

立法會
Legislative Council

LC Paper No. CB(2)874/18-19

Ref : CB2/HS/4/16

Paper for the House Committee meeting on 1 March 2019

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

Purpose

This paper reports on the deliberations of the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims ("the Subcommittee").

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.

Introduction of an 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 ("D of Imm")'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 ("JR") 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 incorporates the provision of publicly-funded legal assistance ("PFLA") 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 may lodge an appeal, which would be handled by a statutory Torture Claims Appeal Board ("TCAB").

Introduction of a 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 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.

The Subcommittee

8. The Subcommittee was appointed by the House Committee on 28 October 2016 to follow up issues relating to the unified screening mechanism for non-refoulement claims. The terms of reference of the Subcommittee are in **Appendix I**.

9. Dr Hon Elizabeth QUAT and Hon YUNG Hoi-yan are Chairman and Deputy Chairman of the Subcommittee respectively. The membership list of the Subcommittee is in **Appendix II**. The Subcommittee has held a total of seven meetings since the commencement of its work in March 2018. The Subcommittee has also received views from 37 organizations and individuals on related issues at one of these meetings. A list of the organizations and individuals which/who have given views to the Subcommittee is in **Appendix III**. The Subcommittee also conducted a visit to Castle Peak Bay Immigration Centre¹ on 19 July 2018 to better understand its operation and facilities.

Deliberations of the Subcommittee

10. The Subcommittee has focused its work on the following areas:
- (a) preventing potential non-refoulement claimants ("claimants") from entering Hong Kong;
 - (b) screening and appeal procedures of USM;
 - (c) removal of claimants whose claims have been rejected;

¹ Castle Peak Bay Immigration Centre operates round-the-clock for the detention of persons pending removal in accordance with the Immigration Ordinance.

- (d) detention policies;
- (e) law enforcement against crime committed by claimants; and
- (f) provision of PFLA and humanitarian assistance.

Preventing potential claimants from entering Hong Kong

Latest statistics on non-refoulement claims under USM

11. According to the Administration, ImmD received a total of 4 906 claims from 2010 to 2013, an average of 102 claims per month. Since the commencement of USM in March 2014 to end 2015, ImmD received 9 687 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 and an average of 101 claims per month in 2018. In parallel, the number of appeals filed with TCAB also increases. 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. The relevant figures of non-refoulement claims under USM (as at end November 2018)² are as follows:

Overall situation of claims (no. of cases)	
(a) Pending determination by ImmD	920
(b) Claims withdrawn or where no further action can be taken	6 677
(c) Claims determined by ImmD	
● Substantiated	77
● Rejected	
- No appeal lodged	1 105
- Appeal lodged	14 405
<i>Total of non-refoulement claims</i> ^{Note}	<i>23 184</i> <i>(cases)</i>

Note: After implementation of USM in March 2014, as at end November 2018, ImmD received a total of 16 485 non-refoulement claims. Together with the 2 501 torture claims pending screening previously, and the 4 198 claims on other grounds such as cruel, inhuman or degrading treatment or punishment lodged before implementation of USM, there were a total of 23 184 claims requiring ImmD's screening under USM.

² Source: LC Paper No. CB(2)529/18-19(03).

Immigration control

12. The Subcommittee notes that the top four source countries of claimants pending screening by ImmD are India, Pakistan, Bangladesh and Vietnam (accounting for almost 70% of all claimants). Some members take the view that most of these claimants are "economic migrants" who intend to take up unlawful employment in Hong Kong. Such claimants would make non-refoulement claims only after being intercepted for overstaying in Hong Kong. These members consider that the Administration should step up immigration control to prevent these claimants from smuggling into Hong Kong or entering Hong Kong legally and subsequently overstaying and making non-refoulement claims.

13. The Administration shares members' view on the importance of adopting pre-arrival control measures to prevent potential claimants from entering Hong Kong. To this end, measures have been introduced to address the rapid increase in the number of new claimants. These include 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 ("the Order") 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. Since the coming into effect of the Order, the court has heard nine such cases, and the heaviest penalty imposed by the court is imprisonment for five years and three months. Members are also pleased to note that since the implementation of the above measures, the number of NECIIs has been decreasing. Notably, in 2017, there were 893 NECIIs (monthly average 74), representing a 60% decrease over 2015 (monthly average 318). In 2018, there were 639 NECIIs (monthly average 53), a further 28% decrease over 2017.

14. In the light of some members' concern as to whether the pre-arrival control measures would unnecessarily prevent bona fide claimants from entering Hong Kong and making non-refoulement claims, the Administration has stressed that its overall strategy is to combat smuggling syndicates. In view of the ever changing means of illegal immigration, it would keep reviewing the measures to combat illegal immigration in various boundary control points as well as collaborating with the Mainland authorities to combat the smuggling of illegal immigrants.

Pre-arrival registration

15. According to the Administration, 22% of claimants came from India and over 80% of them were overstayers who arrived in Hong Kong as visa-free visitors but only made a claim after they had been arrested for overstaying or been refused permission to land. Against this background, ImmD has implemented the PAR requirement for Indian passport holders since January 2017, under which Indian nationals must first successfully apply for PAR online before visiting Hong Kong visa-free.

16. Members are advised that PAR has been operating smoothly since commencement. The number of Indian visitors overstaying in Hong Kong has decreased by 80% and there is only one non-refoulement claim from Indian visitor arriving on PAR. As at end of January 2019, about 550 000 visitors from India have successfully registered, representing a success rate of over 90%. Some members have expressed concern about whether the introduction of PAR for Indian passport holders has a negative impact on the visit of Indian nationals, such as those who visit Hong Kong for business purpose.

17. The Administration has explained that unsuccessful PAR applicants can submit an application for a visa to visit Hong Kong. While a visa application would normally be issued within four weeks upon receipt of all necessary documents, the processing time can be shortened in urgent cases and there have been cases in which the visa was issued within a few days. Around 50% of Indian visitors who fail the online PAR registration can successfully obtain entry visa upon application. The Administration has further advised that in the longer term, it would consider extending the PAR requirement to other countries on a need basis. To facilitate PAR applications, members have urged the Administration to disseminate the information on PAR and visa application channels for Indian visitors to the travel industry.

18. The Administration has stressed that the PAR requirement has struck a balance between immigration control and convenience for visitors. It is fully aware of members' concern about the impact of PAR and would make adjustment on the requirement whenever necessary. That said, it would continue communicating with InvestHK and relevant parties to enhance promotion of the PAR requirement to Indian nationals.

Screening and appeal procedures of the unified screening mechanism

Screening procedures

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

- (a) the claimant must submit a claim form to ImmD to provide all grounds of his/her claim and the supporting facts (including documentary proofs);
- (b) the claimant must attend screening interview(s), after returning the claim form, to make clarifications and answer questions relating to his/her claim;
- (c) 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
- (d) claimant aggrieved by ImmD's decision may lodge an appeal.

A flowchart of the screening procedures under USM is in **Appendix IV**.

Screening of pending claims

20. Members generally consider it unacceptable and undesirable that claimants have to stay in Hong Kong for several years or even longer for a final decision to be made on their claims. Members have called on the Administration to introduce measures to expedite the screening of pending non-refoulement claims, such that substantiated claimants can be arranged for resettlement to a third country as early as possible. Some members have expressed concern about the abuse of the screening procedures by some claimants to delay repatriation. These members have suggested that instead of giving 49 days for a claimant to complete a claim form,³ the time allowed for filing a claim form should be shortened and the extension application of a claimant who fails to attend an interview without a valid reason should be rejected. Some other members, however, have expressed concern that there would not be sufficient time for the claimants to prepare the necessary

³ A claimant must complete and return the claim form within 28 days to commence the screening procedures. At the request of DLS upon implementation of USM, claimants are given 21 additional days to return their claim forms by means of administrative measures.

documentary proofs if the timeframe is tightened and thus the standards of fairness would be compromised.

21. The Administration has pointed out that the existing deadline for submitting a completed claim form has been determined after deliberations in the enactment of the existing laws and is further lengthened at the strong request of DLS. Claims submitted beyond the deadline are dealt with in accordance with existing laws. The Administration has further advised that it is carrying out a review of the existing regime and will come up with legislative proposals to expedite the screening of claims.⁴

22. Some members have expressed concern that as at end September 2018, there is an average time lag of 15 months between entering Hong Kong and making claims by the claimants. In these members' view, a claimant should be required to submit a claim within a specified time period from his time of arrival in Hong Kong. According to the Administration, the average time lag arises from the fact that many illegal immigrants and overstayers do not lodge a claim until they are intercepted by law enforcement officers in Hong Kong. The Administration shares members' view that persons in genuine need should lodge claims within a reasonable period of time. However, a blanket policy not to handle any late claims across the board may not meet the high standards of fairness as required by the court. The Administration has advised that the issue would be considered in the context of the upcoming legislative exercise to expedite the screening of claims.⁴

23. Members note with concern that only 13 claims are referred to lawyers for assistance under the Legal Assistance Scheme for Non-refoulement Claimants ("LAS") provided by DLS per day, i.e. about 3 200 claims per year. The referral capacity of DLS in supporting the provision of PFLA to claimants is thus a limit to the processing of claims. Members welcome the launch of the Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants ("Pilot Scheme") since September 2017 to further expedite screening, under which a supplementary roster of lawyers is set up to run in parallel LAS provided by DLS.⁵ Members are advised that eligible lawyers currently participating in DLS can join the supplementary roster of the Pilot Scheme. Different from LAS provided by DLS, the Pilot Scheme does not need to employ a large number of supporting staff and that the administrative work is reduced by substituting time-based remuneration for

⁴ Please refer to paragraphs 52 to 57 below regarding the legislative proposals to amend the Immigration Ordinance.

⁵ Please see paragraphs 42 to 44 below regarding the deliberations on provision of PFLA to non-refoulement claimants.

participating lawyers with a standard fee. As a result, the daily number of claims for which the screening procedures can be commenced is thereby increased to 23 cases per day from the original DLS ceiling of 13.

24. Concern has also been raised about whether more manpower resources will be provided to ImmD to speed up the screening of claims. According to the Administration, ImmD has created 83 new posts in 2016 to handle such claims. Moreover, additional interpreters and translators are also recruited to provide interpretation for claimants at briefing sessions and screening interviews, translation of documents submitted by claimants as well as administrative measures to tighten the requirements for extension of time for submitting claim forms and re-scheduling interviews. Most screening interviews are now conducted in about two weeks upon the return of claim forms, which is about 11 weeks earlier than before. ImmD has further enhanced the efficiency of screening procedures by flexible staff deployment and optimized workflow, including advanced scheduling of screening interviews and handling of claims involving claimants from the same country by dedicated officers. The handling time per claim (i.e. from the commencement of 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. It is expected that the screening of all the pending claims can be completed by the first half of 2019.

Lodging appeals with TCAB

25. It is provided for under the Immigration Ordinance (Cap. 115) ("IO") that a claimant aggrieved by ImmD's decision may lodge an appeal, without any merits test, in writing within 14 days after he/she is informed of such decision. The appeals will be considered by TCAB independently. Members of TCAB comprise former judges or magistrates, as well as overseas and local experts with relevant experiences.

26. Some members have expressed concern that arising from speedier screening of claims by ImmD, a large number of appeal cases would be filed with TCAB. As shown from the fact that 95% of rejected claimants have lodged appeals, these members are concerned whether the Administration and TCAB can cope with the increasing number of appeal cases.

27. The Administration has advised that new members have been appointed to TCAB since July 2016, expanding its membership from the original size of 28 to the current strength of 97. The Administration has maintained close communication with TCAB as to whether extra resources are required to handle appeal cases. Notably, manpower of the TCAB secretariat and ancillary

facilities (such as office accommodation and hearing facilities) have been increased. As such, the number of claims determined by TCAB in 2017 has increased by 3.8 times over 2016 (from a monthly average of 49 to 235), and has further gone up in 2018. It is expected that the pending appeal cases would be completed in 2021.

28. Some members have suggested that TCAB should publish its decisions so as to increase its transparency in handling appeals. The Administration has stressed that the requirement for substantiation of a non-refoulement claim is based on legal requirement and depends on the merits and facts of individual cases, ImmD and TCAB would adopt an objective approach and make reference to information of the claimant's country of origin and other related considerations when assessing the claims. Written notice detailing the final decisions with reasons would be provided to claimants afterwards. The Administration has pointed out that of the 300 applications for JR in 2017, the court has granted leave to only 10 cases. This reflects that TCAB has discharged its task satisfactorily. Nonetheless, the Administration is carrying out a review of the existing arrangements and would come up with legislative proposals to expedite the handling of appeals.⁴

Application for judicial review

29. According to the information provided by the Judiciary, the number of applications for leave to JR in relation to non-refoulement claims received by CFI of the High Court had increased since 2017 by over 10 times from 103 in 2015 and 60 in 2016 to 1 006 in 2017. In 2018, as at mid-December, there were close to 3 000 applications to CFI for leave to JR in relation to non-refoulement claims. Members are gravely concerned about the sharp increase in non-refoulement claim cases filed with CFI, and that more of such cases are now being filed with CFA. Members have expressed concern about the impact of the upsurge of such JR cases on the Judiciary.

30. The Administration has assured members that it maintains communication with the Judiciary in respect of handling of non-refoulement claims, including the latest figures of claims and appeals, and the expedition in the handling of appeals by TCAB, so as to facilitate timely preparation of the Judiciary in terms of its manpower and resources to cater for any latest development. This apart, the Judiciary is also closely monitoring the situation and considering how such upsurge of cases should be handled without seriously affecting the processing of other civil cases. In this regard, the Judiciary would assess whether any additional requirements for judicial and other staffing sources are required, and if so, would put forward such proposals to the

Government according to the established mechanism of the budgetary arrangements between the Judiciary and the Government.

Substantiated non-refoulement claims

31. The total expenditure on handling of non-refoulement claims (including screening of claims, provision of PFLA and humanitarian assistance) are about \$1.1 billion and \$1.4 billion in 2017-2018 and 2018-2019 respectively. As at end January 2019, there are 127 substantiated claimants staying in Hong Kong, and four claimants have been arranged by the United Nations High Commissioner for Refugees ("UNHCR") for resettlement in a third country. Members have sought clarification as to whether the claimants of substantiated non-refoulement claims have been referred to UNHCR for resettlement in other countries. Some members have expressed grave concern about the low substantiation percentage of non-refoulement claims determined by ImmD, having regard to the huge expenditure for handling such claims. Some other members, however, have raised concern as to whether the low substantiation rate of claims is attributed to the stringent threshold for screening of claims.

32. The Administration has stressed that all non-refoulement claims are screened in accordance with relevant laws and court judgments in Hong Kong. Whether a person's non-refoulement claim would be substantiated depends on the individual circumstances of his/her case as well as the situation in his/her country of origin. In determining a non-refoulement claim, the duty of ImmD is to assess whether an illegal immigrant should be removed immediately, or whether removal action should be temporarily withheld until his/her claimed risks cease to exist. For those claimants whose claims are substantiated, their removal would be withheld until their claimed risks cease to exist. Where a non-refoulement claim is 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 is drawn to the fact that the 1951 Convention relating to the Status of Refugees and its 1967 Protocols have 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 claimants nor determining the refugee status of anyone. The illegal immigrant status of these claimants will not change, regardless of the result of their non-refoulement claims. The Administration has added that regular review of the cases would be conducted and claimants may be removed to their country of origin when circumstances so warrant.

Removal of claimants whose claims have been rejected

33. Most members take the view that rejected claimants should be removed from Hong Kong as soon as practicable. Members have enquired about the difficulties encountered in the repatriation of a rejected claimant. The Administration has advised that before repatriation of a rejected claimant, ImmD will contact the claimant's country of origin for verification of the claimant's identity and issue of necessary travel document. While the work requires cooperation of the claimants' country of origin, it is observed that many authorities have accorded a rather low priority to such work. The whole process normally takes one to six months. Complications may also arise in the repatriation arrangements if there is no direct flight from Hong Kong to the claimant's country of origin. To enhance removal efficiency, ImmD has begun discussion with governments of major source countries so as to ensure that rejected claimants will be removed as soon as possible.

34. To encourage the claimants to leave Hong Kong as early as possible, some members have suggested that the Administration should consider providing financial incentive to those claimants who are willing to leave Hong Kong voluntarily even though their claims are pending screening. The Administration has stressed that it would study and explore the viability of any lawful, practicable and effective options to expedite the removal procedures.

35. Some members are of the view that claimants who are convicted of committing crime in Hong Kong should be repatriated immediately. The Administration has pointed out that the court has ruled that the right of a claimant not to be subjected to cruel, inhuman, or degrading treatment or punishment is absolute. Even if a claimant is convicted of a criminal offence, it is still necessary to screen the claim concerned under procedures which meet the high standards of fairness required by the court. As such, removal procedures of rejected claimants would only be commenced after all the screening and appeal procedures are completed. The Administration has assured members that although claimants would not be repatriated immediately upon their conviction of crime, their claims are given priority to be handled, such that they can be removed as soon as possible if their claims are rejected.

Detention policies

36. Sections 32 and 37ZK of IO stipulate that D of Imm may detain illegal immigrants during the removal procedures and the screening process of their non-refoulement claims respectively. Persons who are detained under IO may be detained in places stipulated under the Immigration (Places of Detention) Order (Cap. 115B), including the Castle Peak Bay Immigration Centre, ImmD's

detention facilities at boundary control points, as well as sites and buildings that are set apart for the purposes of prisons under the Prisons Ordinance (Cap. 234) and specified in the Schedule to the Prisons Order (Cap. 234B). At present, illegal immigrants who are detained by ImmD (including claimants) are mostly detained at Castle Peak Bay Immigration Centre, which has a capacity of about 500. As at end November 2018, 60 claimants pending final determination of their claims are being detained in the Castle Peak Bay Immigration Centre.

37. Some members take the view that accommodating the claimants in detention centres would facilitate the maintenance of law and order in Hong Kong. This would also reduce the incentive for claimants to come to Hong Kong to take up illegal employment. Some other members, however, have strongly opposed to the setting up of closed detention centres and consider that the Government should honour its international obligations to safeguard the rights of the claimants.

38. The Administration has advised that ImmD is bound by the common law Hardial Singh principles when exercising power to detain, under which ImmD cannot continue to detain a person if it cannot complete the removal or screening procedures within a reasonable period of time. The Administration has added that the setting up of detention centres is a complicated issue and the society has diverse views. It would continue studying the issue, including exploring any lawful, practicable and effective option, and would keep LegCo updated when ready.

Law enforcement against crime committed by claimants

39. Some members have expressed grave concern that there was an increase in crime committed by claimants and that many claimants are affecting the daily life of Hong Kong residents. They have pointed out that many ethnic minorities in Hong Kong have also complained that their daily life is affected by the large number of claimants in Hong Kong. These members have urged the Police to step up patrol in all districts. Members are advised that the Police have stepped up patrol in relevant districts to respond to the community call. A dedicated team has also been set up under the Organized Crime and Triad Bureau to address the situation. Some other members, however, hold different views. They consider that the crime rate of claimants is not exceptionally high in comparison with the overall crime rate of Hong Kong. In these members' views, the misperception of high crime rate of claimants has attributed to discrimination against the claimants in Hong Kong.

40. Some members are gravely concerned about the Administration's efforts to tackle the problem of claimants taking up illegal employment in Hong Kong.

They have called on the Administration to consider imposing higher penalty on employers of these claimants and to enhance publicity in the claimants' home countries that they are not allowed to take up employment in Hong Kong.

41. The Administration has advised that prosecution has been instituted against claimants who take up illegal employment as well as their employers, who are both in breach of the law. According to the court's sentencing guidelines, employers who are 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 has further advised that information on arrest and conviction relating to illegal employment is frequently disseminated to draw the attention of employers to the legal consequences of employing illegal workers.

Provision of publicly-funded legal assistance

42. Members note that the expenditure on PFLA has increased from \$97 million in 2014-2015 to an estimate of \$271 million in 2018-2019. Some members have expressed the view that the Administration should consider imposing a cap on PFLA to claimants to uphold the principle of prudent use of public funds and to prevent abuse of USM. The Administration has drawn members' attention to the ruling of the High Court in the *FB v Director of Immigration and Secretary for Security* ((2009) 2 HKLRD 346) case which held that the Government must provide, among others, PFLA to claimants during the screening process, so as to meet the high standards of fairness required by the court. The Administration is thus required to provide every claimant with PFLA. The Administration has further advised that while some countries have imposed statutory limit on PFLA to claimants, it would study the issue during the review of the operation of the Pilot Scheme.

43. Some members have expressed concern that duty lawyers have discretion to decide whether to continue representing a claimant on appeal before TCAB. Noting that only about 10% of appeal cases are provided with PFLA, these members have called on the Administration to review the provision of PFLA such that all claimants would be provided with legal representation during the appeal stage. The Administration has explained that the above arrangement has been adopted by DLS since it was engaged to operate LAS. The merits of an appeal are assessed by the same lawyer responsible for the previous screening process. In addition, all appeals are handled by TCAB which is an independent statutory body. The Administration has stressed that PFLA provided to claimants is free and without upper limit.

44. In view of the satisfactory outcome of the Pilot Scheme in expediting the handling of claims, members have enquired whether the Administration would consider substituting LAS operated by DLS with the Pilot Scheme. The Administration has advised that as the Pilot Scheme has been operating for just over one year, it will review the Scheme shortly. The review will include examining whether its mode of operation is more flexible while expediting the handling of claims. In the long run, it will review the provision of PFLA to claimants. The Administration has stressed that the fundamental objective is to ensure the continual provision of PFLA to claimants according to the high standards of fairness as required by the court on the one hand, and to cater for the changing number of claims flexibly with the proper use of public funds on the other.

Provision of humanitarian assistance

45. Since 2006, the Administration has been engaging a non-governmental organization to provide humanitarian assistance to claimants who are deprived of basic needs during their stay in Hong Kong, so as to prevent them from becoming destitute. Currently, the Social Welfare Department ("SWD") has commissioned the International Social Service Hong Kong Branch ("ISS-HK") for administering and delivery of such humanitarian assistance. The assistance covers accommodation-related assistance (monthly rent allowance per adult and child is \$1,500 and \$750 respectively, plus rent deposit and property agent fee), basic utilities allowance (\$300 per month), food (\$1,200 per month), other basic necessities (offered in-kind), and counselling services, etc. At present, there are about 11 000 claimants receiving humanitarian assistance.

46. The total expenditure on humanitarian assistance to the claimants has increased from \$254 million in 2014-2015 to an estimate of \$755 million in 2018-2019. Some members are concerned about the possible abuse of humanitarian assistance by "bogus" claimants. In these members' view, such assistance should be provided to bona fide claimants only. While acknowledging the principle of prudent use of public funds, some other members are concerned about the sufficiency of the monthly assistance for the claimants in meeting the high cost of living in Hong Kong, bearing in mind that claimants are prohibited from taking up employment.

47. The Administration has advised that to ensure proper use of public funds, ISS-HK is required to submit monthly service statistical reports and financial statements to SWD, and maintain all financial records for inspection. The Administration has stressed that the provision of humanitarian assistance aims to ensure that claimants will not become destitute during their stay in Hong Kong, but not to provide them with assistance more than necessary to meet their

basic needs, so as to avoid any magnet effect which may have serious implications on the long-term sustainability of such assistance and the immigration control of Hong Kong. The Administration would, from time to time, review the overall assistance level and make adjustment as necessary. Claimants with extra needs may provide justifications and documentary proof to ISS-HK for its consideration on a case-by-case-basis. For instance, extra food allowance will be given to claimants when instant formula is needed.

Taking up employment

48. Some members consider that substantiated claimants should have the right to work in Hong Kong while pending the resettlement to a third country to be arranged by UNHCR. Pointing out that claimants have to obtain prior approval from ImmD for taking up employment, these members have requested the Administration to consider abolishing the requirement for the claimants to submit applications for taking up employment after having secured confirmed job offer as well as to streamline and expedite the relevant application and approving procedures.

49. The Administration has advised that CFA upheld in its ruling handed down in 2014 that non-refoulement claimants, even if their claims are substantiated, have no constitutional right or any other legal right to work in Hong Kong. That said, substantiated claimants may submit their applications to ImmD for taking up employment. Having regard to the merits of individual cases, as at end January 2019, ImmD had approved 92 such applications on an exceptional basis, involving 39 persons working in different sectors in Hong Kong. The Administration has further advised that it would examine, from time to time, whether the application procedures can be streamlined and expedited.

Other assistance

50. Members note that the Hospital Authority ("HA") will provide all claimants staying in Hong Kong, regardless of the progress of their claims, with medical services. They may submit their applications for medical fee waivers to HA or service units of SWD for assessment in accordance with the current mechanism on waiving medical expenses for non-eligible persons. Discretionary approval for the one-off waiver of medical expenses at public clinics or hospitals will be given on a case-by-case basis.

51. Some members take the view that children of claimants should have basic right to education. These members are concerned about the support to those minor claimants who are school-aged children. The Administration has

advised that if the arrangement of school placement is needed for minor claimants, applications may be made to the Education Bureau ("EDB"). Upon receipt of such applications, EDB will consult ImmD. If the minor claimant concerned will not be removed from Hong Kong shortly, and ImmD does not have any objection, EDB will vet the application and make decision on school placement. Successful applicants will be arranged placement at suitable schools, having regard to the districts they live in and their learning level. This apart, ISS-HK will offer extra financial assistance to these claimants to meet the additional expenses arising from schooling.

Legislative proposals to amend the Immigration Ordinance

52. Currently, the screening procedures of USM follow those of the statutory screening mechanism for torture claims, as stipulated in Part VIIC of and Schedule 1A to IO. As part of the comprehensive review of USM, the Administration has reviewed the provisions of IO in respect of the screening procedures and other related matters.

53. According to the Administration, after drawing from and assessing the operational experience of USM and making reference to the relevant overseas legal provisions and practices, it proposes to tighten the statutory timeframes and procedures for the handling of extension applications (e.g. submission of claim forms and lodging an appeal). For those key procedures under USM (e.g. submission of documents and evidence, arrangement of screening interviews) without any specific provisions in the legislation, the Administration has proposed to stipulate in the law the specific requirements for such procedures so as to enhance the overall screening efficiency.

54. Some members have expressed support for tightening the statutory framework for a claimant's submission of a claim form and lodging of an appeal. These members have urged the Administration to expedite the introduction of the relevant legislative proposals. Some other members, however, have expressed reservation about the need for the proposal having regard to the fact that the number of pending claims has reduced significantly. These members are particularly concerned whether the standards of fairness under the tightening timeframe would be compromised.

55. The Administration has explained that the decrease in the number of pending claims is attributed to the drop in the number of new claimants and the implementation of administrative measures to expedite the screening of claims. Nevertheless, it is believed that the proposed amendments to IO would in the long run prevent delay or obstruction to the screening process and avoid further disputes.

56. The Administration has also advised that under the legislative proposals, it would continue to allow a claimant, before the submission deadline, to submit a written application to an immigration officer for extending the time to return the claim form. To ensure fairness, the Administration has proposed to specify in the legislation more clearly that such applications should be considered only after a claimant has exercised all due diligence to comply with the original deadline as far as practicable, and that a claimant can request for an extension of the timeframe for returning a claim form on the ground of "exceptional" and "uncontrollable" circumstances. The Administration has further advised that the timeframe for submission of claim forms is proposed after drawing reference to overseas practice, and assured members that it would keep listening to views from different parties when drafting the amendment bill.

57. Given that the work period of the Subcommittee will expire by early March 2019, members consider that the legislative proposals and related issues should be further discussed by the Panel on Security ("the Panel"), if necessary. The Subcommittee subsequently notes that the Panel has been further consulted on the Administration's latest legislative proposals to amend IO in relation to handling of non-refoulement claims at its meeting on 8 January 2019.⁶ Most members of the Subcommittee have urged the Administration to expedite the introduction of the legislative proposals to amend IO in relation to handling of non-refoulement claims. According to the Administration, it plans to introduce the relevant amendment bill into LegCo in the first half of 2019.

Recommendations

58. Members are of the view that assistance should be provided to bona fide or substantiated claimants. The Subcommittee recommends that the Administration should consider the following:

- (a) to continue monitoring the trend of non-refoulement claims, and keep collaborating with the Mainland authorities to combat the smuggling of illegal immigrants;
- (b) to monitor the impact of PAR requirement on the Indian visitors and disseminate the information on visa application channels for Indian visitors to the travel industry;
- (c) to expedite the screening of pending non-refoulement claims;

⁶ Please refer to LC Paper No. CB(2)529/18-19(03) regarding the Administration's latest proposal to amend IO in relation to handling of non-refoulement claims.

- (d) to maintain close communication with TCAB on whether extra resources are required to handle appeal cases;
- (e) to maintain close communication with the Judiciary on the manpower and resources requirements to cope with the upsurge in number of JR cases in relation to non-refoulement claims;
- (f) to step up discussion with governments of major sources countries of claimants to ensure early removal of rejected claimants, especially those who are convicted of committing crime in Hong Kong;
- (g) to liaise with UNHCR on the resettlement arrangement of substantiated claimants;
- (h) to enhance enforcement action against illegal employment of claimants, disseminate information on the legal consequences of employing illegal workers to employers as well as enhance publicity in the claimants' country of origin that they are not allowed to take up employment in Hong Kong; and
- (i) to expedite review of the Pilot Scheme.

59. Some members of the Subcommittee strongly urge the Administration to consider the need for setting up detention centres. These members also urge the Administration to expedite the removal procedures of rejected claimants, such as provision of financial incentive to encourage claimants to voluntarily leave Hong Kong early.

60. Some other members of the Subcommittee have called on the Administration to ensure that the rights of claimants are safeguarded and all the claims are screened in accordance with the high standards of fairness as required by the court while enhancing the efficiency of USM.

Advice sought

61. Members are invited to note the work and support the recommendations of the Subcommittee.

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

Terms of reference

To study and follow up issues relating to non-refoulement claims (including but not limited to the arrangements of the unified screening mechanism, legal aid arrangements, prosecution policy, welfare and schooling arrangements, housing arrangements for non-refoulement claimants awaiting screening, as well as law and order issues caused by these claimants), and make timely recommendations.

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

Membership list*

Chairman Dr Hon Elizabeth QUAT, BBS, JP

Deputy Chairman Hon YUNG Hoi-yan

Members Hon James TO Kun-sun
Hon CHAN Hak-kan, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon YIU Si-wing, BBS
Hon Dennis KWOK Wing-hang
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon CHIANG Lai-wan, SBS, JP
Hon Alvin YEUNG
Hon CHU Hoi-dick
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon SHIU Ka-fai
Hon CHAN Chun-ying, JP
Hon LAU Kwok-fan, MH

Total : 16 members

Clerk Miss Betty MA

Legal adviser Ms Vanessa CHENG

* Changes in membership are shown in Annex to Appendix II.

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

Changes in membership

Member	Relevant date
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP	Up to 23 March 2018
Hon LUK Chung-hung, JP	Up to 24 April 2018
Hon Charles Peter MOK, JP	Up to 11 July 2018

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

List of deputations/individuals which/who have given oral representation to the Subcommittee

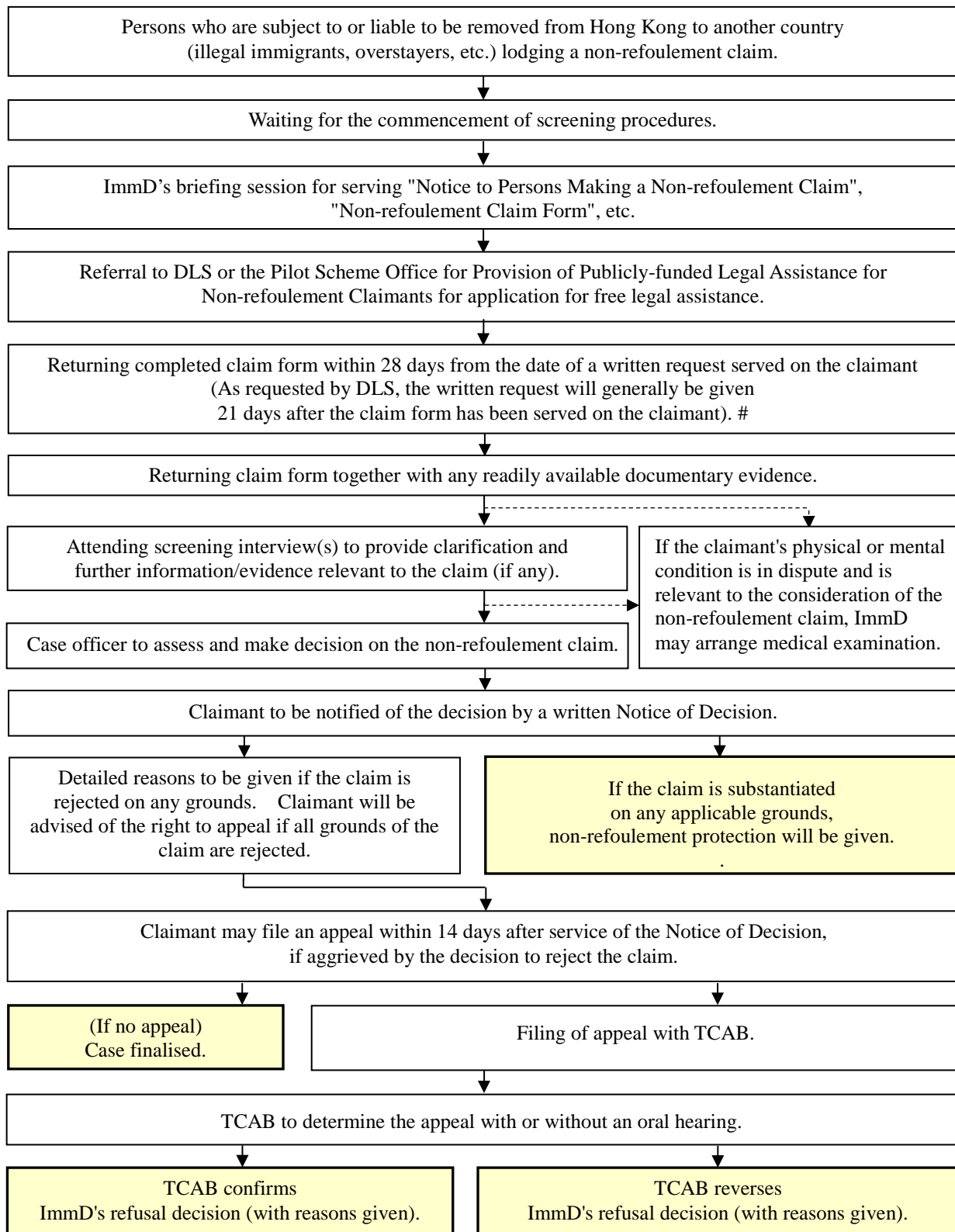
1. Branches of Hope
2. DAB
3. DAB Ethnic Minorities Committee
4. Davis Polk & Wardwell
5. Dr CHAN Lih-shing
6. Dr Isabella NG Fung-sheung
7. Health In Action
8. Justice Centre Hong Kong
9. Liberal Party Youth Committee
10. Miss Christine FONG Kwok-shan
11. Miss Crystal YEUNG
12. Mr Billy CHAN Shiu-yeung, Member of Sha Tin District Council
13. Mr Chenyi Roy NJUABE
14. Mr LEUNG Kwok-hung
15. Mr Michael DANIEL
16. Mr Mohamed FUSSEINI
17. Mr POON Shing
18. Mr Riben LI Kai-lap

19. Mr SAI Htong-kham
20. Mr Suleiman Mohammed BASHIRU
21. Mr Thomas FRANZ
22. Mr 李詠民
23. Ms Fitri AMBARWATI
24. Ms Karen MCCLELLAN
25. Ms Kelley LOPER
26. Ms KWONG Kwai-sim
27. Ms 夏泳迦
28. Ms 張彤蔚
29. Socialist Action
30. Socialist Immigrant Action
31. Socialist Refugee Action
32. The Hong Kong Society for Asylum-seekers and Refugees
33. Youth against Racism
34. 南昌東之友
35. 反黑金、反港獨關注組
36. 香港基督教勵行會難民中心
37. 香港群策匯思

List of deputations which have provided written views to the Subcommittee only

1. A member of the public
2. Concern Group for the Rights of Asylum-Seekers and Refugees in Hong Kong
3. Daly & Associates
4. Miss 呂施施
5. Mr Alex CHAN
6. Mr Hinson MAN
7. Ms Minnie SIU
8. United Nations High Commissioner for Refugees

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.