

SUBMISSION TO THE SUBCOMMITTEE TO FOLLOW UP ISSUES RELATING TO THE UNIFIED SCREENING MECHANISM FOR NON-REFOULEMENT CLAIMS OF THE LEGISLATIVE COUNCIL

For its meeting on 15 January 2019

January 2019

Justice Centre Hong Kong (Justice Centre) makes the following submissions to the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims (the Subcommittee) of the Legislative Council of the Hong Kong Special Administrative Region, China (Hong Kong) for its meeting on 15 January 2019 on publicly-funded legal assistance for non-refoulement claims.

Legal representation at the Torture Claims Appeal Board

Although non-refoulement claimants are assigned a duty lawyer for the Immigration Department's initial evaluation of their claims, the publicly funded legal assistance ceases at the Torture Claims Appeal Board (TCAB) stage for the vast majority of the time. As a result, 91% of non-refoulement claimants were not legally represented at the TCAB in 2017.¹ This risk procedural unfairness, and renders the system less efficient.

At present, it is entirely at the duty lawyer's discretion whether to continue to represent claimants on appeal before the TCAB. However, there is a lack of information about the policy/guidelines issued by the Legal Aid Department/Duty Lawyer Services for duty lawyers to consistently and effectively determine whether a claimant should be represented. Indeed, Justice Centre is not aware of any oversight, or independent review of the exercise of this discretion.

We remain concerned that this is detrimental to the claimants' right to a fair hearing and to the prompt and efficient operation of the TCAB. Claimants are prohibited from working in Hong Kong while their claims are processed and rely on government allowances of about HKD\$3,000 for all expenses, including housing, food and transportation. It is extremely unlikely for claimants to be able to afford a private lawyer for their claims.

The Administration is recommended to review the mechanism for providing publicly funded legal assistance for non-refoulement claimants at the TCAB and ensure all claimants have unhindered access to such legal assistance that does not depend on the decision of their lawyer. After all, as the Court of First Instance clearly outlined within *FB v.*

¹ Theresa Lee, for Secretary for Security. (28 June 2018). Response to data request titled "Torture Claims Appeal Board Operations". Retrieved from: https://accessinfo.hk/en/request/torture_claims_appeal_board_oper.

Director of Immigration & Secretary of Security and Another legal representation is fundamental to fairness throughout each stage of the USM:

I have no doubt at all that the seriousness and complexity of the issues to be considered are such that a Convention claimant ought to have access to legal advice throughout the process.²

Whilst Justice Centre strongly urges that ensuring legal representation will in any case increase the efficiency of the TCAB.

Improving capacity of the TCAB

Currently, according to paragraph 9.1 of the Principles, Procedures and Practice Directions of the TCAB, if a claimant is legally represented, his legal representative and the Government's legal representative *should* confer and consider as early as possible; and in advance of the hearing. Parties should therefore determine in advance what agreement can be reached regarding the scope of the appeal.

Representatives should then assist the TCAB by producing a list of agreed issues.

However, this rarely if ever occurs. As stated in the Principles, Procedures and Practice Directions (PPP), this policy is specifically aimed at increasing the efficiency of the TCAB, which is in the firm interests of all parties and the wider public.³ An amendment to the statutory regime for the TCAB and/or the PPP should therefore be considered, to include the following:

- (i) To *require* all parties to engage in confirming the issues agreed/in dispute at the earliest reasonable opportunity, and to provide the list in question to the TCAB; and
- (ii) To enable the TCAB to exercise case management powers to ensure (i) takes place promptly; and/or,
- (iii) Subject to any agreement between parties (or in the absence of the same; or where the TCAB otherwise reasonably disagrees with the list, or any part of the list (as at (i)), to otherwise narrow the issues of its own volition, providing reasonable notice to all parties, sufficiently in advance of any hearing so that relevant evidence can be submitted in a timely fashion;

² [2009] 2 HKLRD 346, [2009] 1 HKC 133; [para. 146]; see: <http://www.hklii.hk/eng/hk/cases/hkcfi/2008/1069.html>

³ Torture Claims Appeal Board. (12 September 2016). *Principles, Procedures and Practice Directions of the Torture Claims Appeal Board (Fifth Edition)* Retrieved from: <https://www.sb.gov.hk/eng/links/tcab/PPP.pdf>.

Narrowing the scope of issues in dispute will diminish the length of any oral hearing(s); reduce the volume of evidence and pleadings required within such proceedings; reduce the amount of time and costs for duty lawyers and government Counsel alike in preparing for proceedings; be more consistent with standard procedure as within all other forms of civil litigation; and, in turn, is likely to significantly diminish the requirement for Judicial Review proceedings.

Whilst it is to be noted that if a claimant is not legally represented, it will be more difficult to implement this policy.

Increasing the efficiency of the TCAB is one of the key aspects of increasing efficiency of the Unified Screening Mechanism as a whole. As of November 2018, there were 6,477 appeals pending determination by the TCAB. In quarter three of 2018, the TCAB determined non-refoulement claims at the rate of about 400 claims a month.⁴

Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants

In September 2017, the Administration started the Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants. We welcome the Administration's upcoming review of this pilot scheme. Justice Centre requests the Administration to review the pilot scheme with a transparent and rigorous framework and consult civil society and non-refoulement claimants for this purpose. In developing the indicators, reference should be made to relevant overseas research and reviews such as *Justice at Risk: Quality and Value for Money in Asylum Legal Aid*.⁵

Improving efficiency by providing access to early legal advice and representation to non-refoulement claimants

Improving the efficiency of the Unified Screening Mechanism without compromising fairness is in the interest of both the Administration and people in need of protection. As Justice Centre has stated in previous submissions to the Legislative Council, ensuring claimants' access to early legal advice and representation will effectively improve how a claim is argued and prepared and therefore the efficiency of the process sustainably. Allowing and funding community legal centres to develop the expertise of lawyers will ensure a sufficient number of lawyers specialising in refugee law in the long term. Currently, in Hong Kong, non-governmental organisations are not allowed to legally represent clients because their in-house lawyers may then be considered to give third-party advice in breach of the Practice Direction N of the Law Society of Hong Kong. There are publicly-funded law centres in comparable jurisdictions, including the Australia, Canada⁶ and the UK. In particular, in the UK, the Government funded refugee

⁴ Theresa Lee, Security Bureau. (7 November 2018). Response to data request titled "Torture Claims Appeal Board- Q3, 2018". Retrieved from: https://accessinfo.hk/en/request/torture_claims_appeal_board_q3_2#incoming-876.

⁵ Julie Gibbs and Deri Hughes-Roberts. (December 2012). *Justice at Risk: Quality and Value for Money in Asylum Legal Aid*. Runnymede. Retrieved from: https://www.asylumaid.org.uk/wp-content/uploads/2013/02/Justice_at_Risk_Report.pdf.

⁶ DLA Piper and PILnet. (May 2017). *This Way: Finding Community Legal Assistance in Hong Kong*. Retrieved from: https://www.dlapiper.com/~media/Files/News/2017/05/REPORT_THIS_WAY_31%20May%202017.pdf.

lawyers through the NGO Refugee Legal Centre, which operated for close to 20 years and produced many of the leading barristers, solicitors, judges and government lawyers practising today.

Late delivery of Administration papers prior to meetings

Justice Centre is concerned that the Administration's paper for this meeting was not made publicly available until 11 January 2019, two working days before the meeting. This was not the first time the Administration's paper for a meeting of the Legislative Council was made public so close to the meeting, leaving insufficient time for key stakeholders, including civil society, to prepare written submissions. This limits the space for civil society actors to be involved in public policy and legislative developments, leading to less effective discussions in the Legislative Council and limiting the diversity of information available to Legislative Council members. For information about previous occurrences of this problem, please see Justice Centre's submissions to the Subcommittee for its meetings on 18 October 2018 and 27 November 2018 and to the Panel on Security of the Legislative Council for its meeting on 8 January 2019.⁷

Recommendations

The Subcommittee is invited to recommend the Administration to:

- Review the mechanism for providing publicly funded legal assistance for non-refoulement claimants at the TCAB and ensure all claimants have unhindered access to such legal assistance that does not depend on the decision of the lawyer;
- Consider proposing an amendment to the statutory regime for the TCAB and/or the PPP to increase its capacity as set out above;
- Develop a transparent and rigorous framework for the review of the Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants and consult civil society and non-refoulement claimants for this purpose;
- Provide quality information about the Unified Screening Mechanism to non-refoulement claimants or potential claimants at the earliest opportunity;
- Ensure early access to legal advice and legal representation to non-refoulement claimants immediately upon the registration of claims;
- Ensure that Administration papers are made available in both Chinese and English at least two weeks in advance of the deadline for civil society to make submissions for a meeting; and

⁷ Justice Centre Hong Kong. (October 2018). "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims". LC Paper No. CB(2) 38/18-19(01). Retrieved from: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181018cb2-38-1-e.pdf. Justice Centre Hong Kong. (November 2018). "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims". LC Paper No. CB(2)325/18-19(01). Retrieved from: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181127cb2-325-1-e.pdf.

- Immediately commence a meaningful and considered public consultation process for key stakeholders with respect to the proposals being considered as part of the Comprehensive Review of the Strategy of Handling Non-refoulement Claims.

Questions for the Administration

- In 2017, only 9% of non-refoulement claimants were legally represented for their petitions/appeals. Has the Administration studied whether ensuring all claimants have access to legal representation will increase the efficiency of the TCAB?
- What will be the methodology of the review of Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants? Will the Administration consult civil society and non-refoulement claimants for this purpose?
- Will the Administration provide early access to legal advice and representation to non-refoulement claimants immediately upon the registration of claims before the acceptance of claimants' written significations? If not, what are the reasons?

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About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

For more information please visit: www.justicecentre.org.hk