
SUBMISSIONS TO THE PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES

Legal aid for non-refoulement claimants

For discussion on the agenda item

“Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases”
on 18 July 2017

Introduction

This paper outlines the recommendations of Justice Centre Hong Kong relating to access to legal aid for non-refoulement claimants in Hong Kong. Access to legal aid and access to justice is of paramount importance to non-refoulement claimants, who may face persecution, torture or even death if returned to their countries of origin. We believe that the focus of the legal aid policy should be on improving the regime as a whole in the long run, including developing the expertise of lawyers and setting out clearer guidance and accountability mechanisms, which will contribute to strengthening the rule of law in Hong Kong.

Accusations that the legal profession misuses public funds that are not supported by robust evidence harm the reputation of both the legal profession, the Legislative Council and with this the rule of law. Discussion should not be limited to reacting to accusations of misuse of legal aid in a piecemeal manner, especially in a context where there is a continuing negative public discourse about non-refoulement claimants that is often factually unfounded.

Developing the expertise of lawyers through publicly-funded law centres

The Administration has repeatedly raised concerns over the shortage of duty lawyers that are trained to provide assistance to non-refoulement claimants and the backlog of claims.¹ The Security Bureau has been liaising with for Duty Lawyer Service on this issue, but the DLS is constrained in its capacity.² As of 31 March 2017, there were 8,956 outstanding non-refoulement claims³, but the number of claims referred to

¹ Security Bureau, “An update on the comprehensive review of the strategy of handling non-refoulement claims”, LC Paper No. CB(2)1533/16-17(03), June 2017, page 6, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>

² Security Bureau, “An update on the comprehensive review of the strategy of handling non-refoulement claims”, LC Paper No. CB(2)1533/16-17(03), June 2017, page 6.

³ Immigration Department, “Statistics on Non-refoulement Claim”, available at: <http://www.immd.gov.hk/eng/facts/enforcement.html>, accessed on 17 July 2017.

PROTECTING FORCED MIGRANTS' RIGHTS

qualified lawyers by the DLS has remained at 13 per working day⁴. The Security Bureau has resorted to pre-arrival measures to 'contain' the number of non-refoulement claimants⁵, which gives rise to concerns in relation to access to non-refoulement protection of individual in need of such protection. Moreover, new measures such as the Pre-arrival Registration System for Indian nationals may have an adverse impact on tourism and business.

To develop the expertise of lawyers in this area of law and speed up the Immigration Department's determination of non-refoulement claims, the Administration can consider funding specialist lawyers through non-governmental organisations ('NGOs'). There are publicly-funded law centres in comparable jurisdictions, including the UK, Australia, Canada, New Zealand and the USA. PILnet and DLA Piper have also recommended in their recent research "THIS WAY - Finding Community Legal Assistance in Hong Kong" the establishment of community legal centres funded by the Government in Hong Kong.⁶ In particular, in the UK, the Government funded refugee lawyers through the NGO Refugee Legal Centre, which operated close to 20 years and produced many of the leading barristers, solicitors, and Judges Government lawyers practising today.⁷

Representation of non-refoulement claimants on appeal

Currently, only 9% of non-refoulement claimants are represented for their petitions/appeals at the Torture Claims Appeal Board ('the TCAB').⁸ The distinctly low proportion of claimants represented at the TCAB stage shows that there is a systematic problem in this policy. There is very little publicly available information about the legal aid policy relating to these petitions/appeals and independent research should be carried out to understand the reasons for this problem. It appears that the duty lawyer of a claimant who has assisted with the claim at first instance, i.e. when it was determined by the Immigration Department, decides whether the claimant is to continue to be represented.⁹ However, there is a lack of information about any

⁴ Security Bureau, "An update on the comprehensive review of the strategy of handling non-refoulement claims", LC Paper No. CB(2)1533/16-17(03), June 2017, page 6.

⁵ Security Bureau, the Hong Kong Government, "Legislative Council Brief: Immigration Ordinance (Chapter 115)- Immigration (Unauthorized Entrants) (Amendment) Order 2016", 18 May 2016, available at http://www.legco.gov.hk/yr15-16/english/subleg/brief/2016ln066_brf.pdf

⁶ PILnet & DLA Piper, "THIS WAY - Finding Community Legal Assistance in Hong Kong", May 2017, page 15, http://www.pilnet.org/images/FINAL_REPORT_31_May_2017.pdf

⁷ Refugee Legal Centre website, <http://www.refugee-legal-centre.org.uk/about-us/background.html>, accessed on 17 July 2017.

⁸ Access to information request, "Torture Claims Appeal Board Operations", available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_oper#incoming-512, accessed on 17 July 2017.

⁹ *Ibid.*

guidelines issued by the TCAB or the Legal Aid Department for duty lawyers to determine whether a claimant should be represented. Claimants are not allowed to appeal decisions of duty lawyers not to represent them at the TCAB either and Justice Centre is not aware of any oversight. This is detrimental to claimants' right to a fair hearing and to the prompt and efficient operation of the TCAB. Claimants have no right to work in Hong Kong and rely on Government allowance of about HKD\$3,000 for all expenses, including housing, food and transportation. It is extremely unlikely for claimants to be able to afford a private lawyer for their claims. Moreover, if more non-refoulement claimants are represented at the TCAB and their cases are argued properly, there may be fewer applications for judicial review of TCAB decisions.

Independent system to review complaints or allegations of misuse of legal aid

In the Administration's paper for this meeting of the Panel on Administration of Justice and Legal Services on 18 July 2017 titled "Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases", in the table about 'legally-aided cases involving judicial reviews' on page 5, the number of legal aid applications made and legal aid certificates granted in the last three years were divided into those made by/granted to non-refoulement claimants and 'others' without any explanation of why non-refoulement claimants were singled out.¹⁰ This might give some the impression that the Administration may be suggesting that non-refoulement claimants deserve differential treatment about misuse of legal aid, which is an unfair suggestion as non-refoulement claimants are required to go through the same procedure and the means and merits test provided by the Legal Aid Ordinance, Cap. 91 as other individuals.

To strengthen confidence in the legal aid system and the rule of law, it is important both to ensure proper use of legal aid as well as address any unfounded allegations of its misuse. A robust independent system should be put in place to investigate claims of misuse of legal aid. Independent lawyers can be appointed to conduct file reviews and report on their findings.

Recommendations

We call upon the Home Affairs Bureau and the Legal Aid Department to:

- Develop the expertise of lawyers, especially in the area of refugee law, through authorising and/or funding NGOs to deliver legal services to protection claimants;

¹⁰ Home Affairs Bureau and Legal Aid Department, "Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases" (LC Paper No. CB(4)1386/16-17(03)), July 2017, page 5, available at: <http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718cb4-1386-3-e.pdf>

- Provide clear guidelines for duty lawyers on what factors to consider when assessing whether a non-refoulement claimant should be represented on appeal at the TCAB and consult civil society and the joint professions (i.e. the Law Society and Bar Association) for the purpose of drawing up the guidelines;
- Introduce mechanisms for non-refoulement claimants to appeal and/or obtain an independent review of the decision/s of duty lawyers not to represent them at the TCAB;
- Commission independent bodies such as university law schools to conduct research 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
- Put in place a robust independent system to review complaints or allegations of misuse of legal aid.

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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