

STATEMENT (8 DEC 2015)

Motion proposed for the Legislative Council Meeting on 16 December 2015 on "Expediently formulating measures to combat the problem of 'bogus refugees'"

On 4 December 2015, the Hon. IP Kwok-him gave notice to move a motion on "Expediently formulating measures to combat the problem of 'bogus refugees'" at the LegCo Council meeting of 16 December 2015 - the content of which can be found [here](#). This statement outlines Justice Centre's position on the proposed motion.

Justice Centre welcomes the opportunity for a review of the Unified Screening Mechanism (USM) to process non-refoulement claims on the grounds of persecution; torture; and cruel, inhuman, degrading treatment or punishment (CIDTP). Justice Centre, and other concerned stakeholders have been calling for a review of the USM for several months, as it is a new procedure, and like any new system, should be closely monitored, evaluated and reviewed. Justice Centre regrets that there have been so few opportunities for consultation with relevant stakeholders, including civil society, to give feedback to the USM.

We urge that any review or evaluation of the USM not be measured solely against "stopping abuse" but centred on how the USM is working to ensure that those in genuine need of protection receive it, underpinned by a human rights-based approach. In this regard, Justice Centre has several concerns about the proposed measures set forth in the motion, as well as general concerns on the USM relevant to any review of the system, which are listed below.

These concerns are informed by a comprehensive survey (USM Survey) that we have conducted in the past 6 months with 200 claimants from 33 countries of origin to understand their experiences at all stages in the USM process. This research is the evidence base for an upcoming Justice Centre report on the USM next year, but there are some preliminary results that we wish to bring to LegCo members' attention, as these are relevant to the concerns in this proposed motion.

First, Justice Centre would like to outline the following concerns on specific "measures to prevent abuse of the unified screening mechanism" raised in the motion:

1. On "Stepping up law-enforcement efforts to intercept illegal immigrants"

Hong Kong must first and foremost abide by its commitments in the *UN Convention against Torture (CAT)* and the *International Covenant on Civil and Political Rights*, including the principle of non-refoulement on which the USM is based - the duty not to return or expel someone to places where their lives or freedom may be at risk. Every person who crosses into the HKSAR Territory has a right to an individual procedure to claim protection, and there is a body of international jurisprudence that provides guidance on the duty of the state not to engage in "push backs" even in international waters.

2. On "Expediting the procedure for screening non-refoulement claims"

It is clear that the Immigration Department faces a challenge with backlogs of claims. A large backlog is not in the interest of Hong Kong, nor claimants with genuine claims, who must then wait for long periods of time without a decision on their claim. However, simply taking measures to shorten processing times without addressing the quality, training and resourcing of the system (such as in areas of interpretation, country of origin information or training of duty lawyers or decision-makers, among others) may risk curtailing "high standards of fairness" as set out by the courts. On a more practical level, mere "expediting" may actually result in more erroneous rejections at first instance and, consequently, more time and resources spent on appeal and judicial review processes in the courts - which would have implications for the backlog problem.

3. On "Setting a statutory time limit for lodging non-refoulement claims"

It has been [reported by](#) the Hong Kong Administration to the Legislative Council that, according to government statistics, on average, claimants lodge a claim in the following time brackets after entering Hong Kong (Under 3 months 26%; 3 to 12 months 33%; 13 to 24 months 16%; Above 24 months 23%). What this information does not differentiate is how many of these claims are claims from new arrivals to Hong Kong versus people who were simply transferred from the old UNHCR system to the USM (many of whom had already been waiting for a decision from the UNCHR for several years).

Moreover, a proposed time limit for lodging a USM claim based on arrival to Hong Kong would not take into consideration the obligations that the Hong Kong Government has to provide non-refoulement protection to *refugees sur place* – people who did not originally leave their country of origin or come to receiving country originally to seek protection, but who may become a refugee at a later date owing to changes in the situation in their country of origin while they are abroad, such as a revolution, civil war, coup d'état.

Furthermore, a cause of delay in filing a claim in the USM may stem from lack of information on the USM and how to apply for people seeking protection. Justice Centre notes that very little information on USM is actually available on the Immigration Department website or telephone hotline; and the Immigration Department did not have readily available information to our Access to Information request to seek details about what information is provided on the USM at the airport and border points. At the start of the USM last year, Justice Centre conducted previous research that found that many people were confused about how to access this new system, the findings of which are documented in our 2014 Report, [Meeting the Bare Minimum](#).

Preliminary results from our USM survey for Justice Centre's upcoming follow-up report on the USM finds that 22% of the respondents stated that one reason for not requesting protection at the border was that they were unaware of the procedure for doing so and did not know what to ask for. In fact, only 5 out of the 200 respondents stated that they obtained information about seeking protection from Immigration at the airport. Most people obtained information on the USM from friends, Justice Centre, UNHCR or from other NGOs. Accessing clear and coherent information is essential for meaningful access to justice.

4. On "Imposing a cap on the publicly-funded legal assistance"

A cap on publicly-funded legal assistance was highlighted in the Hong Kong Government's proposed "enhancements" to the USM first circulated in December 2014, which have not yet been enacted. The Law Society and the Bar Association of Hong Kong both gave their views on these proposals earlier this year, [as did Justice Centre](#) and other stakeholders, including on aspects related to legal assistance.

The proposed USM "enhancements" make reference to caps on legal assistance in other jurisdictions. Justice Centre urges caution in the use of other common law jurisdictions as comparators exclusively in the context of a cap on legal aid, as these contexts are quite distinct to those in Hong Kong for several reasons:

- a) The countries mentioned in the Hong Kong Government's proposed enhancements are all signatories to the 1951 Refugee Convention with significantly higher acceptance rates than evidenced in Hong Kong.
- b) Those countries are dealing with a significantly more well-developed body of law and expertise in this area, able to more efficiently identify those in need of legal protection. The legal community has had more time to amass experience in dealing with claims of this nature and to develop skills to deal with this vulnerable population.
- c) The scope for error is less in any established system than in a new one, and thus more flexibility should be built into the USM in its early stages of commencement, rather than less.
- d) Furthermore, in the other jurisdictions referred to, mixed modes of legal aid service delivery are possible, such as the existence of law centres or public interest law organisations. As such, the rights of the more vulnerable are more protected as there are more opportunities for people to receive legal assistance even if they are unable to obtain sufficient assistance from public-funded legal aid.

For these reasons, Justice Centre has [communicated before](#) to the Security Bureau and the LegCo Panel on Security that it would be premature to now impose a limit on the number of hours that lawyers can dedicate to a case. This limit is likely to lead to further decline in the quality of legal service provided to protection claimants.

5. On "Setting up holding centres to properly manage non-refoulement claimants"

Justice Centre commends Hong Kong for offering an alternative to unnecessary detention by allowing people seeking protection to be released on recognizance and live in the general community. As the International Detention Coalition notes, "under international law, immigration detention is only ever meant to be used as a last resort and where it is necessary, reasonable, and proportionate to a legitimate government objective." UNHCR's 2014-2019 global strategy to support governments to end the detention of asylum-seekers and refugees, entitled [Beyond Detention](#), notes:

"Research in fact shows that not even the most stringent detention policies deter irregular migration, and further, that there are workable alternatives to detention that can achieve governmental objectives of security, public order and the efficient processing of asylum applications. Importantly, as seeking asylum is not an unlawful act, detaining asylum-seekers for the sole reason of having entered without prior authorisation runs counter to international law. Under international law, individuals have the right to seek asylum, and if they do so, to be treated humanely and with dignity. Access to open reception arrangements and fair and efficient status determination procedures need to be part of the overall State architecture."

The motion does not explain what “holding centres” may refer to, but Justice Centre is concerned that such proposed “holding centres” may unduly restrict the rights, movement and freedoms of people seeking protection. Justice Centre therefore warns caution at this proposal.

In addition to the above concerns about specific suggestions in the motion, Justice Centre also raises the following general concerns relevant to the motion to review the USM

6. Terminology used publicly to refer to protection claimants

Justice Centre is highly concerned about the usage of charged language such as “bogus refugees”, “illegal immigrants” or “abusers” in public fora – particularly by members of the Administration (including the Immigration Department) who should be impartial decision-makers – and in the media, and the impact this may have on public perceptions and negative stereotyping. As Prof Alexander Betts, Director of the Refugee Studies Centre at Oxford University finds: “Words that convey an exaggerated sense of threat can fuel anti-immigration sentiment and a climate of intolerance and xenophobia.”

This language of “bogus refugees” or “illegal immigrants” runs the risk of conflating economic migrants with people seeking protection. As a result of existing policies and laws, a protection claimant has no other option but to overstay their visa, even if they come legally to Hong Kong before they are eligible to seek protection in the USM. Thus they are essentially forced into illegal status and the “illegal immigrant” label is therefore disingenuous. We have raised these concerns about charged language on [numerous occasions](#).

7. Low substantiation rate of the USM and implications for protection

Moreover, Justice Centre is concerned that the USM’s 99.7% rejection rate (based on Justice Centre’s most recent Access to Information Request to the Immigration Department that showed 12 substantiations out of 2,237 total determinations of claims) suggests that the Immigration Department may be applying an unreasonably high standard in establishing risk of persecution, torture and/or CIDTP. Indeed, Justice Centre has been made aware of negative decisions at first instance from countries that are experiencing widespread violence and are currently considered by a number of governments and the UNHCR as countries of concern for asylum purposes, such as Central African Republic, Somalia and Yemen.

In fact, Justice Centre’s survey finds that not only are respondents from certain key countries of concern being rejected, but they also, on average, wait longer for their claim to be processed in the USM. The survey shows that respondents from countries of concern had longer waiting times between filing their letter of written signification and receiving their briefing session than the overall respondents in the survey (average time for remainder of respondents, 6.9 month, versus 9.3 months for claimants from countries of concern).

8. Lack of public statistics to monitor, evaluate and review the USM

A complicating factor in reviewing the USM is the fact that there is no regularly published data related to new claims, rejections, substantiations and other relevant statistics, disaggregated by nationality. For example, Justice Centre has received many inquiries, including from members of this Legislative Council, about how many

claimants in the USM come from the Middle East in light of the recent European refugee crisis; information on number of claims filed by people from the Middle East has never been provided by the government.

As a measure of last resort, Justice Centre has been filing access to information requests to the Immigration Department to seek this data. However, the Immigration Department has only ever disaggregated statistics on claims for 8-9 countries at a time, lumping the remaining as "others", whereas Justice Centre received people from over 50 countries in 2014, most of whom fall within this "others" category.

Moreover, access to information requests are not a substitute for a public database – which is a standard practice of asylum systems in the jurisdictions that the government frequently uses as comparators – and is part and parcel of a fair, transparent and accountable system. Moreover, responding to individual, ad-hoc access to information requests is burdensome on departments themselves. We urgently request the Hong Kong Government to develop a public database on the USM, with data disaggregated by all countries of origin, updated quarterly.

9. Recent allegations of abuse of the system and potential human trafficking

In a [press release](#) from 28 October 2015, the Government stated that it was "very concerned with recent reports that some agencies in India are suspected to be arranging Indian nationals to come to Hong Kong under a fictitious 'asylum visa', providing a range of 'services' [...and...] arranging unlawful employment for them. Apart from serious abuses to our non-refoulement screening mechanism, such 'services' exposed in the reports may also involve a number of serious criminal offences amounting to human trafficking."

Justice Centre agrees that abuse of the USM system is in no one's interest, much less those in genuine need of protection. As an organisation working on forced migration issues – including protection and human trafficking – and in light of the Government's above concerns, Justice Centre would like to know how cases of potential human trafficking are handled by Immigration officials, including through the USM system. The Hong Kong Government has stated that stringent law enforcement action will be taken against criminal activities, but Justice Centre urges the government to take a comprehensive approach to human trafficking from the prevention, prosecution and victim protection perspectives.

In conclusion, Justice Centre reminds members of the Legislative Council that the USM arose from Hong Kong's legal obligations to provide protection to people with genuine *non-refoulement* risks. This should be at the heart of the system and embedded in its institutional culture.

Justice Centre has an open and welcome door to discuss these matters with any and every Legislative Council member. We urge that any review of the USM involve relevant stakeholders, such as government departments, UNHCR, the joint legal professions, civil society and also hear from the voices of refugees, survivors of torture and other people seeking protection.

In light of Hong Kong's recent appearance before the UN Committee against Torture in November 2015, and CAT's questions and concerns about the USM, Justice Centre also urges that any review of the USM incorporate CAT's recommendations set out in its forthcoming concluding observations.