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Panel on Security

Updated background brief prepared by the Legislative Council Secretariat for the meeting on 1 April 2022

Handling of non-refoulement claims and the related staffing proposals

Purpose

This paper provides background information and summarizes Members' past discussions on the handling of non-refoulement claims and the related staffing proposals.

Background

Screening mechanism for non-refoulement claims

2. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") has been applicable to Hong Kong since 1992.¹ Article 3 of CAT requires that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

3. Pursuant to several court rulings since 2004, the Administration introduced an enhanced administrative screening mechanism for torture claims in December 2009 to ensure that the procedures would meet a high standard of fairness in the making of the above determination. The enhanced mechanism included the provision of publicly-funded legal assistance ("PFLA") to torture claimants

¹ The People's Republic of China has ratified CAT in October 1998. After the establishment of the Hong Kong Special Administrative Region on 1 July 1997, CAT continues to apply to Hong Kong.

through the Duty Lawyer Service (“DLS”), enhanced training for decision makers and a petition procedure involving adjudicators with a legal background who might conduct oral hearing if required. To provide for a statutory process for determining torture claims, the Immigration (Amendment) Ordinance 2012 came into operation in December 2012. It covered, among others, the procedures and time limit relating to the making of torture claims, the requirements for the Immigration Department (“ImmD”) to arrange screening interviews and issue written notices of decisions, and an appeal mechanism in relation to such claims whereby a Torture Claims Appeal Board (“TCAB”) was established for the purpose.

4. In view of the Court of Final Appeal’s rulings in two judicial review cases in December 2012 and March 2013 respectively, the Administration commenced operating the unified screening mechanism (“USM”) in March 2014 for determining claims for non-refoulement protection made by illegal immigrants refusing to be removed to another country on all applicable grounds.² The screening procedures of USM follow those of the statutory screening mechanism for torture claims. Subsequently, the Administration commenced a comprehensive review of the strategy of handling non-refoulement claims (“the comprehensive review”) in 2016 in view of the rising number of new claims and claims pending screening by ImmD upon the implementation of USM.

5. Since the commencement of the comprehensive review, the Administration has implemented a number of measures with the following four major focus that have yielded positive results: (a) reducing at source the number of non-ethnic Chinese illegal immigrants and overstayers who may lodge non-refoulement claims in Hong Kong; (b) expediting the screening of the backlog of claims and appeals; (c) expediting the removal of claimants whose claims and appeals (if any) have been rejected; and (d) stepping up enforcement against crimes such as unlawful employment and studying detention strategies to increase deterrence. As part of the comprehensive review, the Administration introduced the Immigration (Amendment) Bill 2020 (“the Bill”) in December 2020. With the passage of the Bill by the Legislative Council (“LegCo”) in April 2021, the Immigration (Amendment) Ordinance 2021 came into operation in August 2021 to, among others, further improve the handling of torture claims including enhancing the efficiency of screening claims by ImmD and preventing delaying tactics; improving the procedures and functions of TCAB; and strengthening the capability of ImmD in removing unsuccessful claimants, detaining claimants

² Apart from the risk of being subjected to torture within the meaning of CAT, these applicable grounds include the risk of being subjected to ill-treatment that would violate his absolute and non-derogable rights under the Hong Kong Bill of Rights (“HKBOR”) (e.g. the right not to be subject to arbitrarily deprivation of his life or cruel, inhuman or degrading treatment or punishment guaranteed by Articles 2 and 3 of HKBOR respectively), or persecution (with reference to the non-refoulement principle under Article 33 of the 1951 Convention Relating to the Status of Refugees), etc.

pending final determination of their claims and taking enforcement actions. A flowchart provided by ImmD on its website showing the prevailing screening process of non-refoulement claims under USM is in **Appendix 1**.

Dedicated supernumerary directorate support

6. Two supernumerary directorate posts were created in 2016 for around three years to March 2019, viz. one Administrative Officer Staff Grade C post in the Security Bureau (“SB”) and one assistant director post in ImmD, to steer the comprehensive review, as well as to step up relevant enforcement measures and expedite the screening of non-refoulement claims.³ Subsequently, these two posts were extended for another period of three years to 31 March 2022 to continue the above work. The posts are now designated as Principal Assistant Secretary (Security) Review and Assistant Director (Removal Assessment and Litigation) respectively.⁴

Members’ deliberations

7. The Panel, the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims formed under the House Committee in the Sixth LegCo and the Bills Committee on Immigration (Amendment) Bill 2020 discussed the handling of non-refoulement claims at various meetings. Separately, the Panel was consulted on the staffing proposals referred to in paragraph 6 above in February 2016 and November 2018 respectively. The deliberations are summarized in the following paragraphs.

Expediting the screening of non-refoulement claims and appeals

Submission of claim form

8. Members noted that in the past, torture claimants were given a period of 49 days (i.e. 28 days as provided under the law, plus 21 days of extension granted through administrative means at the request of DLS upon implementation of USM) to return their claim forms to commence the screening procedures. To shorten the time allowed for returning a completed claim form to expedite the screening of claimants, a new threshold for extension was introduced under the Bill. Applications for a further period to return the claim form might be allowed on the satisfaction of an immigration officer that the claimant concerned had

³ The Administration’s proposal for the creation of these two posts was supported by the Establishment Subcommittee (“ESC”) at its meeting on 31 May 2016 and approved by the Finance Committee (“FC”) on 17 June 2016.

⁴ The Administration’s proposal to retain these two posts was supported by ESC at its meeting on 22 February 2019 and approved by FC on 10 May 2019.

exercised “all due diligence” to return the claim form within the 28-day period but because of “circumstances beyond the claimant’s control”, would not be able to or failed to do so. Some Members expressed concern whether the new threshold for extension of time for returning a claim form could conform to the high standards of fairness required in the procedures for dealing with claims as laid down by the court.

9. The Administration advised that there was no cause for the above concern, as it was firmly established in previous court cases that the exercise of determining whether a claim made was valid had to be one of “joint endeavor”. Claimants were expected to take active steps in fulfilling and complying with every screening requirement and procedure (including any time limit), and whether they had exercised “all due diligence” and whether a situation amounted to “circumstances beyond the claimant’s control” would be considered on a case-by-case basis having taken into consideration all relevant facts and circumstances. The Administration further advised that the screening of non-refoulement claims, which incorporated PFLA and publicly-funded interpretation services, as well as an appeal mechanism (claimants aggrieved by ImmD’s decision could lodge an appeal with the independent TCAB), met the high standards of fairness required by the court.

Screening interview

10. Members noted that in order to prevent uncooperative claimants from making repeated requests for deferral of screening interviews or re-scheduling an interview without any reason, claimants were obliged to attend interviews at the date, time and place specified by ImmD under the Bill. On the language used for communication, it was provided for under the Bill that ImmD might direct a claimant to communicate in a language that the officer reasonably considered the claimant was able to understand and communicate in. Some Members were concerned that since the screening interview needed not to be conducted in the claimant’s most proficient language, a claimant’s basic rights would be compromised. The Administration advised that such arrangement could prevent claimants from abusing the publicly-funded simultaneous interpretation service arranged by ImmD, such as requesting the use of specific rare tribal dialects in the interviews with the intention to delay the screening process. All relevant information such as documents submitted by the claimant and previous communication with the claimant would be taken into account by ImmD when considering whether a claimant could reasonably understand and communicate in another language.

Appeal

11. Noting that most claimants rejected by ImmD would lodge an appeal to TCAB and there were around 1 000 new appeals received by TCAB each year ,

Members had all long urged the Administration to improve the effectiveness and efficiency of TCAB. They noted that to ensure the effective operation of TCAB, provisions had been added under the Bill to enable the Chairperson of TCAB to delegate certain powers and functions to a Deputy Chairperson, streamline TCAB's procedures in determining an appeal where the claimant was absent from the hearing, and enable TCAB to give less than 28 days' notice of a hearing to the parties if it considered appropriate to do so in a particular case.

12. Some Members expressed concern about whether TCAB had a sufficient number of members to hear and determine appeals. According to the Administration, it had expanded TCAB's membership to the strength of 76 as of February 2021. The Administration would further appoint suitable members to TCAB and increase the manpower of the TCAB secretariat as and when necessary, so as to clear up the appeals backlog as soon as practicable.

Leave application for judicial review

13. Members noted with concern that the Judiciary had been faced with influx and upsurge of caseload relating to non-refoulement claims since 2017. In 2020, there was a significant increase in the number of related applications for leave to apply for judicial review filed with the Court of First Instance of the High Court ("CFI"), as well as a sharp increase in the number of related applications for leave to appeal filed with the Court of Final Appeal and civil appeals filed with the Court of Appeal of the High Court ("CA").⁵ They urged the Administration to liaise with the Judiciary about the judicial manpower required to cope with the caseload and clear the backlog.

14. The Judiciary advised that it had been actively recruiting more substantive judges to fill the existing vacancies, as well as appointing more deputy judges for the above purpose. This apart, a basket of measures had been implemented to streamline processing procedures as far as possible. Subject to the availability of sufficient judicial manpower, the targets were to dispose 2 000 cases at CFI and 1 000 cases at CA each year with a view to clearing the backlog in a few years' time. Some Members considered the target unacceptable since the large number of non-refoulement claimants stranded in Hong Kong had been costing billion dollars to be paid out of public coffer annually. They called on the Judiciary to implement more effective measures to deal with the backlog.

Removal procedures for rejected claimants

15. Members noted that to enhance ImmD's removal efficiency in respect of

⁵ The processing of non-refoulement claim-related cases usually had to go through the Court of First Instance of the High Court, the Court of Appeal of the High Court and then the Court of Final Appeal according to the established procedures.

unsuccessful claimants, the Bill stipulated that once a torture claim had been rejected by an immigration officer, ImmD could in parallel commence liaising with the related authorities (including a torture risk State) for the purpose of making arrangements for removal. There was a concern that such arrangement would disclose to the torture risk State that the claimant had lodged a non-refoulement claim in Hong Kong, thus endangering the safety of the claimant. Some Members sought clarification on whether a claimant whose claim had already been rejected by ImmD and TCAB but who had applied for leave to apply for judicial review would be removed.

16. The Administration assured members that ImmD would not disclose to relevant authorities whether the person concerned had lodged any non-refoulement claim in Hong Kong when making arrangements for removal, nor would it execute the removal of a claimant with a pending appeal to TCAB. ImmD would also temporarily suspend removal of an unsuccessful claimant if the person had filed an application for leave to judicial review. The removal procedures of the claimant concerned would only commence after the legal proceedings had been disposed of.

17. Some Members were of the view that claimants convicted of a 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 a crime, it was still necessary to screen the claim concerned under procedures which met the high standards of fairness required by the court. 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.

Detention of claimants

18. Some Members considered that claimants who had committed a serious crime or was likely to pose a threat or security risk to the community should be held in closed detention, while some other Members held the view that claimants who had not committed any crime in Hong Kong should not be detained under the common law principles concerning fundamental human rights and appropriate procedures. The Administration advised that the 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. To enhance transparency and provide unequivocal legal backing to the immigration officers in considering and determining the detention period, the Bill had provided for the circumstances which might justify a detention and should be taken into account when considering whether a period of detention was reasonable and lawful. At the suggestion of some Members, the Administration added the factor of whether

the person concerned was likely to pose a threat or security risk to the community for determining the reasonableness and lawfulness of the detention period. Regarding the suggestion to set up closed camps to detain claimants, the Administration stressed that other than matters to be handled on the legal front, it had to take into account various practical issues on land, infrastructure, manpower, management, etc.

19. Expressing concern that there were claimants coming to Hong Kong only with an attempt to take up unlawful employment, there had long been calls from Members for enhancing the detention capacity so as to further deter potential claimants from arriving at Hong Kong and minimize the security risks posed by some to the community. The Administration advised that it had made use of existing detention facilities to detain claimants posing higher security risks to the community. In addition to the Castle Peak Bay Immigration Centre, which could accommodate about 500 immigration detainees, the recently renovated Tai Tam Gap Correctional Institution had a detention capacity of 160, thereby enhancing the ImmD's ability of handling detention cases.

Stepping up enforcement relating to non-refoulement claimants

Increasing the penalties

20. Members were concerned that some claimants came to Hong Kong with an attempt to abuse the screening mechanism for non-refoulement claims for economic incentive by taking up unlawful employment. They welcomed the proposal under the Bill that the penalty for an employer employing a torture claimant, who was not lawfully employable, would be increased from a maximum fine of \$350,000 and three years' imprisonment to a maximum fine of \$500,000 and 10 years' imprisonment. On the proposal that the penalty that could be imposed on the owner of an aircraft and his agent if a passenger of the aircraft arrived in Hong Kong without a valid travel document was proposed to be increased from a level 3 fine (i.e. \$10,000) to a level 6 fine (i.e. \$100,000) to intercept illegal immigrants at the source, some Members were concerned about the ten-fold increase. The Administration advised that there were some 200 such cases each year and there was a need to reflect the gravity of the consequence of the owner of an aircraft and his agent for breaching the duty. Written explanation would be sought from airlines, when necessary, during investigation.

Implementing an Advance Passenger Information system

21. Members noted that the International Civil Aviation Organization had updated the Convention on International Civil Aviation in 2018, including a new requirement for its members to put in place the Advanced Passenger Information ("API") system. According to the requirement, airlines were required to provide, among others, passenger information to immigration authorities of the destination

port before flight departure. To enable the Hong Kong Special Administrative Region to fulfil its obligation in this regard, the Bill empowered the Secretary for Security to make regulations requiring, amongst other things, airlines (or other carriers) or their owners or agents to provide passenger information to ImmD prior to the departure of an aircraft (or other means of transportation) coming to Hong Kong; and empowering ImmD to direct that a passenger might not be carried on board the aircraft (or other means of transportation) to Hong Kong.

22. Members enquired about the details of information and data to be collected under the API system and the use of such information and data for the prevention of potential non-refoulement claimants from arriving at Hong Kong. The Administration advised that although the operational details of the API system were yet to be drawn up, the handling of records and personal data collected under the API system would be similar to the personal information that ImmD would have access to when the relevant persons were presented for immigration clearance upon their arrival in Hong Kong. Members were assured that the personal data collected would be handled with care and in full compliance with the requirements of the Personal Data (Privacy) Ordinance (Cap. 486). Members were subsequently advised at the meeting of the Panel in February 2022 that ImmD had completed the feasibility study and was now preparing the tendering procedures. The Administration would consult LegCo on the relevant subsidiary legislation and seek its approval for the required funding proposal with a view to implementing the API system as soon as possible.

Provision of publicly-funded legal assistance

23. In the course of scrutinizing the Bill, some Members considered that to ensure proper use of public fund, the Administration should review the provision of PFLA to claimants during the screening process under the Legal Assistance Scheme for Non-refoulement Claimants operated through DLS and the Pilot Scheme on Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants (“the Pilot Scheme”) operated by the Security Bureau by, say, setting a limit on PFLA as was adopted by some countries such as Canada and the United Kingdom. The Administration advised that PFLA was currently provided to all claimants in need at ImmD’s screening stage, and whether PFLA would continue to be provided during the appeal stage would be assessed by the same lawyer representing the claimant in the original screening process based on the merits of the case. The Administration was reviewing the Pilot Scheme, which included examining whether its mode of operation was more flexible while expediting the handling of claims. It would formulate the long-term way forward on the provision of PFLA to non-refoulement claimants, including whether there was merit to impose a statutory limit in this regard, in due course taking into account the outcome of the review.

Dedicated supernumerary directorate support

24. When the Panel was consulted in November 2018 on the Administration's proposal to extend the two supernumerary directorate posts as set out in paragraph 6 above to continue steering the comprehensive review and to step up relevant measures, Members in general expressed support for the proposal. Question was raised as to whether an extension for a period of three years for the two supernumerary posts was sufficient given the massive number of cases on non-refoulement claim, appeal and judicial review pending handling, as well as the need to ensure the smooth implementation of the transitional arrangements and the enhanced screening and appeal procedures after the passage of the relevant bill which had yet been introduced into LegCo at the time of discussion.

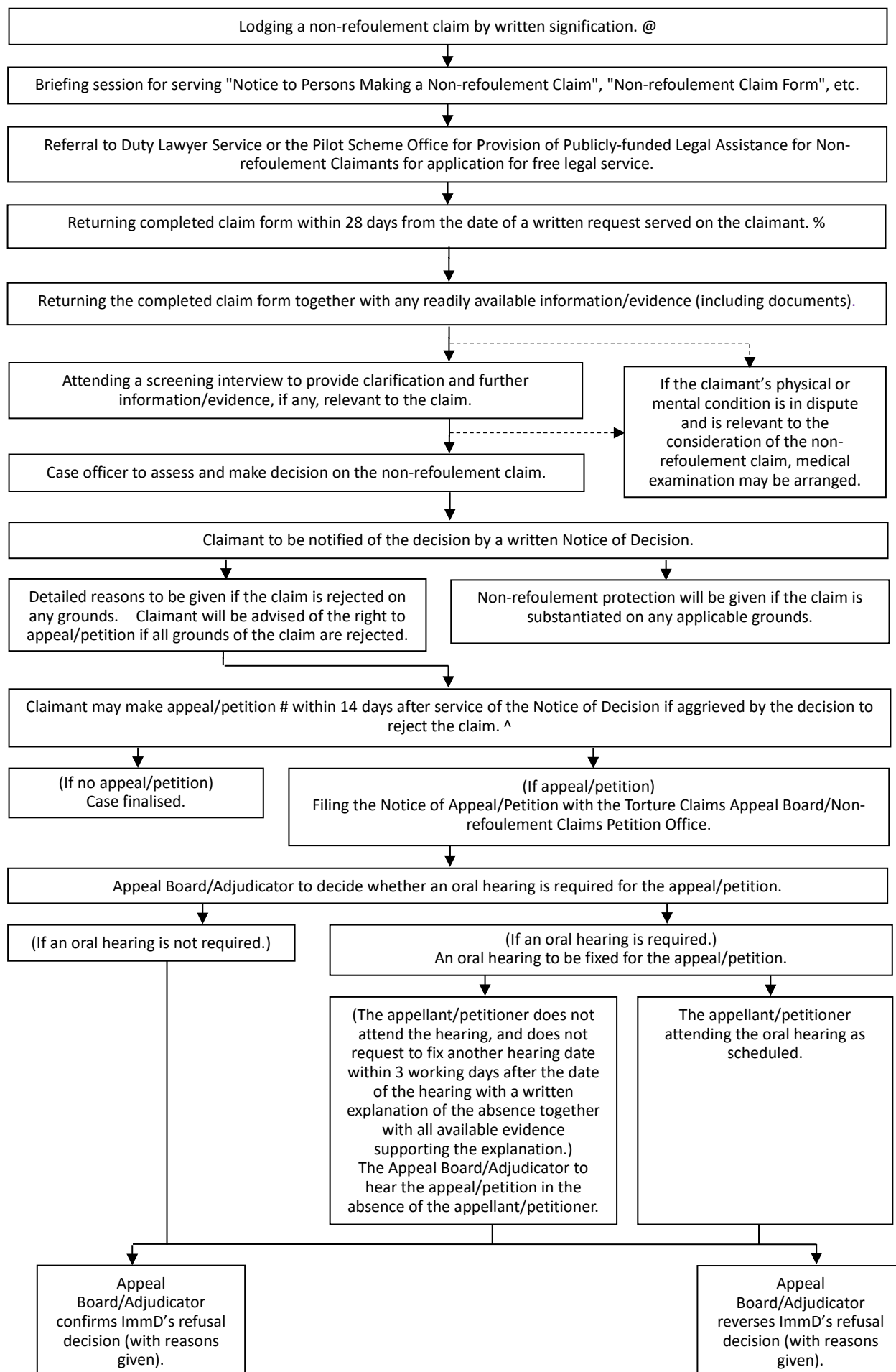
25. The Administration advised that considering the need for prudent use of public resources, it had come up with the current proposal. It would continue to closely monitor the progress of the comprehensive review and examine the need of further extending the tenure of the two supernumerary posts in due course.

Impact of the coronavirus disease 2019 epidemic

26. Members were advised in February 2021 that ImmD had basically cleared the backlog of claims accumulated over the years in early 2019 and the handling of pending appeals was expected to be completed by mid-2021 at the earliest. With the outbreak of the fourth and the fifth waves of the coronavirus disease 2019 epidemic, Members were concerned about whether the handling of non-refoulement claims had been affected. According to the Administration, due to the special work arrangements during the epidemic, only limited PFLA could be provided to claimants, which delayed the commencement of the screening procedures of some claims. As of early 2022, there were around 14 000 non-refoulement claimants in Hong Kong. Among them, there were some 700 claims pending screening by ImmD, some 1 700 claimants whose appeal against ImmD's decision was pending decision by TCAB. Furthermore, more than 8 000 claimants lodged applications for leave for judicial review in relation to the results of their claims and some 1 000 unsuccessful claimants were awaiting for repatriation.

Relevant papers

27. A list of relevant papers available on the LegCo website is in **Appendix 2**.

Processing Non-refoulement Claims under the Unified Screening Mechanism (USM) *

Notes:

* This flow chart is intended for a quick glance of the screening process of non-refoulement claims under the USM. It should not be taken as a formal or comprehensive reference of all the procedural steps involved. Please refer to the "Notice to Persons Making a Non-refoulement Claim" for the details.

[/https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf](https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf)).

@ The written signification must give a general indication of the reasons for claiming non-refoulement protection to enable Immigration Department (ImmD) to consider if claim may be made under the USM. Photograph and fingerprints taking will be arranged for the claimant to formally make the claim.

% Time extension for returning the completed claim form may only be allowed if the case officer is satisfied that the claimant has exercised, or had exercised, all due diligence to return the completed claim form but will not be able to, or failed to, do so within the time limit because of circumstances beyond the claimant's control. Failure to return the completed claim form will result in the claim being deemed withdrawn.

For details of the appeal/petition process, please refer to the website of the Torture Claims Appeal Board/Non-refoulement Claims Petition Office at <http://www.sb.gov.hk/eng/links/tcab/index.htm>).

^ If the appeal/petition is filed after the expiry of the 14-day appeal/petition period, the Appeal Board/Adjudicator must decide, as a preliminary decision without a hearing, whether the Appeal Board/Adjudicator will allow the late filing of the Notice of Appeal/Petition.

(08/2021)

Source: Processing Non-refoulement Claims under the USM which is accessed at the website of the Immigration Department at https://www.immd.gov.hk/pdf/non-refoulement_claim_flow_chart.pdf

Appendix 2

Relevant papers on the handling of non-refoulement claims and the related staffing proposals

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
	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
	11.11.2016 (Item V)	Agenda Minutes
	6.6.2017 (Item IV)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the	27.3.2018	Agenda Minutes

Committee	Date of meeting	Paper
Unified Screening Mechanism for Non-refoulement Claims	24.4.2018	Agenda Minutes
	21.5.2018	Agenda Minutes
Panel on Security	10.7.2018 (Item III)	Agenda Minutes
	2.11.2018 (Item V)	Agenda Minutes
	8.1.2019 (Item III)	Agenda Minutes
Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims	--	Report of the Subcommittee issued for the House Committee meeting on 1 March 2019
Bills Committee on Immigration (Amendment) Bill 2020	--	Report of the Bills Committee issued for the House Committee meeting on 16 April 2021
Panel on Security	8.2.2022 (Item III)	Agenda

Council Business Division 2
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