

**For discussion on
2 July 2013**

**Panel on Security of the Legislative Council
Screening of Non-refoulement Claims**

Purpose

This paper briefs Members on the Administration's plan to introduce a unified screening mechanism (USM) to assess claims for non-refoulement protection lodged by persons not having the right to enter and remain in Hong Kong on the basis that removing them to another country would expose them to, in addition to a risk of torture as defined under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a risk of (a) torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights (BOR Article 3 claims); and/or (b) persecution with reference to the principle under Article 33 of the 1951 Convention relating to the Status of Refugees (persecution claims) .

Background

CAT Claims

2. The CAT has been extended to Hong Kong since 1992. Article 3(1) of that Convention provides that "no State Party shall expel, return ("refouler") 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."

3. In June 2004, the Court of Final Appeal (CFA) ruled in *Sakthevel Prabakar v. Secretary for Security* ((2004) 7 HKCFAR 187) that given the momentous importance of a determination on CAT claims to claimants, high standards of fairness must be demanded in the making of such a determination¹. The Immigration Department (ImmD)

¹ "High standards of fairness" requires, amongst other things, the potential deportee be given every reasonable opportunity to establish his claim, decision-makers to make their own assessment taking into account all relevant considerations, and if claim is rejected reasons sufficient for consideration of subsequent review action be given to claimants.

introduced an administrative screening mechanism for CAT claims thereafter. In December 2009, the administrative screening mechanism was further enhanced in light of the Court of First Instance's judgment in another judicial review case *FB & Ors v. Director of Immigration and Secretary for Security* (HCAL 51, 105-107 & 125-126/2007). Legislative provisions underpinning the enhanced administrative mechanism have commenced operation since December 2012.

Latest Development

BOR Article 3 Claims

4. Article 3 of the Hong Kong Bill of Rights (BOR) (giving effect to Article 7 of the International Covenant on Civil and Political Rights (ICCPR)) protects individuals from being subjected to torture or cruel, inhuman or degrading treatment or punishment (CIDTP). Accordingly, the HKSAR Government should not expose individuals to the danger of torture or CIDTP. On the other hand, section 11 of the Hong Kong Bill of Rights Ordinance (HKBORO) (Cap. 383) provides that the Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of such legislation, as regards persons not having the right to enter and remain in Hong Kong.

5. In December 2012, the CFA ruled in its judgment in *Ubamaka Edward Wilson v. Secretary for Security* (FACV 15/2011) that whilst section 11 of the HKBORO is constitutional and consistent with Article 39 of the Basic Law², it should be construed in its context, adopting a "generous and purposive approach"³. Accordingly, since the rights guaranteed by Article 3 of BOR are absolute and non-derogable, they cannot be excluded by section 11 of the HKBORO insofar as the exercise of powers and the enforcement of duties under immigration legislation are concerned.

6. In gist, following the CFA judgment in *Ubamaka*, persons not having the right to enter and remain in Hong Kong (e.g. illegal immigrants and overstayers) may claim non-refoulement protection by invoking Article 3 of BOR to resist removal or deportation to another

² Article 39(1) of the Basic Law provides, *inter alia*, that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

³ §5, *Ubamaka Edward Wilson v. Secretary for Security*, FACV 15/2011.

country. In other words, the ImmD should not remove or deport persons (with no right to remain in Hong Kong) to another country where that person faces a genuine and substantial risk of being subjected to torture or CIDTP, which has attained a minimum level of severity⁴, no matter how objectionable his conduct or character may be requiring his removal or deportation⁵.

Persecution claims

7. The 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol do not apply to Hong Kong. The Administration has always maintained a firm policy of not granting asylum, and accordingly, asylum claims (on grounds of a claimed fear of persecution) have always been assessed by the United Nations High Commissioner for Refugees (UNHCR) in Hong Kong. However, before exercising powers of removal or deportation to another country, the prevailing practice of the Director of Immigration (D of Imm) is that he would, on humanitarian grounds, have regard to a person's claimed fear of persecution. Where the UNHCR determines such claim to be well-founded, that person will not be removed to the country of putative persecution. This practice is consistent with the principle of non-refoulement expressed in Article 33 of the Refugee Convention⁶, despite that the Convention does not apply to Hong Kong.

8. In March 2013, the CFA ruled in *C & Ors v. Director of Immigration* (FACV 18-20/2011) that, as long as the D of Imm maintains such prevailing practice giving weight to any determination conducted by the UNHCR before, he is required to independently determine whether the claimed fear of persecution is well-founded, before executing one's removal or deportation to another country. The judgment does not affect the Administration's position that the Refugee Convention and its Protocol have never been applied to Hong Kong and our firm policy of not granting asylum to anyone.

⁴ §172, *Id*

⁵ §142, *Id*

⁶ Article 33 of the Refugee Convention provides that : (1) No Contracting State shall expel or return ("refoul") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; and (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

A Unified Screening Mechanism

9. In view of the CFA judgments in *Ubamaka* and *C*, the ImmD would withhold removing or deporting any person to another country where the person has made a torture or CIDTP claim under Article 3 of BOR and/or a persecution claim with reference to Article 33 of the Refugee Convention until his claim(s) has been finally determined in a manner that satisfies high standards of fairness (on top of a torture claim under Article 3 of CAT which is already available to the claimants). Where any of these claims is substantiated, the ImmD would provide non-refoulement protection to the claimant.

10. We plan to assess non-refoulement claims (namely CAT, BOR Article 3 and persecution) under a USM based on the existing statutory CAT claim screening mechanism. Under the USM, for example, claimants will complete a unified claim form⁷ to provide all grounds of the non-refoulement claim or all available documentary evidences. After a completed claim form is returned by claimants, the ImmD would arrange for them to attend an interview to provide information and answer questions relating to their non-refoulement claims⁸. Claimants must provide all information or all available documentary evidence relating to their claims for the ImmD's assessment in one go.

11. The ImmD will assess a claim for non-refoulement protection on applicable grounds, considering whether there are substantial grounds to believe that the claimant, if removed or deported to another country, will face a real and substantial risk of being subjected to torture or CIDTP, or has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in that country, or any other reasons to withhold removal of the claimant, giving weight to determination conducted by the UNHCR, if any. Decisions with reasons will be provided to claimants.

⁷ For the purpose of section 37Y of the Immigration Ordinance (Cap. 115) in regard to the screening of CAT claims, the unified claim form will be regarded as the torture claim form specified by the D of Imm under section 37Y(4). At the same time, the same unified claim form will also be used for the ImmD's assessment of BOR Article 3 and/or persecution claims.

⁸ For the purpose of section 37ZB(1)(b) of the Immigration Ordinance (Cap. 115) in regard to the screening of CAT claims, the screening interview will be regarded as the interview which an immigration officer must require the claimant to attend after a completed torture claim form is returned by the claimant. At the same time, information provided by the claimant at the same interview will also be used for the ImmD's assessment of BOR Article 3 and/or persecution claims.

Appeals

12. As regards CAT claims, claimants aggrieved by the ImmD's decision may appeal to the Torture Claims Appeal Board (TCAB) established under section 37ZQ of the Immigration Ordinance (Cap. 115). We are studying the feasibility of arranging for TCAB members to also handle non-statutory/administrative appeals against the ImmD's decisions on BOR Article 3 and/or persecution claims to ensure that appeals will be handled by qualified adjudicators in a fair, independent and effective manner.

Training for decision-makers

13. To ensure that decision-makers under the USM have proper understanding of the expanded scope of the screening mechanism, relevant and updated international and local jurisprudence, training to be conducted by qualified and experienced authorities (e.g. the UNHCR, the United Kingdom Border Agency, medical experts, etc.) will be arranged for them before the USM commences operation.

Publicly-funded legal assistance

14. Since December 2009 when the Administration launched the enhanced screening mechanism for CAT claims, publicly-funded legal assistance is available to claimants through the Duty Lawyer Service (DLS). At present, over 350 barristers and solicitors, who received training from the Law Society on CAT screening and related matters, are on a roster to provide legal assistance to claimants, including completing the CAT claim form, accompanying claimants at screening interviews, examining the case and assessing merits of appeal for claimants aggrieved by the decision of the ImmD, and representing claimants at oral hearing (if any) during appeals. We have initiated discussion with the DLS on extending the same assistance to claimants under the USM.

Humanitarian assistance

15. On humanitarian grounds, the Social Welfare Department (SWD), in collaboration with a non-governmental organisation (NGO) and on a case-by-case basis, offers in-kind humanitarian assistance to CAT and asylum claimants to prevent them from becoming destitute, covering temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, and medical service. To

ensure that the basic needs of claimants are met, each case is reviewed monthly by the responsible NGO. The SWD monitors the programme closely, reviews assistance level from time to time and makes adjustments as necessary. The same assistance will be available to claimants under the USM.

The Way Forward

16. We aim to finalize the operational details of the USM in collaboration with stakeholders, including the DLS and the UNHCR, with a view to commencing its operation by end 2013.

**Security Bureau
June 2013**