

**Informal Briefing to Selected LegCo Members of the Panel on Security
for their meeting on 2 February 2016 to discuss the HKSAR Administration's
comprehensive review of the strategy of handling non-refoulement claims**

1. Protection versus removal – purpose of the review

Whilst Justice Centre welcomes a comprehensive review (the “review”) of the Unified Screening Mechanism (USM), launched by the Immigration Department (“ImmD”) and Security Bureau (“SB”), it is worth remembering that the purpose of the USM is to **protect** those at risk of persecution, torture and cruel, inhumane, degrading treatment or punishment. We are concerned that the current proposal for the Review places too much emphasis on **removal**, rather than protection. In the Administration’s Paper (LC Paper No. CB(2)648/15-16(05)), the words “remove” and “removal” are mentioned 3 times and 22 times, respectively, while the words “protect” and “protection” are mentioned 0 times. Any reform of the USM ought to have protection as its primary objective.

2. (para 10-13): pre-arrival controls and screening procedures

The Review proposal refers to introducing pre-arrival controls for people “with high immigration risks”. And, in order to “expedite the screening process” and “deter clear abusers, whilst ensuring that screening procedures will continue to meet with the high standards of fairness required by law”, the Government has proposed amending the Immigration Ordinance, with the 3 objectives of:

- a. provide statutory underpinning to USM, the operational procedures of which follow Part VIIC of the Immigration Ordinance
- b. tighten procedures to clearly specify the time allowed for each step and to prohibit abusive behaviour
- c. screen out manifestly unfounded claims early
- d. set out the scope and limits, as appropriate, on the provision of publicly-funded legal assistance; and
- e. enhance the operation and capacity of TCAB

Concerns:

Justice Centre notes that expedited screening procedures run the risk of placing speed and efficiency above fairness and justice. Indeed, this was the problem with the United Kingdom’s “Detained Fast Track” (DFT), which the [Court of Appeal](#) held to be systemically unfair to asylum seekers. The Supreme Court upheld this. At its height, the UK Government was detaining 1 in 4 asylum seekers for the duration of their asylum claims and was registering 99% rejection rates in the assessment of these same claims. In particular, the UK Government could not be certain of the level of risk of unfairness to particularly vulnerable people.

Questions:

- What exactly does ImmD mean by “high immigration risks”; what are the criteria for determining whether someone is “high immigration risk”; and what is the administrative process for challenging a decision on “high immigration risk”?
- What steps will ImmD/SB take to ensure an expedited screening process meets high standards of fairness?
- What timeframes do ImmD/SB have in mind for each step, and how would it “prohibit abusive behaviour”? What does “abusive behaviour” refer to?
- What constitutes “manifestly unfounded” claims and how will that be determined?
- What limits would be placed on publicly-funded legal assistance? How will ImmD/SB ensure non-refoulement claimants receive quality legal assistance? Will duty lawyers receive ongoing training?
- How might ImmD/SB enhance the operation and capacity of the TCAB? Would this involve additional training and oversight?

3. (para. 14) Detention

The Administration’s paper states that “We will carefully consider the feasibility of clarifying and strengthening ImmD’s legal power to detain claimants pending screening, whilst screening or appeal is underway, and / or after their screening is complete but they are remaining in Hong Kong for some other reasons (e.g. they have lodged a judicial review), so as to minimize their security impact, to prevent them from taking up unlawful employment, and to ensure more efficient screening and subsequent removal.”

Concerns:

The [existing detention policy](#) is consistent with UNHCR’s [position](#) that detention should normally be avoided and be a measure of last resort. Its [detention guidelines](#) also emphasise that detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Justice Centre is concerned that the ImmD is moving away from their existing policy that is consistent with guidance on the Hong Kong Bill of Rights Ordinance and the Basic Law from the Court of Final Appeal. There is a [wealth of research](#) to show that detention is not an effective deterrent, is costly and counterproductive for several reasons; and may actually be harmful for people who are already very vulnerable.

Questions:

- What is the evidence base or what research was relied to draw the conclusion that detention “minimizes a security impact, prevents unlawful employment and leads to efficient screening and removal”?
- What is the projected cost benefit to the public purse in expanding the detention state compared to the existing system which has a 97% compliance and appearance rate without detention?
- Will detaining a person because they are pending appeal or have lodged a judicial review serve as a deterrent for claimants with mistaken rejections at first instance to accessing justice?

- According to what criteria will people be screened for detention and what safeguards will be in place for vulnerable people, such as survivors of torture, families with children, unaccompanied children and claimants suffering from severe physical and mental health problems?
- How will the DLS service be expanded to ensure that detainees will have access to specialist legal representation while in detention?
- What will be the impact to the public health system in ensuring there are adequate health services within the detention estate and there will be medical experts who can identify and document survivors of torture and mental health professionals who can support detainees?
- How will Hong Kong ensure that these new detention proposals comply with the Hong Kong Bill of Rights Ordinance, the Basic Law and the [Hardial Singh principles](#) which should be applied to the proper approach to the statutory construction of any statutory power of administrative detention?

4. (para 15) Removal and enforcement

The Administration's paper states that it will strengthen liaison with local Consulates General to expedite the removal process and that it will step up enforcement against syndicates and related criminal activities. Previously, the Administration [noted](#) that certain criminal activities "may also involve a number of serious criminal offences amounting to human trafficking".

Concerns:

Unsuccessful non-refoulement claimants at first instance are entitled to appeal and, if appropriate, judicial review. In its efforts to remove "unsubstantiated claimants as soon as possible", the ImmD should still ensure that unsuccessful claimants at first instance are informed of their rights to appeal and to judicial review before commencing the removal process. We underscore the gravity of mistaken rejections and removal when it comes to non-refoulement claims, as "life and limb" are at risk for claimants, if they are sent back to a place where they may be at risk of being tortured or killed. As such, any process for removal must only be commenced after the claimant has exhausted their legal processes and/or made an informed decision not to pursue further appeals/ judicial reviews.

Questions:

- What are ImmD's proposed plans to ensure that unsuccessful non-refoulement claimants are fully informed of their legal rights to appeal and/or seek judicial review, so that "genuine" refugees with potentially mistaken rejections at first instance refugees are not wrongfully deported to their countries of origin?
- What procedures and training is in place for the identification of and assistance to potential victims of human trafficking in the USM system?

5. (para 16 & 18) Consultation process

The Administration's paper notes that "research and preparatory work is already underway on the four major dimensions identified in paragraphs 10 to 15 above" and that "throughout the review process, [The Administration] will, as always, listen to the views of stakeholders on effective measures to ensure that genuine claimants are identified without delay, abuses of the screening procedures are minimized, and economic migrants are deterred from

coming to Hong Kong for illegal work.” Lastly, the Administration notes that it plans to “identify administrative measures to expedite screening”.

Concerns:

A review is welcome on the USM, but Justice Centre and other civil society groups have raised several other concerns about the USM that it appears will receive little or no attention in the comprehensive review, such as: how people with special needs are catered for in the USM; the quality of country of origin information, training of duty lawyers and ImmD decision-makers, transparency of the USM (notably disaggregated statistics and redacted decisions); the low acceptance rate thus far; availability of quality interpretation; lack of durable solutions; the low levels of humanitarian assistance, their lack of regular immigration status; among other concerns. In the background paper, many of these concerns were also voiced by LegCo members, but appear to have gone unheeded in the proposed review.

Moreover, Hong Kong was recently reviewed by the UN Committee against Torture, a human rights treaty body that gave considerable attention to providing recommendations to the Hong Kong Government on how to improve the Unified Screening Mechanism last December. **None of these recommendations are included in the scope of this review.** Recently, the Chief Executive of Hong Kong even stated on public record that he would consider withdrawing Hong Kong from the UN Convention against Torture. As a reminder, CAT’s concluding observations include:

- a. Ensure unhindered access to the USM to all individuals wishing to claim protection, irrespective of their immigration status;
- b. Enhance the fairness and transparency of the screening process by, inter alia: (i) ensuring that non-refoulement claims are thoroughly and individually examined; (ii) 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; (iii) publishing redacted versions of the decisions of the Torture Claims Appeal Board;
- c. Develop mechanisms for the early identification of victims of torture, their priority access to the USM and their immediate access to redress;
- d. Grant an alternative immigration status to refugees and substantiated USM claimants that would allow them to remain legally in HKSAR until the end of the USM process, and facilitate their access to legal work in order to avoid destitution and degrading treatment;
- e. Consider the extension of the 1951 Refugee Convention and the 1967 Protocol to Hong Kong.

Questions:

- How and why did the Administration determine that it would focus its comprehensive review on these four issue areas and what scope does the comprehensive review have for addressing issues that fall outside these four areas that are raised by stakeholders (i.e. interpretation, transparency or training)?
- What efforts have ImmD made to ensure that appropriate interpreters are available to assist non-refoulement claimants so that their claims can be handled expeditiously?
- What kind of training, monitoring and supervision, if any, will be given to ImmD officers in relation to handling and adjudicating non-refoulement claims?

- Will the UNHCR have a monitoring and evaluation role like they do in other jurisdictions to monitor decision-making of immigration caseworkers?
- What are the details of the research and preparatory work that has already been undertaken?
- Which stakeholders have been consulted by SB/ ImmD already in relation to the Review? Which stakeholders do SB/ ImmD plan to consult as part of the Review?
- What is the time frame for the consultation with relevant stakeholders as well as the process by which it will be done (meetings, written submissions, etc.)?

6. Creation of Posts (para 19-20)

SB and ImmD plan create two new posts and the job descriptions for these posts are included in Annex D and E to the Review.

Concerns:

The job descriptions do not include minimum criteria or required expertise for the post, nor is information provided on how these posts will be recruited and selected. Neither of the two job descriptions makes any mention about a duty of the officers to liaise with relevant stakeholders, such as the joint professions, the UNHCR or civil society organisations, yet this appears to be a key component of the comprehensive review that they will steer.

Questions for ImmD/ SB:

- What are the qualifications and relevant expertise required for the AOSGC post and the AD(RAL) post respectively?
- Will these posts be appointed or recruited, recruited publicly or internally; advertised locally or both locally and internationally and open to experts from other countries to apply?
- How will these posts consult with relevant stakeholders outside of government departments?

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