

**Informal Briefing to Selected LegCo Members of the Panel on Security
for their meeting on July 7 2015 to discuss the Unified Screening Mechanism
for Non-refoulement claims**

Justice Centre has reviewed the Administration's paper that it has issued in advance of the July 7th Panel in which the USM will be discussed and we would like to bring the following concerns to your attention. We refer directly to the paragraphs in [the Administration's paper](#).

1. Regressive change in rhetoric to sweepingly label all refugees and protection claimants as "illegal immigrants" and focus on "removal" rather than protection

Since the last time that the USM was discussed by the Panel on Security, there has been a marked shift in the choice of language by the Administration. Whereas it previously used to make reference to "non-refoulement claimants", the Administration's paper makes incessant reference to refugees and protection claimants as "illegal immigrants" (mentioned no less than 12 times). This term is inaccurate, misleading and dehumanising.

It is disingenuous because the phrasing assumes that the refugees chose to commit the immigration offences (Para. 2 mentions "Foreigners who smuggled themselves into Hong Kong, and visitors who overstayed their limit of stay allowed by the Immigration Department (ImmD)" and para. 4 "illegal immigrants refusing to be removed to another country").

In reality, people seeking protection have no other option but to overstay their visa before they can file for non-refoulement protection because government policies deliberately force them to do so. For example, Immigration Department's *Note on Determination of Non-Refoulement Claims* dated February 2014 states that a person can claim for non-refoulement protection "**only if** – (a) the person is **subject or liable to removal** from Hong Kong ..." (paragraph 13, emphasis added).

It is likewise misleading in para. 9b to state that 50% entered Hong Kong legally as visitors but did not leave Hong Kong as required after their limit of stay had expired (over-stayers).

We have heard several reports of people seeking protection telling Immigration they wish to file a claim, and instead being given a visitor visa by Immigration and being then required to wait until it expires before they can file a claim. We have long advocated that people seeking protection should be granted some sort of immigration status that distinguishes them from over-stayers.

We are highly concerned about the vitriolic discourse in the media against refugees in recent months and have been in communication with the Equal Opportunities Commission on this matter. We feel the government's strong language only serves to perpetuate negative stereotyping, intolerant views and discrimination, and goes

against its positive obligation to promote human rights and raise awareness among the public.

In fact, our Director of External Relations recently wrote [an Opinion piece](#) in the South China Morning Post around World Refugee Day on this dramatic shift in language to create a blanket label of refugees as “illegal immigrants”.

Likewise, the prism through which the government views the screening system seems to be primarily focused on removal. In para. 2, the government states that “to safeguard immigration control and for the public interest, they [illegal immigrants] should be removed as soon as practicable.” In para 5, it is stated that the “objective of USM is to decide whether an illegal immigrant may (and should) be removed immediately or whether removal action should be temporarily withheld until his claimed risks cease to exist”. The focus on removal is particularly concerning when juxtaposed with the low recognition rates under the USM, seeing that the USM has only seen 8 substantiated claims in its first year (far less than 1% recognition rate). This is lower than other countries' systems and even the UNHCR's RSD prior to the USM based on comparative statistics.

Moreover, what is stated in para 5 is inconsistent with the legal requirements on the Director of Immigration in respect of protection claimants as stated by the Court of Final Appeal. In *C v Director of Immigration & Anor* (2013) 16 HKCFAR 280, it is held that: “given it is the practice of the Director, when deciding whether or not to exercise his power under the Immigration Ordinance to remove refugee claimant to the country of putative persecution, to have regard to humanitarian considerations, and that whether such claim is well-founded, is a relevant humanitarian consideration, the Director must determine whether the claim is well-founded. Moreover, any such determination must satisfy the high standards of fairness required having regard to the gravity of the consequence of the determination” (per Tang PJ, at 302). In the same case, Mason NPJ also held: “the HKSARG asserts publicly that, although not bound by the [Refugee] Convention, it nonetheless voluntarily complies with its requirements. Having adopted that policy in these circumstances, no doubt by reason of the powerful humanitarian considerations which are involved ... calls for [the Director of Immigration] to make an independent assessment of the UNHCR determination ... in making that assessment, the /director must observe high standards of fairness” (at 313). The government was required by the decision of the C case to set up the USM. It is clear from the decision of the C case that what ought to underpin the USM should be the “powerful *humanitarian considerations*” to protect claimants from risk of persecution, and not “removal”.

2. Lack of transparency on statistics and potentially misleading figures

We have long been advocating that the government provide regularly updated and readily available statistics on the USM determination and acceptance rates, as is [common practice in other developed countries](#) with screening procedures, as well as for the UNHCR.

Currently, the only time that the government publishes statistics is occasionally before these LegCo meetings or in response to individual access to information requests. Despite Justice Centre filing such requests every quarter since the USM came into place, the Government has never met our request to provide a full breakdown accounting for all nationalities. Rather, it only publishes the top five nationalities or top 10, lumping the remaining nationalities under "others". See para 9a and annex B(c).

In para. 9(c) the government states that "overall speaking, these illegal immigrants had remained in Hong Kong for 13 months on average before lodging a claim". The government also notes that there has been an "influx" of illegal immigrants. However, many of these people would simply be claimants who had only filed a UNCHR claim before the USM was implemented, and had to "enter" into the non-refoulement government system after the UNHCR stopped doing refugee status determination. Some of these claimants could have been here several years with just a UNHCR claim.

Question: Why does the Hong Kong Government refuse to publish a full breakdown of statistics disaggregated by nationality?

Question: In para. 13 the government states that since the commencement of the USM, it takes ImmD about 25 weeks on average to decide on a claim. Can the government provide the average times to decide a claim broken down by nationality of claimant?

3. Concerns over HK Government's proposed screening procedures

The paper refers, in para. 14 to proposals to achieve more efficient screening and optimising the use of available manpower. This paragraph details proposed enhancement measures introduced in December 2014. The government paper states that the Administration consulted with DLS, Hong Kong Bar Association and Law Society of Hong Kong and has revised measures for implementation later this year.

You can see the [submission from the Bar Association here](#).

Justice Centre also filed a submission [which can be viewed here](#).

Question: The responses from the joint professions as well as civil society groups in response to the enhancement measures listed out several concerns about procedural fairness. How has the government taken into account their views exactly?

Question: Has the government also consulted with the UNHCR on the proposed enhancement measures?

Question: Would the Panel on Security consider inviting deputations to give views and opening up a request for submissions on a draft of the proposed enhancements before they are adopted?

In particular, Justice Centre has always advocated on the needs of the most vulnerable to be able to navigate the USM, and the potential impact that "efficiency" enhancements might have on them. In para. 12 the government asserts that case officers from ImmD receive suitable training to attend to physical, mental or other special needs of claimants, as necessary and that claimants who have special needs or wish to have their claim processed expeditiously should approach ImmD to make such a request.

Question: What is the nature of the training received on physical, psychological and other special needs and how many "special needs" cases were screened by ImmD officers in the first year of the USM? How were these handled?

Question: How many requests for expedition of screening were made in the first year of the USM? How many of these requests were granted? How many of those who were granted have been handed down a decision on the claim?

Question: The government mentions resources that go into the USM in regards to manpower, particularly public legal aid, but language interpretation is often crucial for a fair chance in a system. Can the government provide information on how many interpreters it has, in which languages, and where there are interpretation shortages?

4. Refusal to accede to 1951 Refugee Convention and need for durable solutions

The government's position on the 1951 Refugee Convention in para. 6 is regrettable, stating that the convention has "never applied to Hong Kong, and illegal immigrants seeking non-refoulement in Hong Kong are not to be treated as 'asylum seekers or 'refugees'." In fact, one of the most frequently made recommendations by the various UN human rights treaty bodies, in their concluding observations to Hong Kong, is that the Hong Kong Government consider seeking extension of the Refugee Convention.

In this regard, it is worth pointing out that the UN Committee against Torture will be reviewing Hong Kong later this year. Just last month, they issued their list of questions, with several specific questions on the USM (see para. 6 -10 of attachment). On this note, Justice Centre is currently conducting a large-scale survey with claimants on their experience in the USM, with the aim of surveying 200 respondents, in order to submit a report to CAT as well as to publish a follow-up report to the one we published last year on "Meeting the Bare Minimum".

In para. 5, the government asserts that the "illegal immigrant" status of non-refoulement claimants will not change because of their non-refoulement claim, regardless of the result. They also state in para. 18 that "as with all other illegal immigrants, non-refoulement claimants are prohibited from taking up employment in Hong Kong under the law" and that (in para. 17) the humanitarian assistance is "not intended to provide them with extra assistance than is necessary to meet their basic needs".

For those who would not fall under the scope of the UNHCR's mandate and could not be referred for a durable solution, no additional rights or protection is conferred other than non-refoulement. The assumption underpinning the discussion on substantiated claims is that their stay in Hong Kong is temporary, pending a change in the situation of their country back home. In para. 5, it is mentioned that the purpose of the USM is to see whether removal action should be "temporarily withheld until his claimed risks cease to exist". Justice Centre's concern is that there may be people unable to access durable solutions through the UNHCR, but who may have risks that do not cease to exist for several years, if not indefinitely. These people would be stuck in legal limbo in Hong Kong.

Question: Of the 8 substantiated claims that have been recognized in the USM, have procedures started for referral to UNHCR? How many have been able to receive a durable solution?

Question: Of the 8 substantiated claims under the USM and the 24 substantiated under the enhanced administration mechanism, can the government please provide the length of time it took from when they lodged a claim to when they received a positive decision, be it at first instance or appeal), how many are still in Hong Kong, and of those still in Hong Kong, how long it has been since their claim was substantiated?