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Bills Committee on Immigration (Amendment) Bill 2020

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information and summarizes Members' past discussions on the Administration's proposed legislative amendments to the Immigration Ordinance (Cap. 115) ("IO") relating to the handling of non-refoulement claims.

Background

2. Pursuant to several court rulings since 2004, the Administration has reviewed and revised the administrative screening mechanism for torture claims. The revised mechanism, which commenced in December 2009, includes the provision of publicly-funded legal assistance ("PFLA") to torture claimants through the Duty Lawyer Service ("DLS"), enhanced training for decision makers and a petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

3. The Immigration (Amendment) Ordinance 2012, which came into operation in December 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 the Immigration Department ("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 ("TCAB").

4. In March 2014, the Administration commenced operating the unified screening mechanism ("USM") to screen non-refoulement claims on all

applicable grounds.[1] The screening procedures of USM follow those of the statutory screening mechanism for torture claims, which have been in place since the enactment of the Immigration (Amendment) Ordinance 2012. Since then, there were increasing numbers of non-ethnic Chinese illegal immigrants and non-refoulement claimants. At the same time, the number of claims pending the commencement of screening procedures by ImmD was on the rise. As a result, the Administration launched a comprehensive review of the strategy of handling non-refoulement claims in 2016, focusing on the following four areas:

(a) preventing potential claimants from entering Hong Kong;

(b) expediting the commencement of screening procedures for pending claims, shortening the screening time per claim, and expediting the handling of appeals;

(c) expediting repatriation of the claimants whose claims have been rejected; and

(d) studying detention policies and stepping up law enforcement.

The Immigration (Amendment) Bill 2020

5. The Immigration (Amendment) Bill 2020 ("the Bill") was published in the Gazette on 4 December 2020 and received its First Reading at the Council meeting of 16 December 2020. The main object of the Bill is to amend IO to enhance the efficiency of screening torture claims by ImmD and processing appeals by TCAB, and to strengthen the capability of ImmD in handling torture claim cases and taking enforcement actions, including removing unsuccessful claimants and detaining claimants pending final determination of their torture claims. It also provides for savings and transitional arrangements relating to the handling of torture claims.

6. The Bill also seeks to amend the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238) to enable members of the Immigration Service to possess arms and weapons otherwise prohibited by

[1] A claim by someone subject to be removed from Hong Kong to another country that if removed to that country, he will be subjected to torture, or his absolute and non-derogable rights under the Hong Kong Bill of Rights ("HKBOR") will be violated (including being arbitrarily deprived of his life as referred to in Article 2 and cruel, inhuman or degrading treatment or punishment as referred to in Article 3 of HKBOR), or be persecuted, etc.

those Ordinances.

Members' deliberations

7. The Panel on Security and the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims formed under the House Committee discussed the Administration's progress of comprehensive review of the strategy of handling non-refoulement claims and proposed legislative amendments at various meetings. The deliberations are summarized in the following paragraphs.

Measures to expedite the screening of non-refoulement claims

Submission of claim forms

8. Under the existing screening procedures, non-refoulement claimants were given 49 days to return their claim forms.[2] Members were advised that with a view to enhancing the screening efficiency, the Administration was considering tightening the statutory timeframe for submission of claim forms (e.g. to 14 days). To ensure fairness, claimants could request for an extension of the timeframe for returning claim forms if they had exercised all due diligence to comply with the original deadline as far as practicable, and under "exceptional" and "uncontrollable" circumstances.

9. Members were further advised that under the Administration's proposal, the average time needed for determining a claim by ImmD would be shortened from the current 10 weeks to about five weeks, and the average time needed for determining an appeal would be shortened from 16 weeks to about 11 weeks. In short, the entire process of determining a claim, including appeal, would be reduced from about 26 weeks to about 16 weeks.

10. Some members expressed support for the proposed tightening of the statutory timeframe for submission of claim forms so as to expedite the screening of claims. They were, however, concerned that allowing a claimant to request for an extension of the timeframe for returning a claim form on the ground of "exceptional" and "uncontrollable" circumstances might be open to abuse. The Administration explained that examples of circumstances which

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[2] 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.

would be considered as "exceptional" and "uncontrollable" included situations in which the claimant was arrested by another law enforcement agency or suffered from serious illness. To avoid abuse, documentary proof of the "exceptional" and "uncontrollable" circumstances would be required.

11. Some other members, however, considered that shortening the timeframe for submission of claim forms to 14 days was unnecessary, given that the number of pending claims had been significantly reduced in recent years. These members were particularly concerned whether the proposed legislative amendments could meet the high standards of fairness laid down by the court.

12. The Administration advised that the existing regime for the screening of non-refoulement claims, which incorporated PFLA, free interpretation service and free medical examination, as well as an appeal mechanism, met the high standards of fairness required by the court and offered better protection of the rights of claimants than many other jurisdictions. The proposal to shorten the statutory timeframe for submission of a claim form from 28 to 14 days had been drawn up having regard to the timeframes adopted overseas. The proposed measures to expedite the screening of claims, which had been drawn up having regard to relevant overseas legislation and practice, as well as the operational experience of USM, also adhered to the high standards of fairness.

Screening interviews

13. Members were advised that the Administration was considering adding provisions in IO to set out the procedures and rules of arranging interviews between ImmD and claimants, so as to prevent claimants from making repeated requests for deferral of interviews or re-scheduling an interview without any reason. The Administration was also considering stipulating in IO that a claimant could apply for re-scheduling an interview only due to "exceptional" and "uncontrollable" circumstances, and such application must be submitted before the original interview date.

14. Some members noted with concern about the proposal to stipulate in IO that if a claimant was reasonably supposed to understand and to be able to communicate in another language, the screening interview needed not to be conducted in the claimant's most proficient language. These members were concerned that a claimant's basic rights would be compromised.

15. The Administration advised that in other countries like Germany and the United Kingdom ("UK") screening interviews also needed not to be conducted in the claimant's most proficient language or dialect, but only in languages in which the claimant could reasonably communicate. The proposal sought to

minimize the delay in screening due to failure to arrange an interpreter as requested by the claimant.

Appeals

16. Noting that the Administration was considering tightening the statutory timeframe for lodging an appeal from 14 days to seven days if aggrieved by ImmD's decision, some members were concerned that the proposed arrangement would be unfair to the claimants. This would also cause practical difficulties for the legal representatives of claimants to prepare and file a notice of appeal. The Administration pointed out that the role of TCAB was to consider the ground of the claim and the relevant supporting documents from the claimant afresh. Moreover, when lodging an appeal, the grounds and supporting documents of the claimant should in general be largely the same as those previously submitted to ImmD for screening.

17. Some members expressed concern about whether TCAB had a sufficient number of members to hear and determine appeals. According to the Administration, it had since July 2016 appointed over 70 new members to TCAB, expanding its membership to the current strength of 102. The establishment of the TCAB Secretariat had also been increased from 12 to 20 posts, with a further increase of 15 new time-limited posts in the 2018-2019 financial year. The Administration would further appoint suitable members to TCAB and increase the number of staff of the TCAB Secretariat as and when necessary, so as to clear up the appeals backlog as soon as practicable.

Removal procedures for rejected claimants

18. To enhance ImmD's removal efficiency, members were advised that the Administration was considering adding provisions in IO to provide that, notwithstanding that the unsuccessful claimants had applied for relevant judicial review ("JR") or legal aid, ImmD could remove them from Hong Kong unless leave to JR had already been granted by the Court. Some members were concerned that such arrangement would render JR meaningless, create a dangerous precedent and undermine the rule of law. Some other members, however, expressed support for the proposals. They considered that many claimants had come to Hong Kong for taking up illegal employment and the humanitarian assistance provided by the Government. If the problems arising from a large number of non-refoulement claimants in Hong Kong were not effectively addressed, it might result in social discontent. These members held the view that the Administration's legislative proposals, which sought to plug existing loopholes, should be implemented as soon as possible.

19. The Administration explained that it was only proposing the removal of a claimant whose claim had already been rejected by ImmD and TCAB, if the claimant had lodged an appeal. It was highlighted that of all the JR leave applications relating to non-refoulement claims since 2017, the court had so far rejected around 98% of them. Moreover, the role of the court was to consider the lawfulness and fairness of the screening procedures, rather than "re-hearing" the claim to assess whether it should be substantiated or not. Furthermore, according to legal advice provided by the Department of Justice, the proposals would not deprive claimants of their fundamental rights. The Administration stressed that a balance had to be struck between ensuring that claimants had reasonable opportunities to substantiate their claims with sufficient procedural safeguards and preventing abuse in the screening of non-refoulement claims and repatriation.

20. Some members were of the view that claimants convicted of crime in Hong Kong should be repatriated immediately. The Administration advised that the court had ruled that the right of a claimant not to be subjected to cruel, inhuman, or degrading treatment or punishment was absolute. Even if a claimant was convicted of crime, it was still necessary to screen the claim concerned under procedures which met the high standards of fairness required by the court. As such, removal procedures of unsuccessful claimants would only be commenced after all the screening and appeal procedures were completed. Notwithstanding this, claims from such claimants were given priority to be handled such that they could be removed as soon as possible if their claims were rejected.

21. Some members expressed concern that claimants who had absconded might pose a security threat to Hong Kong. According to the Administration, consideration was being given to stipulating in IO that if a claimant had absconded or lost contact before commencement of the screening procedures, his claim would be deemed withdrawn automatically.

Implementing the latest requirement of the International Civil Aviation Organization

22. Members were advised that the Administration was considering adding provisions in IO to empower the Secretary for Security ("S for S") to make regulations requiring airlines (or other means of transportation) or their owners or agents to provide passenger information to ImmD before the departure of flights (or other means of transportation) coming to Hong Kong; and, when necessary, authorizing ImmD to request airlines (or their owners or agents) not to allow individual persons to board the plane (or means of transportation) to Hong Kong.

23. According to the Administration, the proposal was originated from the new requirement of the International Civil Aviation Organization ("ICAO") in 2018 and passenger information would be handled with risk-based measures. There were 16 countries, including Australia, Canada, UK and the United States of America, which had implemented the ICAO requirement. The Administration was studying the experience of other jurisdictions and working on the detailed proposals. The regulation to be made by S for S in relation to such a requirement would be subject to further scrutiny by the Legislative Council ("LegCo").

Accommodating non-refoulement claimants in detention centres

24. Members noted that the existing detention power exercised by ImmD was subject to the common law *Hardial Singh* principles, under which ImmD could not continue to detain a person if it could not complete the removal or screening procedures within a reasonable period of time. Members further noted that the Administration was considering adding provisions in IO that, in considering whether a period of detention was reasonable, other than the progress of removal and screening of claims, other relevant factors should also be taken into account, such as whether there were a large number of claims or appeals pending screening by ImmD or TCAB at the same time, whether any procedures were hindered directly or indirectly by the person being detained, or whether there were other situations beyond the control of ImmD.

25. Some members expressed concern that claimants convicted of committing crime were posing a threat to life and property in Hong Kong, and asked whether such persons would be held in closed detention. Some other members, however, considered that claimants who had not committed any crime in Hong Kong should not be detained. They queried why claimants could be detained in light of common law principles regarding fundamental human rights and appropriate procedures.

26. The Administration advised that it had not formed a view on the question of closed detention of claimants. While the option of closed detention of claimants would not be ruled out, a firm legal basis should be established before such an option could be considered. That said, the proposal, which was made after making reference to the legislation and case law in the handling of Vietnamese migrants in the past, was not in conflict with the common law principle regarding detention of a person within a reasonable period of time.

Relevant papers

27. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
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Appendix

Relevant papers on proposed legislative amendments relating to the handling non-refoulement claims

Committee	Date of meeting	Paper
Panel on Security	2.7.2013 (Item II)	Agenda Minutes
	3.6.2014 (Item VI)	Agenda Minutes
	7.7.2015 (Item IV)	Agenda Minutes LC Paper CB(2)2048/14-15(01)
	3.11.2015 (Item V)	Agenda Minutes
	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

Committee	**Date of meeting**	**Paper**
	6.6.2017 (Item IV)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims	27.3.2018	Agenda Minutes
	24.4.2018	Agenda Minutes
	21.5.2018	Agenda Minutes
Panel on Security	10.7.2018 (Item III)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims	27.11.2018	Agenda Minutes
Panel on Security	8.1.2019 (Item III)	Agenda Minutes

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