

SUBMISSION TO THE PANEL ON SECURITY OF THE LEGISLATIVE COUNCIL

On the comprehensive review of the strategy of handling non-refoulement claims

July 2018

Justice Centre Hong Kong ('Justice Centre') makes the following submissions to the Panel on Security ('the Panel') of the Legislative Council of the Hong Kong Special Administrative Region, China ('Hong Kong') on the agenda item 'An update on the comprehensive review of the strategy of handling non-refoulement claims', for its meeting on 10 July 2018.

In its paper for the meeting, the Administration states it is considering proposing a number of amendments to the Immigration Ordinance, Cap 115, the Firearms and Ammunition Ordinance, Cap 238 and the Weapons Ordinance, Cap 217, including the following:

- (i) Shortening the time permitted for claimants to complete and submit a Non-refoulement Claim Form;
- (ii) Reducing the time allowed for the inclusion of supporting documents and for the filing of a notice of appeal to the Torture Claims Appeal Board (TCAB);
- (iii) Allowing the Immigration Department to conduct a screening interview in a language other than the claimant's mother-tongue (against the express intentions of the applicant/claimant); and
- (iv) Allowing immigration officers to possess arms and ammunition.¹

The Administration's proposed legislative amendments raise serious concern regarding the impact they would have upon the fairness of the Unified Screening Mechanism (USM), and thus the protection of the rights of non-refoulement claimants. We are equally concerned that they would not achieve the apparent aim of improving efficiency of the USM, and will very likely lead to judicial review challenges, causing unnecessary further delay and avoidable public expenditure.

The detained fast track (DFT) in the United Kingdom, a process for expediting the consideration of asylum claims (while the person was in detention) is an illustrative example.² The DFT was aimed at speeding up the handling of

¹ Security Bureau and Immigration Department, "An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No. CB(2)1751/17-18(01), 9 July 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1751-1-e.pdf>

² Detention Action, "End the Detained Fast Track", available at: <http://detentionaction.org.uk/campaigns/end-the-fast-track-to-despair>, accessed on 9 July 2018.

asylum claims, but instead led to avoidable judicial review challenges and significant public expenditure. At present, most (if not all) DFT claims are being re-determined³ – thus creating a significant backlog of thousands of claims, following a finding by the Court of Appeal that the system was unlawful, due to the strict time limits in operation, which were ‘structurally unfair’.⁴

Fairness of the USM and the recommendations of the Committee against Torture

The fairness of the USM is paramount given the potential consequences of failure: it is a system that operates to ensure that non-refoulement claimants are not returned to a situation of persecution, torture and/or death. It is of concern that the drop in the number of claims is considered by the Administration as a success,⁵ without discussions of the badly needed increase in the quality of decision making. The Committee against Torture (CAT) has repeatedly made clear recommendations for Hong Kong to improve the fairness and transparency of the USM. Regrettably, none of CAT’s recommendations for Hong Kong regarding asylum seekers and refugees has yet been accepted by the Administration, nor even mentioned in the Administration’s paper for this meeting. Informed discussions about how to implement the recommendations of CAT are long overdue. The Administration and the Panel are invited to reconsider the proposals made by the CAT in its concluding observations for Hong Kong in February 2016, including:

- Ensuring unhindered access to the USM to all irrespective of immigration status;
- Enhancing the fairness and transparency of the screening process, by, inter alia, publishing redacted TCAB decisions;
- Developing mechanisms for the early identification of victims of torture and access to redress;
- Allowing refugees to remain legally in Hong Kong; and
- Considering the extension of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol to Hong Kong.⁶

Fairness requires the exercise of flexibility and recognition that the standard timetable has to be enlarged in a variety of instances, as held by the Court of Appeal in the United Kingdom.⁷

³ Diane Taylor, “High court rules more than 10,000 asylum seekers treated unfairly”, *The Guardian*, 20 January 2017, available at: <https://www.theguardian.com/uk-news/2017/jan/20/uk-high-court-rules-10000-asylum-seekers-treated-unfairly-detained-fast-track>

⁴ Detention Action, “End the Detained Fast Track”

⁵ Security Bureau and Immigration Department, “An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)”, para 2.

⁶ Committee against Torture, ‘Concluding observations on the fifth periodic report of China with respect to Hong Kong, China’, CAT/C/CHN-HKG/CO/5, 3 February 2016, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/HKG/CAT_C_CHN-HKG_CO_5_22478_E.docx

⁷ *Refugee Legal Centre v SSHD* [2004] EWCA Civ 1481, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1481.html>.

The proposals considered by the Administration

Whereas, the Administration's recent proposals appear irrational and even arbitrary, failing to provide for this flexibility. Justice Centre notes with concern that it is even unclear from the Administration's paper what the problems and legitimate aim/s these proposals are purporting to address, and why the impact upon procedural fairness has not been considered within the Administration's paper. Whilst it appears that most of the proposals are aimed at reducing delay, it is apparent that in the Administration's view, this delay is deliberately caused by non-refoulement claimants.⁸ However, there is no publicly available data to track whether there are delays within the USM. Moreover, the minimal information the Administration provides does not reasonably support the conclusion that the predominant cause of delay within the USM is non-refoulement claimants deliberately delaying the process. Furthermore, we note there is no consideration of evident delays on the part of the Immigration Department (or the TCAB), and what if any measures would be adopted to help reduce these delays.

Proposal to conduct a screening interview or a hearing in a language other than the claimant's most proficient

The proposal to allow the Immigration Department or the TCAB to conduct a screening interview or a hearing in a language that is not the claimant's most proficient is wrongheaded. It presumes that the Immigration Department or the TCAB can somehow externally determine to what extent a claimant/appellant understands and can communicate in another language. It is entirely unclear how this can be achieved. Indeed, for a hearing to be conducted in one's native language is a basic measure required to ensure adherence to the fundamental principles of fairness, ensuring that the claimant can understand and be understood properly. It is highly unlikely that such a proposal will increase the efficiency of the USM. As stated in one of the leading practitioners guides in respect of asylum/refugee law⁹:

For those giving evidence of life and death affairs in a foreign language, the quality of interpretation takes on particular importance...Where interpretation is found to be unsatisfactory, it will almost certainly require that the evidence be taken again.

Shortening the timeline for submission

Similarly, the proposals to shorten the timeline for submission to the Immigration Department or the TCAB will very likely lead to further delays. Getting relevant information about a claim right early saves time and money, avoiding unnecessary appeals and judicial reviews, as shown in the Solihull Pilot project in the United Kingdom.¹⁰ Many non-refoulement claimants are highly vulnerable, experiencing the continuing impact of trauma, having suffered sexual and gender based violence or torture, and may be unable or unlikely to disclose issues within an accelerated timeline.

⁸ See, for example, the Administration's claim that there have been 'delay tactics' in paragraph five of its paper for the meeting.

⁹ Symes and Jorow, *Asylum Law and Practice*, Second Edition, para. 16.39, p. 925

¹⁰ Jane Aspden, "Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission", October 2008, available at: <http://www.refworld.org/pdfid/4c62615e2.pdf>

The Administration does not provide any information about how to ensure adequate opportunity for these claimants to submit evidence.

Duties of the Immigration Department and the TCAB

Regarding the Administration's proposal to specify that duties of the Immigration Department and the TCAB do not include assisting the claimants to substantiate their claims/appeals, it has been held by the European Court of Human Rights that the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.¹¹ We note that the language of Article 3 of the European Convention on Human Rights is the substantially same as that of the Hong Kong Bill of Rights. The decision of the European Court of Human Rights is highly persuasive.

Justice Centre would also like to point out the available opportunity to honour the provision in paragraph nine of the Principles, Procedures and Practice Directions (PPP) of the TCAB regarding the agreement on issues between the claimant and the Director of Immigration.¹² In practice, this provision is rarely adhered to by counsel for the Immigration Department. As recognised in the PPP, complying with this provision will reduce the amount of time and public costs. This can increase the number of appeals/petitions the TCAB can handle without the need for legislative amendments.

Allowing immigration officers to possess arms and ammunition

Another example of a potentially irrational and arbitrary proposal is that of considering legislative amendments to allow immigration officers to possess arms and ammunition. In its paper, the Administration does not provide any cases of violence or other incidents in immigration detention that warrant such significant legislative amendments. It is unclear whether the Administration has considered the amount of public expenditure, nor the safety and security implications involved either.

Medical examinations

It is also unclear what exactly the proposals the Administration makes in paragraph 18 are intended to address; as regarding claimants not attending medical examinations arranged for by the Immigration Department on time. Justice Centre also seeks clarification from the Administration whether medical reports written by doctors arranged for by the Immigration Department are submitted to the Immigration Department or the TCAB directly or are given to the claimants to then submit to the Immigration Department or the TCAB.

¹¹ *R.C. v Sweden*, Application No. 41827/07, available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/R.C.%20v.%20Sweden%20%28Application%20no.%2041827-07%29_0.pdf

¹² *Principles, Procedures and Practice Directions of the Torture Claims Appeal Board* (Fifth Edition), 12 September 2016, available at: <http://www.sb.gov.hk/eng/links/tcab/PPP.pdf>

Proposals that can prevent delay in a sustainable manner without concern over fairness

It is unclear from the Administration's paper whether they have considered proposals that *can* prevent delay in a sustainable manner without raising concern over the protection of the rights of asylum seekers.

For example, Justice Centre has proposed the establishment and funding of not-for-profit legal representation, such as community legal centres. Such structures can train specialised lawyers in non-refoulement law. Please note our submissions to the Panel on Administration of Justice and Legal Services for its meeting on 21 July 2017.¹³ Training more specialised lawyers will allow more asylum claims to be handled more quickly in the long run. Justice Centre's other proposals that can prevent delay include:

- Provide quality information about the USM to non-refoulement claimants or potential claimants at the earliest opportunity;
- Ensure early access to legal advice and legal representation to non-refoulement claimants;
- Commission an independent review of the quality of decision making of the Immigration Department and the TCAB;
- Increase transparency about the evaluation of non-refoulement claims, including publishing redacted TCAB decisions;
- Commission an independent study on the reasons for the distinctly small number of non-refoulement claimants represented at the TCAB to ensure the protection of the right to a fair hearing of every claimant; and
- Make arrangements for further increasing resources for the Immigration Department and the TCAB for handling non-refoulement claims.

Further submissions of Justice Centre and civil society

Justice Centre would also like to draw the attention of the Panel to the following submissions we made previously to this Panel, the Subcommittee on Children's Rights, and the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims:

- Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims on the screening of non-refoulement claims and appeal procedures for its meeting on 21 May 2018;¹⁴

¹³ Justice Centre Hong Kong, "Submission to the Panel on Administration of Justice and Legal Services: Legal aid for non-refoulement claimants", 17 July 2017, LC Paper No. CB(4)1427/16-17(01), available at: <https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718cb4-1427-1-e.pdf>

¹⁴ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims on the Screening of Non-Refoulement Claims and Appeal Procedures", LC Paper No. CB(2)1432/17-18(01), May 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1432-1-e.pdf

- Submission to the Panel on Security on the comprehensive review of the strategy of handling non-refoulement claims for its meeting on 6 June 2017;¹⁵
- Submission to the Subcommittee on Children's Rights on the establishment of a data bank for its meeting on 4 April 2018;¹⁶ and
- Submission to the Subcommittee on Children's Rights on refugee children's rights for its meeting on 14 July 2017.¹⁷

Moreover, the Hong Kong UPR Coalition, a coalition of civil society organisations that Justice Centre facilitates, made a joint civil society Universal Periodic Review (UPR) submission to the Office of the United Nations High Commissioner for Human Rights (OHCHR) for the Third Cycle UPR on China, including Hong Kong.¹⁸ Recommendations for the Hong Kong Government on the rights of asylum seekers and refugees are raised in the submission, which is wholly or partly endorsed by 45 civil society organisations.

Lastly, Justice Centre expresses serious concern over the unavailability of the Administration's paper for the meeting in Chinese until late afternoon two working days beforehand, and in English, an official language in Hong Kong, until the afternoon before the meeting. This raises concern over whether Panel members have adequate time to prepare for the meeting and how informed the discussions will be. This also suggests that the Administration does not see the importance of consulting civil society actors or non-refoulement claimants, especially those who do not read Chinese. Justice Centre welcomes the opportunity to provide further information to members of the Panel in writing or in person.

Recommendations

Justice Centre recommends the Panel express opposition to the following legislative amendments considered by the Administration:

¹⁵ Justice Centre Hong Kong, "Submission to the Panel on Security: Comprehensive Review of Strategy of Handling Non-Refoulement Claims", LC Paper No. CB(2)1432/17-18(01), June 2017, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1432-1-e.pdf

¹⁶ Justice Centre Hong Kong, "Speech Delivered by Annie Li, Research and Policy Officer, in the Meeting of the Subcommittee on Children's Rights of the Legislative Council on Establishing a Central Data Bank for Children", 4 April 2018, available at: http://www.justicecentre.org.hk/framework/uploads/2014/03/20180404-LegCo-Subcommittee-on-Children-Speech_Final.pdf

¹⁷ Justice Centre Hong Kong, "Submissions to the Subcommittee on Children's Rights of the Legislative Council", LC Paper No. CB(4)1432/16-17(03), July 2017, available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-submissions-to-Subcommittee-on-Childrens-Rights.pdf>

¹⁸ Hong Kong UPR Coalition, "Joint civil society submission", March 2018, available at: http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf

- Shortening the time for claimants to prepare and submit a claim form/ notices of appeal and to submit evidence;
- Allowing an Immigration Department screening interview or a TCAB hearing to be conducted in a language other than the claimant's most proficient if the Immigration Department or the TCAB can presume the claimant can communicate in the second language; and
- Limiting the opportunity for claimants to give supplementary evidence.

For the other proposed legislative amendments, Justice Centre is concerned that there is insufficient information to give due evaluation. It should be noted that all proposals have to be considered in their totality.

Justice Centre also makes the following recommendations:

- Provide quality information about the USM to non-refoulement claimants or potential claimants at the earliest opportunity;
- Ensure early access to legal advice and legal representation to non-refoulement claimants;
- Commission an independent review of the quality of decision making of the Immigration Department and the TCAB;
- Increase transparency about the evaluation of non-refoulement claims, including publishing redacted TCAB decisions;
- Commission an independent study on the reasons for the distinctly small number of non-refoulement claimants represented at the TCAB to ensure the protection of the right to a fair hearing of every claimant; and
- Make arrangements for further increasing resources for the Immigration Department and the TCAB for handling non-refoulement claims;

Justice Centre will continue to recommend the following generally:

- Hong Kong should amend legislation providing equal rights to access permanent residency for children of asylum seekers, refugees and all migrant workers, consistent with the children of other migrants under Article 24 of the Basic Law within one year;
- Consistent with the concluding observations of the CAT,¹⁹ Hong Kong should ensure that children of migrant workers, refugee and asylum-seeking children have equal access to basic services, including health, education and other social services;
- China should extend the Convention Relating to the Status of Refugees and its 1967 Protocol to Hong Kong within one year;
- Hong Kong should not set an inappropriate high threshold for granting international protection and should grant asylum seekers and refugees the right to work immediately;

¹⁹ Committee against Torture, 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China'.

- Consistent with the concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR),²⁰ Hong Kong should ensure that all children, including asylum-seeking and refugee children, have free access to compulsory education on an equal basis immediately. Hong Kong should also provide scholarships and resource support for education for asylum seekers and refugees immediately; and
- Consistent with the concluding observations of the Human Rights Committee, CESCR and CERD,²¹ Hong Kong should amend the Race Discrimination Ordinance within one year so that it applies to Government functions and powers, and covers the grounds of nationality, citizenship, residence status, and language.

Questions for the Administration

- When will the Administration implement each of the following recommendations made by the Committee against Torture:
 - Ensure unhindered access to the unified screening mechanism to all individuals wishing to claim protection, irrespective of their immigration status;
 - Enhance the fairness and transparency of the screening process by, inter alia, ensuring that non-refoulement claims are thoroughly and individually examined; allowing sufficient time for claimants to fully indicate the reasons for their application and to obtain and present crucial evidence, such as their own medical expert evidence; and publishing redacted versions of the decisions of the TCAB;
 - Develop mechanisms for the early identification of victims of torture, their priority access to the unified screening mechanism and their immediate access to redress;
 - Grant an alternative immigration status to refugees and substantiated unified screening mechanism claimants that would allow them to remain legally in Hong Kong, China until the end of the process and facilitate their access to legal work in order to avoid destitution and degrading treatment;
 - Consider extending to it the 1951 Convention relating to the Status of Refugees and its 1967 Protocol?
- How does the Administration ensure there will be adequate opportunity for non-refoulement claimants, especially those who are impacted by trauma or have suffered sexual and gender based violence or torture, to give evidence, if the timeline for submission is shortened?

²⁰ Committee on Economic, Social and Cultural Rights, "Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China", E/C.12/CHN/CO/2, 13 June 2014, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/CHN/CO/2&Lang=En

²¹ Human Rights Committee, "Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)", CCPR/C/CHN-HKG/CO/3, 29 April 2013, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3&Lang=En;

Committee on Economic, Social and Cultural Rights, "Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China"; and Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: China (including Hong Kong and Macau Special Administrative Regions)", CERD/C/CHN/CO/10-13, 15 September 2009, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/CHN/CO/10-13&Lang=En

- Has the Administration maintained data to track delays, if any, in the USM? How long did the handling of non-refoulement claims take on average in each of the years from 2014 to 2018? What was the longest time taken? How many claims were delayed?
- The Administration apparently claims that non-refoulement claimants have delayed the process of handling non-refoulement claims. How has this been determined? What was the number of such cases in each of the years from 2014 to 2018? What level of immigration officers made that judgment?
- What is the Administration's position on the proposal to establish and fund non-for-profit legal representation such as community legal centres to reduce the costs of the provision of legal advice and representation and to train specialised refugee lawyers?
- How much public expenditure will be involved in allowing immigration officers to possess arms and ammunition?

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About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable forced migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

For more information please visit: www.justicecentre.org.hk