

For discussion on
11 November 2016

Legislative Council Panel on Security

Comprehensive review of the strategy of handling non-refoulement claims

Purpose

This paper updates Members on the latest situation of non-ethnic Chinese illegal immigrants (NECIIs), screening of non-refoulement claims, and progress of the captioned review.

Latest situation

2. The number of NECIIs has surged since 2014, from an average of some 500 to 1 000 per year before 2013 to 1 984 in 2014 and 3 819 in 2015. In the first ten months of 2016, 2 046 NECIIs surrendered or were intercepted, about 33% lower than the same period last year¹. In particular, following stepped up efforts since early 2016 by the Police and the Immigration Department (ImmD) targeting syndicates who smuggled NECIIs into Hong Kong (see paragraph 6 below), a visible drop was recorded since the second quarter this year. See **Annex A**.

3. As regards non-refoulement claims, in the first ten months of 2016, 3 481 claims were received, about 15% lower than the same period last year². Whilst the monthly average of the number of claims made since implementation of unified screening mechanism (USM) in March 2014 to end August 2016 (30 months) is 426, in September and October 2016, respectively 198 and 186 claims were made. See **Annex B**.

¹ In the first ten months of 2015, 3 057 NECIIs surrendered or were intercepted.

² In the first ten months of 2015, 4 118 claims were made; 5 053 in total for 2015.

4. As at end October 2016, 10 675 claims were pending screening by ImmD, amongst which 7 054 (66%) were new claims lodged for the first time since implementation of the USM in March 2014. In addition, 3 954 appeals by rejected claimants were pending determination by the Torture Claims Appeal Board (TCAB). By immigration status, 51% of pending claimants are NECIIs (top source countries: Vietnam, Pakistan and Bangladesh) and 44% are overstayers (top source country: India)³. A summary of claimants' profile and statistics of claim is at **Annex C**.

Comprehensive review

5. As we explained to the Panel on Security in February 2016⁴, the comprehensive review will focus on four areas – (a) pre-arrival control; (b) screening procedures; (c) detention and (d) enforcement and removal. Our efforts so far and our plans ahead are set out in the ensuing paragraphs. An outline of the review is at **Annex D**.

Pre-arrival control

6. About half of all non-refoulement claimants pending screening are NECIIs who entered Hong Kong illegally. The majority of them originated from visa-required countries, e.g. Vietnam, Pakistan, Bangladesh, etc. Since many of them sought to enter Hong Kong via the Mainland, our law enforcement agencies (LEAs) have worked with relevant authorities in the Mainland since early 2016 to step up enforcement against syndicates who make arrangements for the passage of these NECIIs to Hong Kong⁵. As shown in paragraph 2 above, initial results are beginning to show. LEAs will continue to keep up with these enforcement efforts to prevent resurgence of NECIIs.

7. The remaining half of the claimants are mainly overstayers, i.e. foreigners who entered Hong Kong legally (as visitors or otherwise on a valid visa) but have overstayed after expiry of their limit of stay. Over 30% of claimants in this category are Indian visitors.

³ The rest are mainly persons refused permission to land by ImmD upon arrival in Hong Kong.

⁴ See LC Paper No. CB(2)648/15-16(05)

⁵ Since February 2016, four large-scale joint-operations have been conducted, during which 264 suspects were arrested in the Mainland and Hong Kong, including 87 core members of smuggling syndicates. At the same time, almost 10 000 NECIIs were arrested in the Mainland.

8. At present, Indian visitors may visit Hong Kong visa-free (for up to 14 days) as long as they possess a valid passport. Once arrived, they may lodge a non-refoulement claim (even if they are refused permission to land at control points). Imposition of a visa requirement on all Indian passport holders would be one option to address this problem, but we have no such plan at this stage considering the strong economic and social ties between the two places. Alternatively, we plan to introduce a new pre-arrival registration (PAR) requirement⁶ for Indian passport holders intending to visit Hong Kong in order to prevent those with higher immigration risks (e.g. those likely to overstay/lodge non-refoulement claims) from boarding a plane or ship to Hong Kong.

9. After implementation, Indian passport holders intending to visit Hong Kong must first apply online for a PAR, without which they would not be able to visit Hong Kong visa-free⁷. During online application, PAR applicants would be asked to provide such information as their personal particulars, immigration and travel history, details of their planned visit to Hong Kong, etc. The PAR system would then conduct a risk assessment based on information provided by the PAR applicant⁸, and it is envisaged that in most cases the application result can be returned to them in real time. Successful applicants will then be able to print out the PAR approval slip for boarding. Indian passport holders without their PAR (or valid visa) would not be allowed to board a plane or ship to Hong Kong⁹.

⁶ Canada and the United States have also implemented similar systems in recent years.

⁷ Pursuant to section 5(4) of the Immigration Ordinance (read together with section 2A(1)), any person (other than a permanent resident) being examined upon arrival shall produce a valid travel document. Section 61 stipulates that a document is not a valid travel document unless it bears, or its holder has obtained, a visa, though the Director of Immigration may exempt from the visa requirement any person or any class or description of person. After introduction of PAR, Indian visitors will be exempted from the visa requirement under section 61(2) only if they are “holders of a valid Indian passport who have successfully registered under PAR”, or are otherwise exempted as per footnote 9 below.

⁸ Based on information provided by the registrant, the PAR system at ImmD will determine whether he or she belongs to the high immigration risk group, based on ongoing analysis of the profile of non-refoulement claimants and overstayers from India. The criteria may be revised from time to time having regard to ongoing trends.

⁹ Persons falling into one of the following categories would be exempted from the PAR requirement and can continue to enjoy the existing visa-free arrangements: (a) Holders of diplomatic and official passports; (b) Holders of United Nations Laissez Passer coming to Hong Kong for official United Nations business; (c) Holders of Hong Kong Travel Pass; and (d) Persons enrolled for e-Channel service.

10. We aim to introduce PAR by early 2017. Briefings for relevant stakeholders including the local Indian community, transport operators, the travel and business sectors, etc. will be conducted prior to system roll out to ensure that they are fully familiarized with its requirements. We will also consider suitable measures to publicize PAR in India.

Screening of claims

11. We have initiated the review of legislative provisions under the Immigration Ordinance (Cap 115) governing procedures on screening of claims (including appeal procedures) and related matters. We aim to draw up legislative proposals within 2016-17, taking into account the operational experience of USM and relevant overseas law and practices, and to introduce a bill into the Legislative Council within 2017-18.

12. Before a revamped statutory screening mechanism is in place, we still need to strive to expedite screening as far as possible, in order to curb the growth of, if not to reduce, the number of pending claims. Following implementation of USM in March 2014, ImmD has determined 1 509 claims in 2014-15 and 2 201 claims in 2015-16, and estimates that it can determine about 3 000 claims in 2016-17. At this speed, the backlog will continue to accumulate.

13. To this end, ImmD has completed an internal review on how to further expedite screening. First, additional resources were obtained to inject more manpower to screening claims. Second, ImmD will streamline procedures as far as possible, so as to optimize the use of available resources. ImmD assessed that through the above two measures, its screening capacity can be enhanced starting from early 2017, leading to a 75% increase in output from 3 000 determinations (13 per day) in 2016-17 to 5 000 or more (23 or more per day) in 2017-18.

14. To increase the number of determined claims by 75% to 5 000 or more claims per year, ImmD requires corresponding support on interpretation and publicly-funded legal assistance (PFLA) to claimants. On interpretation, ImmD is recruiting additional full-time in-house interpreters of various languages¹⁰ to support the handling of additional cases.

¹⁰ The Government has invited the Duty Lawyer Service to consider the same but they decided not to do so.

15. As regards PFLA to claimants, which has been a legal requirement following a court judgment in 2008¹¹, the Duty Lawyer Service (DLS)¹² has since 2009 been operating the Legal Assistance Scheme for Non-refoulement Claimants (formerly torture claimants) (the DLS Scheme). In 2015, 490 lawyers with relevant training on the DLS roster provided assistance to some 2 500 claimants (on average 5.2 claimants per lawyer). If ImmD's output is to increase to 23 claims per day, the average caseload of each lawyer would increase to about 10 claims per year. We assess that there should be reasonable room for the current roster of lawyers to absorb the increased caseload¹³. At the same time, we will also invite the legal profession to continue to organize relevant training such that other lawyers may join the roster in future.

16. We have approached the DLS on the need to increase handling capacity, and were given to understand that it is facing serious staff (particularly the Court Liaison Officer grade) retention and recruitment problem. Given the circumstances, it is not realistic for DLS to increase the number of cases referred to lawyers from 13 to 23 claims per day starting early 2017.

17. To expedite screening as soon as possible, the Government intends to operate, on a pilot basis, a separate roster of the same pool of lawyers to supplement the DLS Scheme. We will invite all lawyers currently on the DLS roster to join this separate roster, and assignment policy will follow that of DLS as far as possible¹⁴. The goal of this

¹¹ The Court of First Instance ruled in *FB v the Director of Immigration* [2009] 2 HKLRD 346 that "the policy not to provide, at the expense of the (Government), legal representation to a claimant who is unable to afford that legal representation, is unlawful and in breach of the duty of the Government to assess claims in accordance with high standards of fairness."

¹² The Duty Lawyer Service is an organization fully subvented by the Government which offers four legal assistance schemes, including the Duty Lawyer Scheme, the Legal Advice Scheme, the Tel-Law Scheme, and the Legal Assistance Scheme for Non-refoulement Claimants, to complement the legal aid services provided by the Legal Aid Department. It is managed by a governing council whose members are appointed by the Hong Kong Bar Association and the Law Society of Hong Kong, and is administered by a full-time Administrator.

¹³ We understand that the DLS has a rule that each lawyer on the roster may concurrently handle not more than 25 claims, which is an upper limit significantly higher than the current or projected average number of claims handled per year.

¹⁴ Under the DLS Scheme, lawyers are assigned cases (primarily) on a roster basis.

supplementary roster is to tap into the pool of trained and experienced lawyers on the DLS roster to provide PFLA to more claimants (an additional 10 claims per day) such that the backlog of cases can be worked down as soon as practicable, whilst ensuring the same quality and standard of legal assistance is rendered.

18. To ensure flexibility in operating the supplementary roster such that it could meet with any unforeseen influx of claims in future, and with the benefit of the experience of the DLS Scheme, we will keep the administration of the pilot as simple as possible and minimize administrative overhead. First, to simplify operation and achieve savings in administrative and accounting costs, we will reimburse lawyers on the supplementary roster a standard legal fee per case (instead of reimbursement by hours spent). Second, legal executive support to lawyers under the supplementary roster will be reimbursed as an allowance in addition to the standard legal fee (instead of being provided by Court Liaison Officers or other staff employed under the pilot). We have already briefed the Hong Kong Bar Association and the Law Society of Hong Kong on the framework, and will continue to engage the two bodies and DLS on implementation details, with a view to launching the pilot by early 2017 to support ImmD to increase the number of determined claims by 75% to 5 000 or more claims per year as soon as possible.

19. Separately, to cater for ongoing increase in workload of TCAB and to prepare for the upcoming further increase in ImmD's caseload output, 24 new members have been appointed to TCAB since July 2016, expanding the membership of TCAB to the current size of 52. We will continue to expand TCAB's membership to cater for anticipated increase in appeal caseload as ImmD makes more determinations per year to ensure that appeals handling would not be another bottleneck¹⁵.

Detention, removal and enforcement

20. ImmD has stepped up enforcement against illegal employment and employers. In the first ten months of 2016, ImmD launched 476 targeted operations against NEC illegal workers (including joint-operations with other LEAs) (a 71% increase over the same period of 2015). 421 NEC illegal workers and 254 local employers have been

¹⁵ To dovetail with ImmD's plan to increase its output to 5 000 decisions or more per annum, it is expected that 4 500 appeals or more will be filed with the TCAB in 2017-18.

arrested, a respective 26% and 44% increase over the same period of 2015. At the same time, we have enhanced publicity to advise employers that they are liable to criminal convictions and immediate imprisonment for employing unemployable persons.

21. Separately, we will consider ways to increase our capacity to detain illegal immigrants (including non-refoulement claimants), taking into account legal, resources and security implications of different proposals, including, amongst others, those to better support the management of detention facilities. ImmD also started to review its removal procedures to ensure that rejected claimants would be removed from Hong Kong as soon as practicable.

Advice Sought

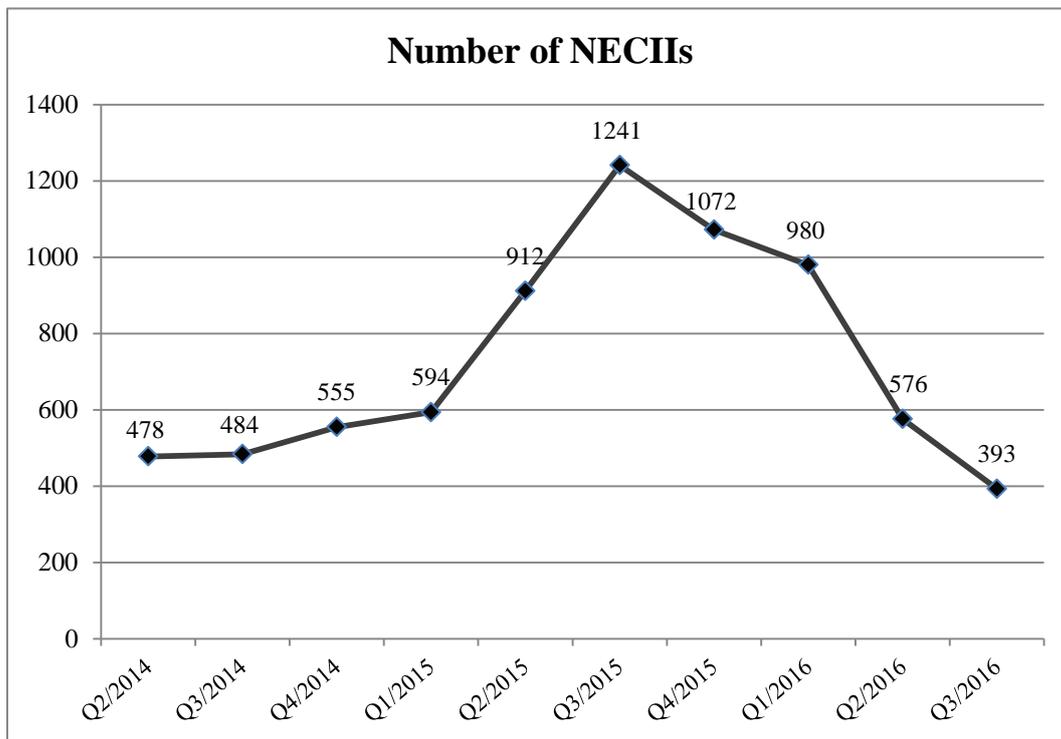
22. Members' views are invited on the plan to introduce the PAR system to prevent visitors of high immigration risks from embarking on their journey to Hong Kong, and to operate a supplementary roster of PFLA to support ImmD to increase the number of determined claims by 75% to 5 000 or more per year in early 2017.

**Security Bureau
November 2016**

Annex A

Quarterly statistics of NECIIs

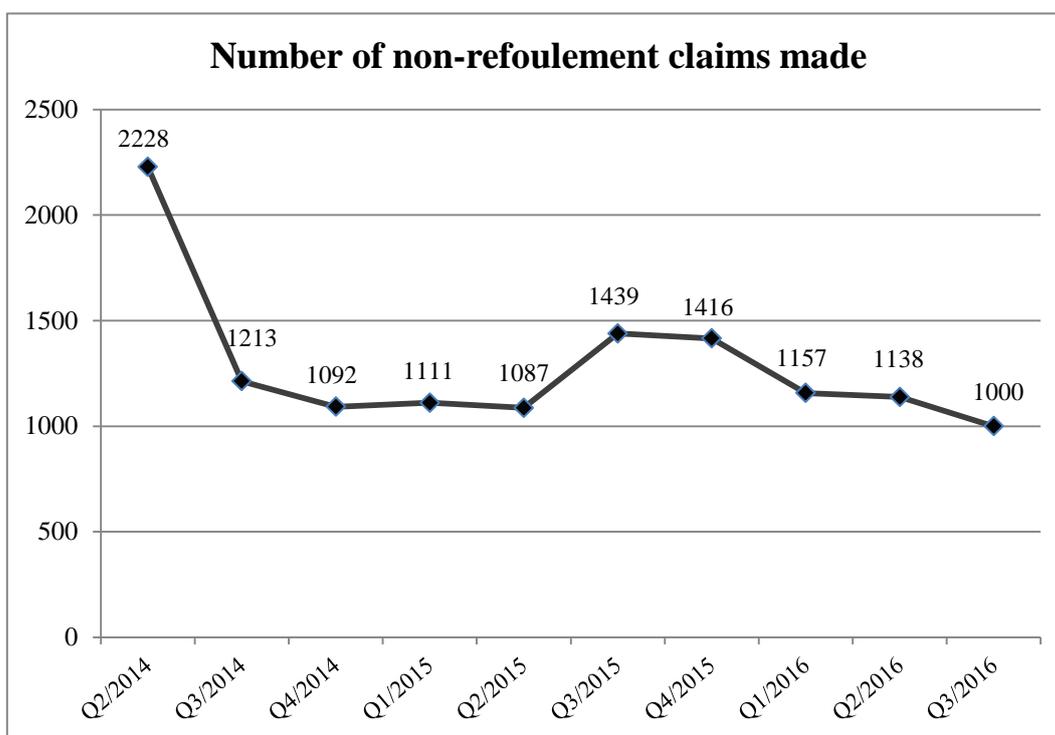
Quarter	Number of NECIIs	% change since the quarter before	% change since the same quarter the year before
Q2/2014	478	/	/
Q3/2014	484	+1%	/
Q4/2014	555	+15%	/
Q1/2015	594	+7%	/
Q2/2015	912	+54%	+91%
Q3/2015	1 241	+36%	+156%
Q4/2015	1 072	- 14%	+93%
Q1/2016	980	- 9%	+65%
Q2/2016	576	- 41%	- 37%
Q3/2016	393	- 32%	- 68%



Annex B

Quarterly statistics of non-refoulement claims

Quarter	Number of claims made	% change since the quarter before	% change since the same quarter the year before
Q2/2014	2 228	/	/
Q3/2014	1 213	- 46%	/
Q4/2014	1 092	- 10%	/
Q1/2015	1 111	+2%	/
Q2/2015	1 087	- 2%	- 51%
Q3/2015	1 439	+32%	+19%
Q4/2015	1 416	- 2%	+30%
Q1/2016	1 157	- 18%	+4%
Q2/2016	1 138	- 2%	+5%
Q3/2016	1 000	- 12%	- 31%



Summary of claimants' profile

As at 31 October 2016, there were 10 675 outstanding non-refoulement claims pending determination by ImmD. An analysis on the particulars of the claimants is as follows.

(a) Sex

Male	7 652	71.7%
Female	3 023	28.3%

(b) Age

<18	556	5.2%
18 – 30	3 720	34.8%
31 – 40	4 191	39.3%
>40	2 208	20.7%

(c) Country of origin

India	2 105	19.7%
Vietnam	2 080	19.5%
Pakistan	2 024	19.0%
Bangladesh	1 295	12.1%
Indonesia	1 067	10.0%
The Philippines	484	4.5%
Nepal	303	2.8%
Sri Lanka	294	2.8%
Gambia	141	1.3%
Nigeria	138	1.3%
Others	744	7.0%
Total	10 675	100%

(d) Immigration status

NECII	5 391	50.5%
Overstayer	4 665	43.7%
Others	619	5.8%

(e) Time lag before making claim after entering Hong Kong (including illegal entry)

<3 months	4 619	43.3%
3 – 12 months	2 980	27.9%
13 – 24 months	960	9.0%
>24 months	1 272	11.9%
Information not available	844	7.9%

The average time lag is 11 months.

**Statistics on torture / non-refoulement claims made
(as at end October 2016)**

Year	Claims made	Claims determined	Claims withdrawn or no further action can be taken	Pending claims (at year end)
End 2009				6 340
<i>Enhanced administrative mechanism (which became statutory mechanism since December 2012)</i>				
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 the administrative and statutory mechanisms</i>	4 925	4 755	4 009	2 501
<i>Unified screening mechanism (USM) (since March 2014)</i>				
Claims lodged on other grounds such as CIDTP or persecution <u>before</u> commencement of USM	4 198			6 699 (= 2501 + 4198)
2014 (Mar to Dec)	4 634	826	889	9 618
2015	5 053	2 339	1 410	10 922
2016 (Jan to Oct)	3 481	2 483	1 245	10 675
Total non-refoulement claims under USM (as at end Oct 2016)	13 168 <i>(Note 2)</i>	5 648 <i>(Note 3)</i>	3 544	

Note 1: ImmD received a total of 4 906 torture claims from 2010 to 2013, an average of 102 per month. In the 32 months since commencement of USM to October 2016, ImmD received 13 168 non-refoulement claims, an average of 412 per month, an increase of 304%.

Note 2: Amongst 13 168 non-refoulement claims, 1 670 (13%) were lodged by rejected/withdrawn torture claimants (or persons who have lodged an asylum claim to the UNHCR previously), 11 498 (87%) were new claims.

Note 3: Amongst 5 648 non-refoulement claims determined by ImmD under USM, 43 were substantiated (including 5 on appeal). Amongst 5 605 claims rejected, 3 925 has lodged an appeal, 989 has departed Hong Kong or are pending removal arrangements, 691 remained in Hong Kong for other reasons (e.g. in prison, pending prosecution, lodged JR, etc.).

Annex D

Outline of comprehensive review of the strategy of handling non-refoulement claims

Pre-arrival control

To tackle the problems at source, we need to prevent economic migrants from embarking on their voyage (or from reaching Hong Kong) and deter those who assist them to this end. Guided by detailed analysis of the background and arriving route of new claimants, we will consider –

- (a) introducing requirement of pre-arrival registration and, if necessary, complementary checking measures for persons with high immigration risks to prevent them from being boarded;
- (b) liaising with authorities of major source countries of claimants and jurisdictions along their usual route to Hong Kong on strengthening enforcement against smuggling syndicates; and
- (c) reviewing visa requirement or visa-free arrangement as necessary.

2. Apart from the above, we have amended the definition of “unauthorized entrants” under Part VIIA of the Immigration Ordinance (Cap. 115) so that stiffer penalties can be applied equally and fairly against human smuggling syndicates smuggling illegal immigrants from any top source countries¹⁶ in addition to Vietnam and the Mainland.

Screening procedures

3. For those who manage to enter Hong Kong and make a non-refoulement claim, we need to expedite the screening process for all cases and deter clear abusers, whilst ensuring that screening procedures will continue to meet with the high standards of fairness required by law.

¹⁶ “Unauthorized entrants” are declared under the Immigration (Unauthorized Entrants) Order (Cap. 115D) between 1979 and 1980 to include only illegal immigrants from the Mainland, Macao and Vietnam. We have amended the declaration so as to include illegal immigrants from eight top source countries, namely, Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia, and Sri Lanka (in addition to Vietnam) as “unauthorized entrants”, subject to appropriate exemptions.

Having accumulated screening experience since 2009 and making reference to the established practices of other common law jurisdictions, we will consider amending Part VIIC of the Immigration Ordinance to –

- (a) provide statutory underpinning to Unified Screening Mechanism (USM), the operational procedures of which follow Part VIIC of the Immigration Ordinance¹⁷;
- (b) tighten procedures to clearly specify the time allowed for each step and to prohibit abusive behaviour;
- (c) screen out manifestly unfounded claims early;
- (d) set out the scope and limits, as appropriate, on the provision of publicly-funded legal assistance; and
- (e) enhance the operation and capacity of Torture Claims Appeal Board.

4. Immigration Department (ImmD) will also enhance its capability to collect countries of origin information useful for screening purposes. Efforts are ongoing to establish contacts with relevant governmental/non-governmental organisations in those countries for establishing an objective and credible database on information of major localities of source countries, as well as topical issues and details of major events of those countries¹⁸.

Detention

5. At present, only a very small percentage of claimants are

¹⁷ In essence, USM is a mechanism under which non-refoulement claims are simultaneously assessed on all applicable grounds including torture risk (using the existing statutory scheme under Part VIIC of the Immigration Ordinance) as well as risk of torture or cruel, inhuman, or degrading treatment or punishment or any other harm prohibited by an absolute and non-derogable right under the Hong Kong Bill of Rights and persecution with reference to Article 33 of the 1951 Refugee Convention, etc. (through an administrative scheme which follows Part VIIC of the Immigration Ordinance).

¹⁸ That said, the information the claimant provided for the purpose of his claim will be treated in confidence. As a general rule, neither the information indicating that the claimant has made a non-refoulement claim nor any information pertaining to his claim will be provided to any government of a risk country without the express consent of the individual concerned.

detained pending or during screening. We will carefully consider the feasibility of clarifying and strengthening ImmD's legal power¹⁹ to detain claimants pending screening, whilst screening or appeal is underway, and/or after their screening is complete but they are remaining in Hong Kong for some other reasons (e.g. they have lodged a judicial review), so as to minimise their security impact, to prevent them from taking up unlawful employment, and to ensure more efficient screening and subsequent removal. If this proposal is considered legally feasible, we will identify suitable facilities for refurbishment to expand immigration detention capacity as necessary. We will also consider proposals to better support the management of detention facilities.

Removal and enforcement

6. Finally, unsubstantiated claimants should be removed as soon as possible. We will strengthen liaison with local Consulates General concerned to expedite the removal process. We will also step up enforcement against syndicates and related criminal activities (e.g. unlawful employment), including close collaboration with Mainland authorities, and enhance publicity in Hong Kong and in major source countries on our applicable law and policies to avoid potential claimants from being misguided by syndicates.

¹⁹ Under the Immigration Ordinance, Cap.115, ImmD may detain an illegal immigrant for such specific purposes as pending consideration of a removal order (section 32(2A)), pending final determination of a non-refoulement claim on the ground of torture within the meaning of section 37U (section 37ZK), pending removal (section 32(3A)), etc. In *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138, the CFA ruled that section 11 of the Hong Kong Bill of Rights Ordinance, Cap.383, precludes reliance by an illegal immigrant on Article 5(1) of the HKBOR or Article 28 of the Basic Law to challenge a decision to detain him or her in accordance with the Immigration Ordinance, Cap. 115 (the case in point was section 32 of the Ordinance). However, the CFA ruled that these detention powers are subject to common law restrictions, particularly the *Hardial Singh* principles, which, in gist, require that ImmD may detain a person only for a period of time reasonable for the statutory purposes for which that person was detained. On the other hand, it remains unclear whether a claimant may be detained after his claim has been rejected but there are other impediments (e.g. judicial review) to his removal.