

For discussion on  
21 May 2018

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

**Screening and Appeal Procedures of  
the Unified Screening Mechanism**

**Purpose**

This paper briefs the Subcommittee on the procedures of handling and screening non-refoulement claims and appeals.

**Background**

2. The Government implemented the Unified Screening Mechanism (“USM”) in March 2014 for screening non-refoulement claims and handling appeals, with a view to enforcing judgments of the Court of Final Appeal (“CFA”), including relevant legal obligations under the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Immigration Ordinance (Cap. 115), by screening non-refoulement claims on all applicable grounds<sup>1</sup>. A summary of key court judgments relating to non-refoulement claims is at **Annex A**.

3. Since the implementation of USM, the number of non-refoulement claimants has surged, and the number of claims pending commencement of screening procedures by the Immigration Department (“ImmD”) has been increasing. As at early 2016, there were more than 11 000 claims pending determination by ImmD. In parallel, the number of appeals filed with the Torture Claims Appeal Board (“TCAB”) also increased. The percentage of rejected claimants lodging an appeal has increased from less than 50% prior to the implementation of USM to about 95% at present.

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<sup>1</sup> Applicable grounds include torture, violation of absolute and non-derogable rights under the Hong Kong Bill of Rights (“HKBOR”) (including arbitrary deprivation of life and cruel, inhuman or degrading treatment or punishment), or persecution.

4. In view of the above, the Government commenced a comprehensive review of the strategy of handling non-refoulement claims (“the comprehensive review”) in early 2016, including expediting the commencement of screening procedures for pending claims, shortening the screening time per claim and expediting the handling of appeals.

### **Latest Situation**

5. Since the commencement of the comprehensive review, the Government has, under the existing legal framework, introduced a number of measures to streamline the workflow and increased the manpower and resources required, so as to expedite the screening of claims and handling of appeals. The number of claims pending screening by ImmD has dropped since 2016, and the processing time per claim has also shortened:

- (a) In 2017, ImmD determined 4 182 claims (monthly average 349), representing an increase of 79% and 30% over 2015 (annual total 2 339, monthly average 195) and 2016 (annual total 3 218, monthly average 268) respectively. In the first four months of 2018, ImmD determined 1 757 claims (monthly average 439), a further increase of 26% over 2017.
- (b) As at the end of April 2018, 3 925 claims were pending screening by ImmD, representing a 55% decrease over the same period in 2017 (8 740 claims) and a 65% decrease over the peak in March 2016 (11 201 claims).
- (c) At present, the processing time per claim is shortened to about 10 weeks on average, as compared to 25 weeks on average at the early implementation of USM.

6. As regards the handling of appeals, the monthly average of appeals determined by TCAB had increased about 3.8 times from 49 in 2016 to 235 in 2017. With extra manpower and resources deployed to TCAB, we expect that the number of TCAB determinations will further increase in 2018. At present, about 6 200 appeals are pending.

7. Latest statistics on non-refoulement claims are at **Annex B**.

## **Screening Procedures**

8. The framework of the existing screening procedures has been in use since 2009, including the following major steps:

- (1) The claimant must submit a claim form to ImmD to provide all grounds of his/her claim and the supporting facts (including documentary proofs);
- (2) The claimant must attend screening interview(s), after returning the claim form, to make clarifications and answer questions relating to his/her claim;
- (3) ImmD decides whether to accept the claim as substantiated or to reject the claim, and informs the claimant of the decision with reasons in writing; and
- (4) Claimant aggrieved by ImmD's decision may lodge an appeal.

9. According to a court ruling, claimants have the right to access to legal assistance during the screening procedures. For claimants who are unable to afford the relevant legal cost, the Government must provide them with legal assistance out of public funds. Currently, all claimants in need are provided with publicly-funded legal assistance ("PFLA") by the Government in steps (1) to (3) above. For those lodging an appeal, such assistance will continue upon passing the merits test.

10. A flowchart of the screening procedures under the USM is at **Annex C**.

### **Commencement of the Screening Procedures**

11. At present, at the beginning of the screening procedures, the claimant has to report to ImmD at a designated office on a specified date and time to obtain the claim form. ImmD will also brief the claimant on the screening procedures and the relevant assistance, such as the legal assistance and translation/interpretation services paid by public funds.

12. In view of the acute surge in the number of claims received (4 634 in 2014, and 5 053 in 2015) since the implementation of USM, 83 additional posts were created by ImmD in 2016-17, adding up to a total of

288 officers dedicated to handling claim-related matters at present, with a view to expediting the commencement of screening procedures for pending claims. Nevertheless, as the Government is required by law to provide every claimant with PFLA, ImmD can only commence the screening procedures for claimants who are provided with PFLA at the same time. All along, the Government has been providing such assistance through the Duty Lawyer Service (“DLS”). Upon the implementation of USM in March 2014, DLS agreed to, as requested by the Government, gradually increase the daily number of claims which can be processed from 8 (i.e. ImmD may commence the screening procedures for about 2 000 claims per year) to 13 (i.e. ImmD may commence the screening procedures for about 3 200 claims per year).

13. To further break through the bottleneck, the Government launched the “Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants” (“the Pilot Scheme”) in September 2017 to run in parallel with the DLS scheme. Currently, 10 cases are referred to the participating lawyers per day under the Pilot Scheme. The daily number of claims for which ImmD can commence the screening procedures is thereby increased by almost 80% from 13 to 23 cases (i.e. an annual total of over 5 000 claims).

14. Against this background, some claimants had to wait for some time upon making the claim before the screening procedures can commence in the past. Nevertheless, given the drop in the number of claims received since the latter half of 2016 and the increase in the number of claims ready for screening resulted from the additional manpower in ImmD and the launch of the Pilot Scheme, the number of pending claims has been decreasing. Our policy objective is that, after clearing all the pending claims, new claims can be screened immediately or shortly, without having to wait for a long time.

### Claim Form

15. A claimant is required to provide his/her personal particulars and family details in the claim form, together with the specific reasons for making the claim, including why and how he/she left his country of origin, the possible risks he/she will face if he/she returns to that country, his/her or his/her family members’ distressing experience, whether or not assistance or protection has been sought from the local government or international organisations in that country, whether or not he/she has lived in places outside his/her city or territory of origin in that country, etc.

He/She also has to submit the supporting documents and related evidence in one go.

16. In July 2012, the Legislative Council (“LegCo”) endorsed the Immigration (Amendment) Ordinance 2012, which stipulates that claimants for non-refoulement on the ground of torture must complete and submit the claim form to ImmD within 28 days subsequent to the commencement of the screening procedures. In response to the strong request of DLS upon implementation of the USM, the Government agreed to give 21 additional days for claimants by means of administrative measures. As such, under the current arrangement, claimants are given 49 days (i.e. 7 weeks) to return their claim forms, which is longer than the statutory period of 28 days.

17. Under the law and existing requirements, a claimant may apply to ImmD for extension of time. The claim of those failing to return the claim form by the deadline will be deemed as withdrawn. If he/she subsequently provides sufficient evidence to satisfy ImmD that the delay was due to circumstances beyond his/her control, ImmD may allow to re-open the screening of the withdrawn claim. When completing and submitting the claim form, the claimant is provided with legal assistance and interpretation/translation services, which are paid by public funds.

#### Screening Interview

18. During screening interview(s), ImmD’s case officer will request clarification from the claimant on the facts provided in the claim form and ask him/her to answer questions about the claim. For those who cannot communicate in Chinese or English, ImmD will arrange simultaneous interpretation. At present, interpreters (including full-time interpreters employed by ImmD and part-time interpreters) serving at screening interviews meet the same qualification requirement as those serving at the Judiciary. Lawyers providing legal assistance to claimants may attend the screening interview(s) but cannot answer questions on behalf of the claimants.

19. It takes time to arrange a screening interview as it has to be conducted at a time convenient to the lawyer and interpreter concerned. Currently, there are no provisions in the Immigration Ordinance specifying the arrangement of screening interviews (such as the circumstances under which a screening interview has to be re-arranged). The screening procedures will be substantially delayed if a screening interview cannot be completed as planned and has to be re-scheduled.

20. Separately, in the past, ImmD would schedule a date for the screening interview with DLS only after the return of claim form by the claimant. As a result, the interview generally would not be conducted until about 13 weeks subsequent to the return of claim form (i.e. 20 weeks after the commencement of screening procedures). The Government proposed in December 2014 to DLS that the scheduling of screening interviews should be conducted before the commencement of screening procedures, so that right on the day when the claimant obtains the claim form and is referred to PFLA, he/she will know the date of his/her screening interview immediately. Following rounds of discussion, the relevant measure was implemented since April 2016. At present, most screening interviews are conducted in about 2 weeks upon the return of claim form, which is about 11 weeks earlier than before. Efficiency has been much improved.

21. On the other hand, given serious delays caused by repeated re-scheduling for cases in which the screening interview could not be completed as scheduled during the early stage of implementation of USM, ImmD has progressively introduced administrative measures to tighten the requirements for extension of time for submitting claim form and re-scheduling interviews. Claimants absent from interviews are required to provide reasonable explanations and documentary proofs within a time limit. Otherwise, their claims will be determined based on the information available. These administrative measures have effectively alleviated delays, and the rate of successful conduct of screening interviews has increased gradually from 61% at the early implementation of USM in 2014 to 79% in 2016, 91% in 2017 and the present 94%.

#### Determination by ImmD

22. Upon completion of interview(s) and receipt of all relevant documents, ImmD has to determine the claim and inform the claimant of its decision with reasons in writing. A claim will be substantiated if ImmD is satisfied that the claimant will be subject to real and foreseeable risk which leads to torture as defined in section 37U of the Immigration Ordinance, or violation of absolute and non-derogable rights under HKBOR (including arbitrary deprivation of life and cruel, inhuman or degrading treatment or punishment), or persecution, etc. When making decisions, ImmD will also make reference to and take into account information of the claimant's country of origin and other related considerations, including whether or not he/she will have effective

protection from the local government of his/her place or country of origin, or whether he/she will be subject to the same risk in all places inside that country.

23. ImmD has enhanced its capability to collect information about countries of origin to facilitate more effective screening of claims. For example, reference has been made to the information of governments/non-governmental organisations of the relevant countries to build a timely, objective and credible database on the locality information, topical reports and major events, etc, for the countries of origin. Separately, to enhance screening efficiency, ImmD has deployed dedicated officers to handle claims involving claimants from the same country. At present, ImmD can, on average, determine a claim in about one week after the screening interview(s).

24. With all the above measures in place, the current handling time per claim (from commencement of the screening procedures to determination by ImmD) has been expedited from about 25 weeks on average at the early implementation of USM to the current average of about 10 weeks.

### Appeal

25. According to the Immigration Ordinance as amended in 2012, claimant aggrieved by ImmD's decision may lodge an appeal in writing within 14 days after he/she is informed of such decision. Members of TCAB include former judges or magistrates, as well as members with judicial background or adjudicators with relevant experience. When handling appeals, TCAB operates independently and is free from interference of the Government.

26. Upon receipt of a Notice of Appeal from a claimant, the TCAB Secretariat will obtain the required documents from ImmD and arrange translation if necessary. Under the law, the TCAB Chairperson has to assign one Member to handle an appeal<sup>2</sup>. After preliminary assessment of the merits of the case, the assigned Member will decide whether or not an oral hearing will be conducted. Under the law, TCAB may decide not to conduct a hearing for an appeal upon considering the merits of the case. However, the Court of Appeal of the High Court ruled in a

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<sup>2</sup> The TCAB Chairperson may also assign three Members to conduct a hearing and determine an appeal, depending on the circumstances of individual cases.

relevant judicial review case in June 2014 that conducting an oral hearing by TCAB should be the norm rather than the exception. Since the ruling, the percentage of appeal cases in which oral hearings are conducted by TCAB has increased from about 5% previously to over 90% at present. As a result, TCAB needs to deploy more time and resources for arranging and conducting oral hearings.

27. Given the surge in the number of non-refoulement claims, and the increase in the ratio of cases involving appeals and oral hearings, the Government has appointed over 70 new Members to TCAB since July 2016, expanding its membership to the current strength of 102, so as to handle the substantially increased number of appeals.

28. Apart from expanding the membership, the Government has allocated extra manpower and financial resources to TCAB for expediting the handling of appeals. In parallel, TCAB has put in place a number of measures to streamline and improve its workflow, and is provided with additional hearing facilities. The Government will continue to appoint suitable Members to TCAB as necessary, enhance its manpower and ancillary facilities for expediting the handling of appeals. The number of appeals determined by TCAB in 2017 had increased by 3.8 times over 2016. With the allocation of additional manpower and resources, the number of TCAB decisions is expected to further go up in 2018. As at the end of April 2018, there were about 6 200 pending appeals.

### **Way Forward**

29. Since the commencement of USM, the Government has accumulated considerable experience in handling claims, and put in place various measures within the existing legal framework, with a view to expediting the screening of claims while complying with the principle of “high standards of fairness”. If the effectiveness of these measures is maintained and the number of new claims received remains at the present level, ImmD may be able to clear the current backlog of claims within next year; and the new and pending appeals would then be completed gradually afterwards.

30. As part of the comprehensive review, the Government is reviewing the provisions of the Immigration Ordinance in respect of the screening procedures and related issues. Making reference to the operational experience of USM and relevant legal provisions and practices overseas, we will examine whether there is the need to set out



specific provisions for procedures or circumstances not covered by the existing legislation, thereby strengthening the legal basis for the effective measures mentioned above, and further empowering ImmD/TCAB to tackle various delay tactics more effectively. We will also consider strengthening the provisions which prescribe the claimants' duties, setting out the consequences of non-compliance with ImmD/TCAB's directions and the law for screening procedures, and tightening timeframes of the screening procedures (including submission of claim form and filing of appeals with TCAB). The Government will report to the LegCo Panel on Security in due course, with the aim of introducing the bill to LegCo next year.

**Security Bureau**  
**Immigration Department**  
**May 2018**

**Key court rulings relating to the handling of non-refoulement claims**

<b>Date</b>	<b>Case</b>	<b>Ruling</b>	<b>Implications on Screening</b>
June 2004	<p><i>Sakthevel Prabakar v Secretary for Security</i></p> <p>[2004] 7 HKCFAR 187</p>	<p>CFA ruled that, to a potential deportee who has made a torture claim, his life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, the Government must determine his claim independently and properly in a way that meets the “high standards of fairness”.</p>	<p>ImmD introduced administrative screening procedures to screen torture claims.</p>
December 2008	<p><i>FB v Director of Immigration and Secretary for Security</i></p> <p>[2009] 2 HKLRD 346</p>	<p>The Court of First Instance of the High Court ruled that the mechanism for screening torture claims must include the following measures to meet the “high standards of fairness” required in <i>Prabakar</i> :</p> <ul style="list-style-type: none"> <li>• The examining officer and the decision-maker should be the same person;</li> <li>• The decision-maker of the claim/appeal should be sufficiently trained;</li> <li>• The appeal handler may conduct oral hearing on an appeal;</li> <li>• During the screening process, the claimant has the right to access to legal representation;</li> <li>• The Government should provide PFLA to claimants in need.</li> </ul>	<p>In December 2009, the Government implemented the enhanced screening mechanism. Claimants may receive PFLA through DLS. Separately, the Government appoints Adjudicators to handle appeal petitions independently, and provides training to relevant officers.</p>

<b>Date</b>	<b>Case</b>	<b>Ruling</b>	<b>Implications on Screening</b>
December 2012	<p><i>Ubamaka Edward Wilson v the Secretary for Security</i></p> <p>[2012] 15 HKCFAR 743</p>	<p>CFA ruled that the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment (“CIDTP”) enshrined under Article 3 of HKBOR is a non-derogable right. Accordingly, the Government must not remove a foreigner to a country where he has a genuine and substantial risk of being subjected to CIDTP, no matter how undesirable or dangerous he is.</p>	<p>The Government implemented the USM in March 2014 to assess non-refoulement claims on all applicable grounds in one go.</p>
March 2013	<p><i>C &amp; Ors v Director of Immigration</i></p> <p>[2013] 16 HKCFAR 280</p>	<p>CFA ruled that as long as the Director of Immigration maintains a prevailing practice of considering a person’s claimed fear of persecution before exercising the power to remove him to another country, the Director (instead of the United Nations High Commissioner for Refugees) is required to independently determine whether the claimed fear of persecution is well-founded before executing such removal.</p>	

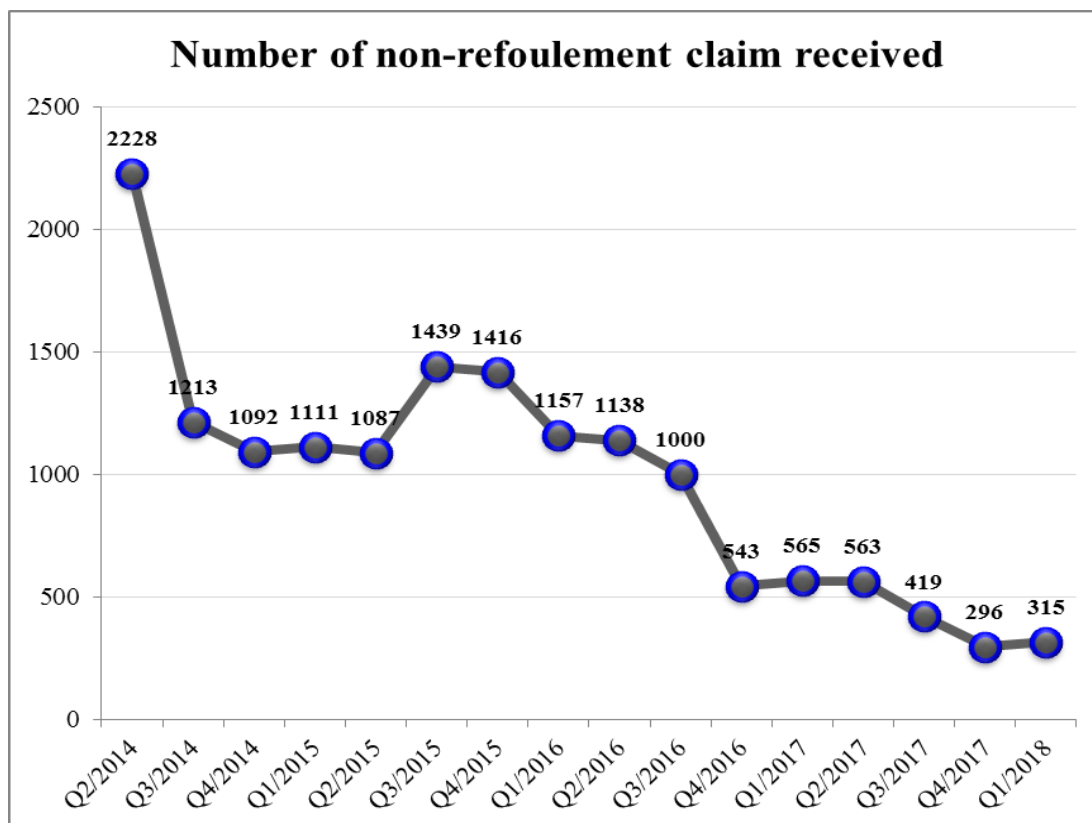
<b>Date</b>	<b>Case</b>	<b>Ruling</b>	<b>Implications on Screening</b>
June 2014	<i>ST v Betty Kwan</i>  [2014] HKCA 309	The Court of Appeal of the High Court ruled that, while there is no absolute right to an oral hearing during the appeal process, certain guidelines should be followed in deciding whether an oral hearing should be held, having regards to facts of the case. The Court of Appeal also observes that conducting an oral hearing should be the norm rather than the exception.	Percentage of oral hearings required at appeal stage (as opposed to consideration of appeal on paper) jumped from 5% to over 90%.

**Annex B**

**Quarterly statistics of non-refoulement claims**

Year	Quarter	Number of claims received	% change since the quarter before	% change since the same period the year before	% change since the peak (Q3/2015) <sup>^</sup>
2014	Q2	2 228			
	Q3	1 213	-46%		
	Q4	1 092	-10%		
2015	Q1	1 111	+2%		
	Q2	1 087	-2%	-51%	
	Q3	1 439	+32%	+19%	
	Q4	1 416	-2%	+30%	-2%
2016	Q1	1 157	-18%	+4%	-20%
	Q2	1 138	-2%	+5%	-21%
	Q3	1 000	-12%	-31%	-31%
	Q4	543	-46%	-62%	-62%
2017	Q1	565	+4%	-51%	-61%
	Q2	563	0%	-51%	-61%
	Q3	419	-26%	-58%	-71%
	Q4	296	-29%	-45%	-79%
2018	Q1	315	+6%	-44%	-78%

<sup>^</sup> ImmD received 2 228 claims in Q2/2014 immediately after USM was launched. The claims received possibly included those who had planned to lodge claim before USM. Hence, it may be inappropriate to include the claim figure of that quarter for trend comparison.



**Statistics on non-refoulement claims  
(as at end April 2018)**

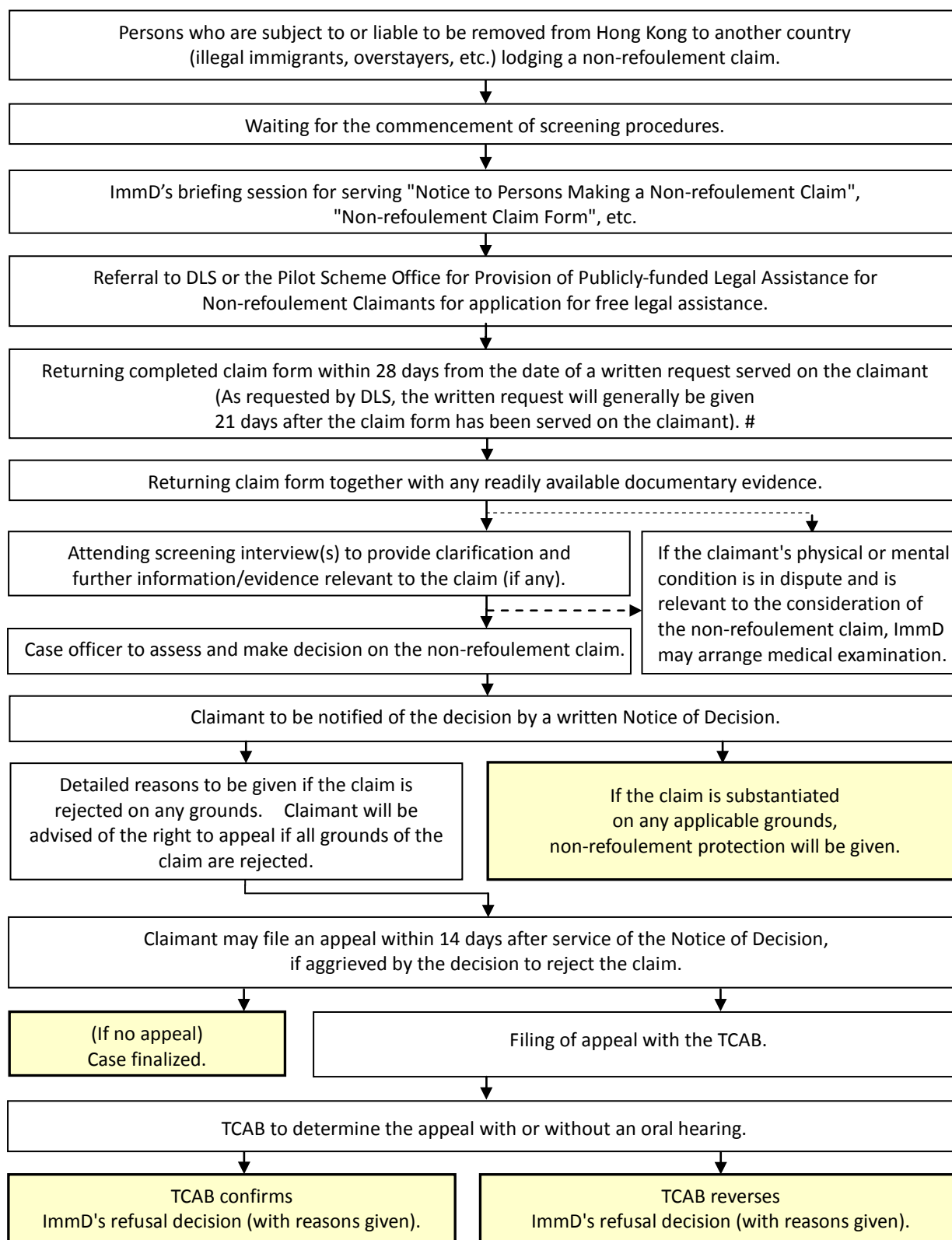
Year	Claims received	Claims determined	Claims withdrawn or no further action can be taken	Pending claims (at year end)
End 2009				6 340
<b><i>Enhanced administrative mechanism (which became statutory mechanism since December 2012)</i></b>				
2010 to 2013	4 906 <i>(Note 1)</i>	4 534	3 920	2 792
2014 (Jan to Feb)	19	221	89	2 501
<i>Total torture claims under administrative and statutory mechanisms</i>	4 925	4 755	4 009	2 501
<b><i>Unified screening mechanism (“USM”) (since March 2014)</i></b>				
Claims lodged on other grounds such as CIDTP or persecution before commencement of USM	4 198			6 699  (=2 501 +4 198)
2014 (Mar to Dec)	4 634	826	889	9 618
2015	5 053	2 339	1 410	10 922
2016	3 838	3 218	1 561	9 981
2017	1 843	4 182	1 743	5 899
2018 (Jan to Apr)	420	1 757	637	3 925
<b>Total non-refoulement claims under USM</b>	<b>15 788</b>	<b>12 322</b> <i>(Note 2)</i>	<b>6 240</b>	<b>3 925</b>

*Note 1:* ImmD received a total of 4 906 torture claims from 2010 to 2013, an average of 102 per month. Since the commencement of USM to end 2015, ImmD received 9 687 torture claims, an average of 440 claims per month. Since the comprehensive review in early 2016, ImmD received an average of 320 claims per month in 2016, and an average of 154 claims per month in 2017, a decrease of 52%. In 2018 (up to end April), ImmD received 420 non-refoulement claims, an average of 105 claims per month.

*Note 2:* Among the 12 322 non-refoulement claims determined by ImmD under USM, 96 (0.8%) were substantiated (including 34 substantiated by TCAB on appeal).

**Annex C**

**Screening procedures for non-refoulement claims under the USM \***



Notes:

\* This flow chart is intended for a quick glance of the screening procedures of non-refoulement claims under the USM. It should not be taken as a formal or comprehensive reference of all the procedural steps involved.

# Time extension for returning the completed claim form may only be allowed with good reasons in special circumstances on a case-by-case basis. Failure to return the completed claim form will result in the claim being deemed as withdrawn.