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Panel on Security

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 6 June 2017**

Unified screening mechanism for non-refoulement claims

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 the past, torture claims made under Article 3 of CAT were handled by the Immigration Department ("ImmD") in accordance with a set of administrative procedures. The administrative mechanism had been subject to challenge in courts. 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. 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.

4. 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 may 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 judgment of CFA in *Ubamaka and C*, 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 ("BOR Article 3 claims"), 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.

7. According to the Administration, the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong. 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.

Comprehensive review of the unified screening mechanism

8. 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. An outline of the comprehensive review is in **Appendix I**. 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 the visa-free arrangement and making non-refoulement claims after arrival.

Deliberations of the Panel

Screening of non-refoulement claims under USM

9. Noting that there were 9 981 claims pending determination by the end of 2016, 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 completion of 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.

10. 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. 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 into Hong Kong. Members

were further advised that the Administration was carrying out a review on the existing regime and would come up with legislative proposals to expedite the screening of claims.

11. 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 registration requirement

12. Members sought information on the progress of implementation of the risk-based online PAR requirement for visitors from India. The Administration advised that about 15 000 online applications had been received in the first two weeks immediately after the implementation of the requirement on 23 January 2017, and about 90% had been approved. ImmD would develop relevant mobile applications to facilitate the work of airlines. The Administration further advised that in the longer term, it might extend the PAR requirement to other countries, on a need basis.

Substantiated non-refoulement claims

13. Noting that the substantiated non-refoulement claims determined by ImmD was only about 0.3%, some members expressed grave concern that the percentage was very low. The Administration explained that whether a person's non-refoulement claim was 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.

14. 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 were also advised that the 1951 Refugee Convention and its 1967 Protocols had never been applied to HKSAR and the Administration would never consider non-refoulement claimants as "refugees" or "bogus refugees". 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

15. 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

16. Some members were concerned that there was an increase in crime committed by claimants. These members expressed concern that non-refoulement claimants were affecting the daily life of Hong Kong residents. 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. They considered that the Police should step up patrol in districts and ImmD should launch more operations to combat illegal employment. Some other members, however, queried whether the crime rate of non-refoulement claimants was exceptionally high in comparison with the overall crime rate of Hong Kong. The Administration advised that the total number of NECIIs released on recognizance who were arrested for crime in 2014, 2015 and the first five months of 2016 were 665, 1 113 and 542 respectively.

17. Some members were of the view that claimants convicted of crime in Hong Kong should be immediately repatriated. 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.

18. Some members were gravely concerned about the Administration's 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. Specifically, 214 claimants had been arrested for the offence of prohibition of taking up employment among the 421 NEC illegal workers arrested in the first 10 months of 2016. According to the court's sentencing guidelines, employers convicted of employment of illegal workers were 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.

Detention

19. 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 USA and Austria 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.

20. 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.

Relevant papers

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

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 countries¹ 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

¹ “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.

will continue to meet with the high standards of fairness required by law. 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 Ordinance²;
- (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 countries³.

² 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).

³ 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.

Detention

5. At present, only a very small percentage of claimants are detained pending or during screening. We will carefully consider the feasibility of clarifying and strengthening ImmD's legal power⁴ 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.

⁴ 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.

**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>

Committee	Date of meeting	Paper
Bills Committee on Immigration (Amendment) Bill 2011	--	<u>Report of the Bills Committee to the Legislative Council</u>
Legislative Council	21.11.2012	<u>Official Record of Proceedings (Question 10)</u>
	20.2.2013	<u>Official Record of Proceedings (Question 14)</u>
Panel on Security	2.7.2013 (Item II)	<u>Agenda Minutes</u>
Legislative Council	7.5.2014	<u>Official Record of Proceedings (Question 4)</u>
Panel on Security	3.6.2014 (Item VI)	<u>Agenda Minutes</u>
Legislative Council	18.6.2014	<u>Official Record of Proceedings (Question 14)</u>
	21.1.2015	<u>Official Record of Proceedings (Question 9)</u>
	29.4.2015	<u>Official Record of Proceedings (Question 9)</u>
Panel on Security	7.7.2015 (Item IV)	<u>Agenda Minutes</u> <u>LC Paper CB(2)2048/14-15(01)</u>
Legislative Council	28.10.2015	<u>Official Record of Proceedings (Question 1)</u>
	28.10.2015	<u>Official Record of Proceedings (Question 12)</u>

Committee	Date of meeting	Paper
Panel on Security	3.11.2015 (Item V)	Agenda Minutes
Panel on Security	2.2.2016 (Item VI)	Agenda Minutes
Legislative Council	24.2.2016	Official Record of Proceedings (Question 18)
Panel on Security	7.6.2016 (Item IV)	Agenda Minutes
Subcommittee on Immigration (Unauthorized Entrants) (Amendment) Order 2016	--	Report of the Subcommittee to the House Committee
Panel on Security	11.6.2016 (Item I)	Agenda Minutes
Legislative Council	15.6.2016	Official Record of Proceedings (Question 12)
Panel on Security	11.11.2016 (Item V)	Agenda Minutes

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