achieve a sufficient deterrent effect against human smuggling syndicates to reduce smuggling of NECIIs into Hong Kong. As regards those visitors who lodge non-refoulement claims after overstaying or being refused permission to land (comprising 47% of all claimants), the majority of them are visitors who entered Hong Kong under visa-free arrangements. We are actively developing the details for introducing pre-arrival

registration (PAR) to prevent those visitors with a high risk of lodging non-refoulement claims after overstaying or being refused permission to land from boarding their flight in the first place. We aim to commence PAR within this year. The Government will also review visa / visa-free policies having regard to ongoing circumstances.

19. In the long run, it is paramount to prevent IIs from abusing the non-refoulement claim mechanism for other purposes (including protracted presence in Hong Kong). Subject to the Legislative Council's (LegCo) approval of the 2016-17 Estimates, ImmD and the Secretariat of the Torture Claims Appeal Board will create 83 and 9 new posts respectively to enhance their capacity in screening claims and handling appeals. We have also commenced research into expediting and tightening the screening procedures and reviewing the publicly-funded legal assistance scheme (including considering the introduction of a cap on legal fees). We aim to brief LegCo and the public on the outcome of our research and the proposed way forward in 2016-17 and commence drafting the relevant legislative amendments.

20. Recently, there are suggestions that we should draw reference to the experience of handling the Vietnamese boat people crisis in the 1980s and re-introduce closed camps. The power vested in the Government under the Ordinance to detain Vietnamese boat people is applicable only to those Vietnamese boat people who arrived Hong Kong before January 1998. Since the 1980-90s, the Court has made a number of rulings³ in relation to the detention of IIs. The suggestion also gives rise to other challenges from land and manpower resources perspectives. That being said, we have commenced research into proposals to empower ImmD to detain more claimants that would conform to legal and operational requirements, so as to deter them from coming to Hong Kong and delaying the removal / screening procedures.

21. As regards the suggestion to abolish the non-refoulement claims mechanism, the HKSAR Government introduced the Unified Screening Mechanism for the purposes of complying with the Convention against Torture (the Convention), the Hong Kong Bill of Rights Ordinance, Cap.383, the Immigration Ordinance, Cap.115, and the rulings of the

³ In particular, the Court of Final Appeal ruled in *Ghulam Rbani v the Director of Immigration* that the ImmD's power to detain illegal immigrants is subject to the common law *Hardial Singh* principles, i.e., if the ImmD cannot complete the removal procedures (including the screening procedures for non-refoulement claims) to remove him within a reasonable time, then the ImmD cannot continue to detain him.

Court of Final Appeal. Even if a reservation is made to Article 3 of the Convention⁴ or the Convention does not apply to HKSAR, this does not absolve the HKSAR Government from having to screen non-refoulement claims pursuant to the requirements of our laws and court rulings. As such, for the purpose of our comprehensive review, we have no plans to consider such measures as requesting the Central People's Government to declare that the Convention does not apply to the HKSAR or to make a reservation to certain provisions of the Convention.

Way Forward

22. Members are invited to support amending the Order. We will be tabling the Amendment Order at LegCo soon for negative vetting. The Government proposes that the Amendment Order shall commence on the date of gazettal to prevent human smuggling syndicates from taking the last opportunity to smuggle NECIIs in large batches before the amendments take effect.

**Security Bureau
Hong Kong Police Force
Immigration Department
April 2016**

⁴ Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates 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.”

Annex A

Number of NECIIs intercepted

	Vietnam	Pakistan	Bangladesh	India	Nepal	Others	Total
2011	281	196	27	9	13	21	547
2012	342	241	116	26	13	18	756
2013	424	457	274	29	15	19	1 218
2014	1 180	358	342	60	24	20	1 984
2015	2 278	686	414	380	31	30	3 819
2016 (As at March)	333	386	103	125	23	10	980

The Immigration (Unauthorized Entrants) Order, Cap.115D

Cap 115D para 1 Citation

This order may be cited as the Immigration (Unauthorized Entrants) Order.

Cap 115D para 2 Declaration of unauthorized entrants

(1) Subject to the exceptions specified in sub-paragraph (2), the following persons are declared to be unauthorized entrants-

- (a) all persons resident or formerly resident in Vietnam;
- (aa) all persons who leave, or seek to leave, the People's Republic of China when not in possession of documents issued in that country permitting them to do so in accordance with its laws;
- (b) all persons resident or formerly resident in Macau;
- (c) all persons who are or have been in Macau, whether in transit or in any other circumstances whatsoever.

(2) The following persons are excepted from the declaration in subparagraph (1)-

- (a) any person holding a valid travel document-
 - (i) who is exempted from section 61(1) of the Ordinance under section 61(2) of the Ordinance; or
 - (ii) who has obtained a visa issued by or on behalf of the Director of Immigration, if the visa has not expired; and
- (b) any person who has been granted permission to land by an immigration officer or immigration assistant.