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**Subcommittee to Follow Up Issues Relating to  
the Unified Screening Mechanism for Non-refoulement Claims**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 6 March 2018**

**Purpose**

This paper provides background information and summarizes the 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 *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. Thereafter, the Immigration Department ("ImmD") introduced an administrative screening mechanism for torture claims made under Article 3 of CAT.

4. 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. 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. 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 might conduct oral hearing if required.

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

5. In the light of the concerns and recommendations raised in the concluding observations of the United Nations Committee Against Torture 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 Administration introduced the Immigration (Amendment) Bill 2011 into the Legislative Council ("LegCo") in 2011, which was passed in July 2012 and came into operation on 3 December 2012. The Immigration (Amendment) Ordinance 2012 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

6. Pursuant to the two judgments of CFA in *Ubamaka* and *C & Ors*, the Administration introduced a unified screening mechanism ("USM") which commenced operating on 3 March 2014 to screen claims made by illegal immigrants refusing to be removed to another country on all applicable grounds (i.e. non-refoulement claims). Apart from the risk of torture as defined under CAT, these applicable grounds include the risk of cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights, and/or persecution drawing reference to Article 33 of the 1951 Refugee Convention relating to the Status of Refugees ("the Refugee Convention"). The screening procedures of USM follow those of the statutory screening mechanism for torture claims, which has been in place since the enactment of the Immigration (Amendment) Ordinance 2012.

#### Comprehensive review of the unified screening mechanism

7. In 2016, the Administration launched a comprehensive review of the strategy of handling non-refoulement claims, which focused on four areas: (a) pre-arrival control; (b) screening procedures; (c) detention; and (d) enforcement and removal. In January 2017, ImmD introduced the risk-based online pre-arrival registration ("PAR") requirement for Indian visitors to prevent those

with higher immigration risks from arriving at Hong Kong under visa-free arrangement and making non-refoulement claims after arrival.

## **Deliberations of the Panel**

### Strategy of handling non-refoulement claims

#### *Screening of non-refoulement claims*

8. Noting that there were 8 740 claims pending determination by the end of April 2017, members were generally of the view that measures should be introduced to expedite the screening of non-refoulement claims. More manpower resources should be provided to ImmD to speed up the screening of claims. Some members suggested that a claimant should be required to submit a claim within a specified time period from his time of arrival in Hong Kong, the time allowed for filing a claim form should be shortened and the application of a claimant who failed to attend an interview without a valid reason should be revoked.

9. The Administration advised that the existing deadline for submitting a completed claim form had been determined after deliberations in the enactment of the existing laws and was further lengthened as a compromise to the strong request of DLS. Claims submitted beyond the deadline were dealt with in accordance with existing laws. The time needed for determining a non-refoulement claim varied from one case to another. Members were further advised that the Administration was carrying out a review of the existing regime and would come up with legislative proposals to expedite the screening of claims.

10. Some members expressed concern about an average time lag of 11 months between the arrival of a claimant in Hong Kong and the lodging of a claim. According to the Administration, the average time lag arose from the fact that many illegal immigrants and overstayers did not lodge a claim until they were intercepted by law enforcement officers in Hong Kong. Besides, the capacity of DLS in supporting the provision of publicly-funded legal assistance ("PFLA") to claimants was also a limit to the processing of claims. To expedite screening, the Administration intended to operate, on a pilot basis, a supplementary roster of lawyers to supplement the DLS roster.

#### *Pre-arrival and immigration control*

11. According to the Administration, the top four source countries of non-refoulement claimants pending screening by ImmD were India, Pakistan, Bangladesh and Vietnam (accounting for almost 70% of all claimants). Pre-arrival control measures aimed to intercept at source those persons who

intended to lodge non-refoulement claims in Hong Kong by preventing them from successfully smuggling into Hong Kong or entering Hong Kong legally and subsequently overstaying and making non-refoulement claims.

12. Following the introduction of the PAR requirement for Indian nationals in January 2017, the Panel was briefed on the implementation progress in June 2017. The Administration advised that prior to the introduction of the PAR requirement, 80% of the claimants from India arrived in Hong Kong as visa-free visitors but only made a claim after they had overstayed or been refused permission to land. PAR had been operating smoothly since commencement. As at end April 2017, about 100 000 visitors had successfully registered, representing a success rate of over 90%. At the same time, the number of Indian visitors who overstayed had decreased. The Administration further advised that in the longer term, it might extend the PAR requirement to other countries, on a need basis.

13. Members were also advised that measures had been introduced to address the rapid increase in the number of new claimants. These included the tightening of immigration control, the launching of enforcement operations in parallel with relevant Mainland authorities to combat smuggling of non-ethnic Chinese illegal immigrants ("NECIIs") across the boundary and the commencement of the Immigration (Unauthorized Entrants) (Amendment) Order 2016 in May 2016 to impose a heavier penalty on syndicates involved in the smuggling of NECIIs from Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia and Sri Lanka into Hong Kong.

#### *Detention*

14. Some members considered that accommodating non-refoulement claimants in closed camps would better protect the personal safety of claimants and facilitate the maintenance of law and order in Hong Kong. This would also reduce the incentives for claimants to come to Hong Kong. Some other members, however, pointed out that the cost involved in the closed detention of a claimant in the United States and Australia was in the region of \$984 to \$3,856 per day, which was 10 to 40 times of the subsidy provided to claimants in Hong Kong. These members queried the need to examine the establishment of closed camps for claimants.

15. According to the Administration, the detention of non-refoulement claimants involved legal and other complex issues. All the views and suggestions of members would be considered in the context of the Administration's comprehensive review of the strategy of handling non-refoulement claims.

### Substantiated non-refoulement claims

16. Some members expressed grave concern about the low substantiation percentage of non-refoulement claims determined by ImmD which was only about 0.3%. The Administration explained that whether a person's non-refoulement claim would be substantiated depended on the individual circumstances of his case as well as the situation in his country of origin. In determining a non-refoulement claim, the duty of ImmD was to assess whether an illegal immigrant should be removed immediately, or whether removal action should be temporarily withheld until his claimed risks ceased to exist.

17. Some members also expressed concern as to whether the claimants of substantiated non-refoulement claims had been referred to the United Nations High Commissioner for Refugees ("UNHCR") for resettlement in other countries. The Administration advised that non-refoulement claimants whose claims had been substantiated would be allowed to remain in Hong Kong and their removal would be withheld until their claimed risk ceased to exist. Where a non-refoulement claim was substantiated on grounds of, inter alia, persecution risks, the claimant would be referred to UNHCR for consideration of recognition as refugee and arrangement of resettlement to a third country. Members' attention was drawn to the fact that the 1951 Refugee Convention and its 1967 Protocols had never been applied to the Hong Kong Special Administrative Region and the Administration would never consider non-refoulement claimants as "refugees" or "bogus refugees". The Administration has a long-established policy of not granting asylum to any non-refoulement claimants nor determining the refugee status of anyone. The illegal immigrant status of non-refoulement claimants will not change because of their non-refoulement claim, regardless of its result. The Administration stressed that all non-refoulement claims were screened in accordance with relevant laws and court judgments in Hong Kong.

### Public expenditure on non-refoulement claims

18. Members were concerned that the estimated expenditure arising from the screening of claims and provision of support for claimants would amount to \$644 million in 2015-2016. Some members expressed the view that the Administration should consider imposing a cap on PFLA to claimants. The Administration advised that while some countries had imposed statutory limit on publicly-funded legal assistance to claimants, it needed to study such overseas experience before drawing up concrete proposals.

### Crime committed by non-refoulement claimants

19. Some members expressed concern that there was an increase in crime committed by claimants and non-refoulement claimants were affecting the daily life of Hong Kong residents. They pointed out that the ethnic minorities in

Hong Kong had also complained that their daily life was affected by the large number of non-refoulement claimants in Hong Kong. These members considered that the Police should step up patrol in all districts. Some other members, however, held different view. They queried whether the crime rate of non-refoulement claimants was exceptionally high in comparison with the overall crime rate of Hong Kong.

20. Some members were of the view that claimants convicted of crime in Hong Kong should be repatriated immediately. The Administration advised that even if a claimant was convicted of crime, it was still necessary to meet the court's request to screen the claim concerned under procedures which met a high standard of fairness. In this connection, the Administration was seeking to complete the screening of such claims before the claimants concerned had completed their sentence terms.

21. Some members were gravely concerned about the Administration's inadequate efforts to tackle the problem of claimants taking up illegal employment in Hong Kong. The Administration advised that prosecution had been instituted against claimants who took up illegal employment as well as their employers, who were both in breach of the law. According to the court's sentencing guidelines, employers convicted of employment of illegal workers would be sentenced to immediate imprisonment of about two to three months, subject to the mitigating factors in individual cases. The Administration further advised that information on arrest and conviction relating to illegal employment was frequently disseminated by the Administration to draw the attention of employers to the legal consequences of employing illegal workers.

### **Relevant papers**

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

## Appendix

### Relevant papers on unified screening mechanism for non-refoulement claims

Committee	Date of meeting	Paper
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>
	Bills Committee on Immigration (Amendment) Bill 2011	--

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Legislative Council	21.11.2012	<a href="#">Official Record of Proceedings (Question 10)</a>
	20.2.2013	<a href="#">Official Record of Proceedings (Question 14)</a>
Panel on Security	2.7.2013 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	7.5.2014	<a href="#">Official Record of Proceedings (Question 4)</a>
Panel on Security	3.6.2014 (Item VI)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	18.6.2014	<a href="#">Official Record of Proceedings (Question 14)</a>
	21.1.2015	<a href="#">Official Record of Proceedings (Question 9)</a>
	29.4.2015	<a href="#">Official Record of Proceedings (Question 9)</a>
Panel on Security	7.7.2015 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a> <a href="#">LC Paper CB(2)2048/14-15(01)</a>
Legislative Council	28.10.2015	<a href="#">Official Record of Proceedings (Question 1)</a>
	28.10.2015	<a href="#">Official Record of Proceedings (Question 12)</a>
Panel on Security	3.11.2015 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	2.2.2016 (Item VI)	<a href="#">Agenda</a> <a href="#">Minutes</a>



<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Legislative Council	24.2.2016	<a href="#">Official Record of Proceedings (Question 18)</a>
Panel on Security	7.6.2016 (Item IV)	<a href="#">Agenda Minutes</a>
Subcommittee on Immigration (Unauthorized Entrants) (Amendment) Order 2016	--	<a href="#">Report of the Subcommittee to the House Committee</a>
Panel on Security	11.6.2016 (Item I)	<a href="#">Agenda Minutes</a>
Legislative Council	15.6.2016	<a href="#">Official Record of Proceedings (Question 12)</a>
Panel on Security	11.11.2016 (Item V)	<a href="#">Agenda Minutes</a>
Panel on Security	6.6.2017 (Item IV)	<a href="#">Agenda Minutes</a>

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