

(Email: bc_53_20@legco.gov.hk)

24 February 2021

Clerk to Bills Committee on (Immigration Amendment) Bill 2020
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Sirs,

Re: Immigration (Amendment) Bill 2020

Please find enclosed my submission regarding the Immigration (Amendment) Bill 2020.

The submission is a policy brief that I hope will guide the Hong Kong Government's priorities and decision-making in reforming the Unified Screening Mechanism through the captioned bill.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Roshan', with a long horizontal flourish extending to the right.

Roshan Melwani



Source: South China Morning Post

David versus Goliath: Addressing Institutional Challenges in the Implementation of Non-Refoulement Policy in Hong Kong

by Roshan Melwani

Introduction

As a signatory to the Convention Against Torture (“CAT”), Hong Kong is under the legal obligation to ensure that no one is forcibly returned to their home state if they are at risk of torture.¹ To honour its CAT obligations, the Government introduced the Unified Screening Mechanism (“USM”) in March 2014 to streamline its handling of *non-refoulement* claims (“NRCs”).²

Five years on, the HKSAR’s strategy to increase the efficiency of the USM has come into conflict with initial efforts to improve access to justice and fairness. Policy-makers have therefore become increasingly concerned that Government policies are leaving refugees behind.

Methodology

A secondary analysis of civil society reports submitted to Hong Kong’s Legislative Council USM Subcommittee was conducted to identify the principal areas of concern among stakeholders.³ The Pilot Scheme (“PS”), the non-publication of decisions of the USM’s Torture Claims Appeal Board (“TCAB”) and Legal Aid cuts were areas consistently identified.

These policies were evaluated to understand how they enact barriers to justice and contribute to errors in USM decision-making. Through a primary analysis of Government data, the resulting systemic implications were contextualised. Actionable reforms were then suggested to combat institutional challenges identified in HKSAR’s non-refoulement policy.

References

- 1- Legislative Council (“LegCo”), *Paper for House Committee Meeting*, 1 March 2019, available at: <https://bit.ly/2FpBQKz>
- 2- UNHCR, *Submission of UNHCR*, available at: <https://bit.ly/35qedMs>
- 3- For list of reports, see: <https://bit.ly/2Fsgrij>
- 4- HK Bar Association, *Views of the HKBA on the Pilot Scheme*, 18 Nov 2016, available at: <https://www.hkba.org/node/38132>
- 5- *ibid.*
- 6- Daly, Ho & Associates, *Submission to LegCo’s USM Committee*, 21 May 2018, available at: <https://bit.ly/2R0UJh8>
- 7- *ibid.*
- 8- HKBA, *Submission on Proposals to Amend the Immigration Ordinance (Cap. 115)*, available at: <https://bit.ly/2SWGpUC>
- 9- Justice Centre, *Submission to the Legislative Council’s USM Subcommittee*, October 2018, available at: <https://bit.ly/301pxqj>
- 10- Daly & Associates, *Submission to Panel on Security*, 18 October 2018 available at: <https://bit.ly/2tEDQMe>
- 11- LegCo, *supra* note 1 at 3.
- 12- See HK High Court Decisions: CACV 248/2018, HCAL 394/2017, HCAL 78/2017, HCAL 155/2017.
- 13- Daly, Ho & Associates, *supra* note 6 at 5.
- 14- Justice Centre, *Legal Aid for non-refoulement claimants*, 17 July 2017, available at: <https://bit.ly/2sMSJfA>
- 15- Daly & Associates, *supra* note 10 at 17.
- 16- Branches of Hope, *Submission on the Unified Screening Mechanism for non-refoulement claims*, 18 Oct 2018, available at: <https://bit.ly/37BKf9M>
- 17- Daly & Associates, *supra* note 10 at 3.
- 18- Justice Centre, *Submission on the Screening of Non-Refoulement Claims and Appeal Procedures*, May 2018, available at: <https://bit.ly/2QU7ZPF>
- 19- See *Villarico Louterliz Talag v Torture Claims Appeal Board and Director of Immigration* [2018] HKCFI 468.
- 20- Daly & Associates, *supra* note 10 at 3.
- 21- Dr. Isabella Ng & Alex Chan, *Submission for the Public Hearing for USM*, 18 Oct 2018, available at: <https://bit.ly/2Qy0wXj>
- 22- Davis Polk, *Re: Unified Screening Mechanism for Non-Refoulement Claims*, 4 Oct 2018, available at: <https://bit.ly/35vsvyan>
- 23- Justice Centre, *supra* note 18, at 3. See also: Refugee Council Australia, *Statistics: 2018 Global Trends*, available at: <https://bit.ly/306PXQj>
- 24- Immigration Department, *Enforcement Statistics*, Oct 2019, available at: <https://www.immd.gov.hk/eng/facts/enforcement.html>. See also: LegCo Security Research Office, *Statistical Highlights*, Oct 2018, available at: <https://bit.ly/39Hq0QF>
- 25- LegCo, *supra* note 1 at 10.
- 26- UNHCR, *supra* note 2 at 4. See also Daly & Associates, *supra* note 10 at 4.
- 27- Justice Centre, *supra* note 14 at 4.
- 28- Justice Centre, *supra* note 9 at 2.
- 29- Daly & Associates, *supra* note 10 at 3.
- 30- HK Lawyer, *Law Society News: November 2019*, available at: <https://bit.ly/2QwEF2H>

Pilot Scheme: Fast-Tracking Injustice?

Since 2017, Hong Kong has set an annual policy objective of determining over 5,000 NRCs.⁴ To overcome the existing backlog of claims, the Government launched the PS to run parallel to the USM's Duty Lawyer Service ("DLS") Scheme. While both Schemes offer publicly-funded legal assistance to asylum-seekers, the PS has been criticised for its structural and operational arrangements:

- **Conflict of Interest:** While the DLS Scheme is independently-operated, the provision of legal assistance under the PS is administered directly by Hong Kong's Security Bureau.⁵ As lawyers assigned to represent claimants under the PS are chosen and paid for by the same Government Bureau responsible for removing them, this raises legitimate concerns of institutional bias.⁶
- **Inadequate Funding:** While lawyers are paid *pro rata* by the DLS, the PS only offers a 'flat fee' of HK\$7,500 per assignment before TCAB.⁷ Unlike the DLS Scheme, the PS does not offer funding for interpretation services, evidence collection or psychiatric evaluation.⁸ Claimants allocated to the PS are therefore unfairly prejudiced, while the flat fee disincentives lawyers from putting in work beyond the bare minimum. This is reflected in the 9% representation rate before TCAB.⁹

More Applications, Less Aid

Between 2015 to 2017, the rate at which Legal Aid was granted to asylum-seekers to challenge *non-refoulement* decisions dropped from 25% to 2.7%.¹⁰ The increasingly stringent approach adopted by the Legal Aid Department ("LAD") evidently reflects the HKSAR's concurrent policy objective of expediting the removal of rejected claimants.¹¹

However, a string of High Court judgments have recently exposed serious errors in law and breaches of procedural fairness under the USM.¹² These were also cases where claimants were refused Legal Aid, or issued decisions only after the statutory limitation period to commence their judicial review ("JRs") had expired.¹³ This has raised fears that genuine asylum-seekers are being denied access to justice due to, *inter alia*:

- The LAD's insufficient expertise in conducting merit assessments in asylum law¹⁴;
- unreasonable delays in processing Legal Aid applications, preventing claimants from having timely access to lawyers¹⁵; and
- an endemic "culture of disbelief" towards NRCs within the Administration.¹⁶

A Pandora's Box: TCAB Decisions

TCAB decisions are not made publicly available, which prevents stakeholders from being able to monitor the quality and fairness of USM decision-making. This is despite the UN CAT Committee's recommendation that Hong Kong publish redacted decisions to allow claimants to effectively prepare their case.¹⁷ Hong Kong's refusal to implement this recommendation has thereby exacerbated the following problems:

- **Administrative Impunity:** Legal practitioners have regularly observed critical mistakes in USM decision-making (e.g. getting the claimant's country-of-origin wrong or relying on Wikipedia as evidence to determine claims).¹⁸ Not publishing TCAB decisions tacitly facilitates bureaucratic complacency.
- **Compassion Fatigue:** The lack of public scrutiny has also enabled USM decision-makers to be held unaccountable for egregious misconduct. In one example, an adjudicator arbitrarily dismissed a claimant's appeal after she sought an adjournment of her TCAB hearing because she was in labour.¹⁹
- **Judicial Incoherence:** The lack of access to TCAB decisions subsequently prevents Courts from being able to obtain a macro-overview of the qualitative flaws in the USM decision-making process.²⁰
- **Legislative Disconnect:** In view of Hong Kong's democratic deficit, the lack of transparency about USM decision-making enables pro-Government legislators to justify tougher policies towards refugees with less public backlash.²¹



* Legal aid certificates may not be granted in the same year when the respective applications were received

Source: Legal Aid Department

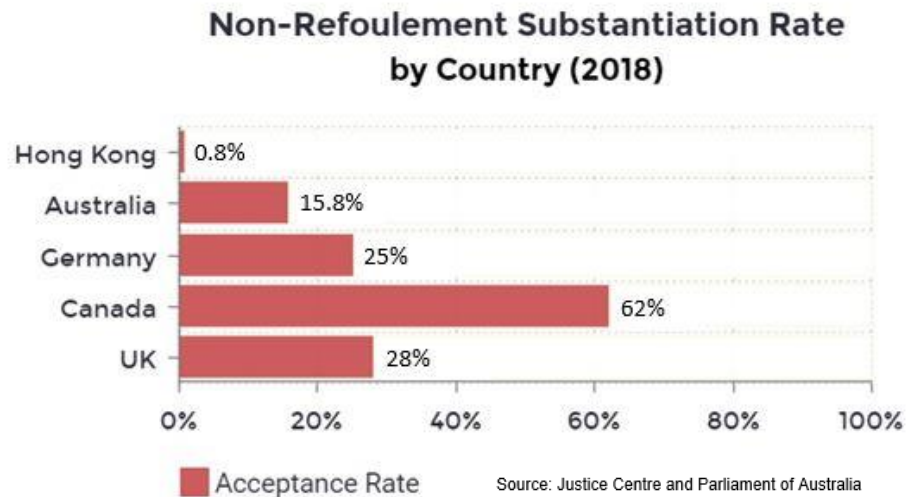
SMP

A Bleak Systemic Picture

Hong Kong's *non-refoulement* substantiation rate, which stands at 0.8%, ranks as one of the lowest in the developed world.²² In view of the barriers to justice examined above, the figure suggests that Hong Kong has implemented an unfairly high threshold for granting protection under its USM system. As seen below, overseas figures corroborate this implication.²³ Compassion fatigue in the administration of refugee policy comes at a high moral price: If genuine claimants slip through the cracks, they will be returned to countries where they could face persecution, torture and/or death. Fairness is therefore paramount.



Source: Immigration Department



Reforms to expedite the screening of NRCs have also come at significant public cost. With the Government increasing its annual USM budget by over HK\$500 million from 2015-2018, the Immigration Department has ostensibly doubled the number of claims it determines each year (2339 in 2015 to 5467 in 2018).²⁴ However, statistical evidence from the Judiciary indicates that Hong Kong's myopic prioritisation of expedience measures has backfired. In the same four years, the number of JRs challenging USM decisions has increased by **30 times** (103 in 2015 to over 3000 in 2018).²⁵ The alarming upsurge in JRs not only prolongs disposal times, but also exposes the Government to preventable criticism for substandard *non-refoulement* decisions. As claimants are returned to the USM for re-screening if their judicial review is successful, haphazard policy implementation has precipitated a vicious cycle of delay and unnecessary expenditure. Meanwhile, refugees are dragged through administrative limbo (in some cases, for 10-15 years) without a durable solution in sight.²⁶

Towards a Comprehensive Asylum Policy

For Hong Kong's asylum strategy to be operationally sustainable, the Government should not sacrifice fairness on the altar of expedience. To combat the institutional failures identified, a comprehensive set of access to justice reforms should be implemented in accordance with following policy-objectives ("POs"):

"Speed and efficiency do not trump justice and fairness."

Justice and fairness are paramount."

- Lord Dyson in *Detention Action* [2015]

(Held: UK's Detained Fast-Track Appeal Process was unlawfully unfair to asylum-seekers)



1. To remedy the systemic lack of accountability and legal representation within the USM System, Legal Aid and Courts;
2. To improve the transparency and consistency of asylum-related decision-making processes; and
3. To conduct regular consultations with civil society stakeholders in the design and implementation of non-refoulement policy.

	POs	Policy Recommendations	Feasibility and Impact
At the USM Stage	1+2	<p>Address operational and funding concerns in the Government's ongoing review of the PS to ensure that:</p> <ul style="list-style-type: none"> i) Lawyers are independently funded at a rate proportionate to the work entailed; ii) Sufficient resources are allocated to enable claimants to obtain interpretation assistance, evidence, medical reports and/or psychiatric evaluation 	<p>The Government has the pre-existing capacity to implement these recommendations as they are already practiced under the DLS Scheme. The requested arrangements were also previously available to all claimants prior to the PS.</p> <p>As constitutional challenges against the PS have already been launched, policy evaluation should be expedited to ensure the PS is not unlawfully infringing upon claimants' rights to a fair hearing.²⁷</p>
	1+2	<p>Establish an independent USM Oversight Committee ("UOC") empowered to:</p> <ul style="list-style-type: none"> i) Review systemic patterns and flaws in the quality of USM decision-making; ii) Investigate complaints of misconduct in the handling of NRCs; iii) Monitor ongoing JRs to ensure that successful claimants are properly re-screened after being remitted to the USM 	<p>In view of existing strain on the Judiciary's resources, establishing a UOC will address the drastic rise in JRs at its source. There is momentum to achieve this proposal due to pressure from international organisations, NGOs and legal practitioners.²⁸ As JRs are structurally limited to assessing decision-making errors on a case-by-case basis, a UOC can contribute to informed policy-making solutions through systemic analysis. It can also remedy the USM's lack of a disciplinary mechanism for administrative misconduct.</p>
	1+2	Publish redacted TCAB Decisions	<p>This policy is realistically achievable as the Government already redacts and publishes other administrative decisions. As seen in other countries, confidentiality concerns can be allayed through anonymisation.²⁹ Publishing decisions will also facilitate public and judicial scrutiny, and secure compliance with UN CAT obligations.</p>
	1+2	Accept and incorporate UN Treaty Body recommendations in Government reports to the Legislative Council ("LegCo")	<p>Taking this policy forward will depend on bureaucratic impetus. In light of the Government's ongoing legitimacy crisis, it would be an opportune time to strengthen public accountability by reaffirming Hong Kong's international commitment to human rights.</p>
	1+2+3	<p>Collaborate with NGOs, field experts and legal practitioners to develop:</p> <ul style="list-style-type: none"> i) Training manuals for USM and Legal Aid decision-makers; ii) Guidelines on the LAD's merit assessment policy for NRC-related JRs 	<p>These recommendations are feasible as there exists significant collaboration between civil society stakeholders in Hong Kong's refugee policy space on various USM capacity-building initiatives. For example, the HK Law Society runs an annual USM Training Programme that sees lawyers, world-renowned academics and the UNHCR prepare training materials on international best practices in refugee adjudication.³⁰ In turn, these policies can potentially combat the Administration's 'culture of disbelief' and improve access to legal representation.</p>
At the Court and LAD Stage	1+3	Fund NGO programs that train lawyers to represent asylum-seekers in JR applications	
	2+3	Facilitate communication between the Court and LAD to synchronise their handling of NRC-related JRs	