

MEETING THE BARE MINIMUM: HONG KONG'S NEW SCREENING PROCESS FOR PROTECTION

A STOCKTAKE OF THE FIRST MONTHS OF IMPLEMENTATION OF THE
UNIFIED SCREENING MECHANISM FOR NON-REFOULEMENT CLAIMS

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I. Glossary of Terms

CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFA	Hong Kong Court of Final Appeal
CIDTP	Cruel, inhuman or degrading treatment or punishment
DLS	Duty Lawyer Service
HKRAC	Hong Kong Refugee Advice Centre (now Justice Centre Hong Kong)
HKSAR	Hong Kong Special Administrative Region
ICCPR	International Covenant on Civil and Political Rights
ISS	International Social Service Hong Kong
ImmD	Hong Kong Immigration Department
LegCo	Hong Kong Legislative Council
Protection Claimant	a refugee and another person seeking non-refoulement protection in Hong Kong based on a risk of persecution, torture, or cruel, inhuman or degrading treatment or punishment
RAS	Removal Assessment Section
RSD	Refugee Status Determination
SWD	Hong Kong Social Welfare Department
UNHCR-HK	The United Nations High Commissioner for Refugees (also known as the United Nations Refugee Agency) Sub-Office in Hong Kong
USM	Hong Kong Unified Screening Mechanism for Non-refoulement Protection

About Justice Centre Hong Kong

Justice Centre Hong Kong, formerly Hong Kong Refugee Advice Centre (HKRAC), is a human rights organisation working fearlessly to protect the rights of Hong Kong's most vulnerable forced migrants - refugees, other people seeking protection and survivors of modern slavery. Justice Centre Hong Kong provides legal information and one-to-one specialised support and services, campaigns for adequate legislation and policies, conducts research and works with schools, universities and the media to fight root causes and change systems and minds. For more information, visit www.justicecentre.org.hk

II. Executive Summary

In March 2014, the Hong Kong Immigration Department (ImmD) rolled out a new screening procedure to assess claims by refugees and other people seeking protection. The mechanism brings under one process claims based on risk of return to persecution (refugee claims); torture; or cruel, inhuman or degrading treatment or punishment claims (CIDTP). These are now collectively known as "non-refoulement" claims which are assessed under a new screening system that the government has called the "Unified Screening Mechanism" (USM).

The government did not choose to implement this system; it was forced to do so by a Court of Final Appeal (CFA) ruling in 2013. The unwillingness that underpins the USM's existence plays out in the system's design, being the "bare minimum of a system". Despite being a unique opportunity to address many challenges that plagued the previous torture screening mechanism, the USM is largely a continuation of it, with a few add-ons.

The commencement of the USM was marked by "business as usual", with the government providing as little information as possible to protection claimants and the public on these new procedures. These information gaps in themselves are a significant barrier to being able to access the system and are therefore particularly problematic. It is precisely at the beginning of a new policy change when information is most needed.

To fill this gap, Justice Centre Hong Kong (Justice Centre) began to offer its own information sessions on the USM to protection claimants in their own language. There has been enormous demand for these services. At these information sessions, Justice Centre also gathered feedback from attendees on the main challenges they were experiencing in entering this new process and on their living conditions in Hong Kong.

This briefing compiles and analyses protection claimants' concerns as expressed in their questions at the information sessions, as well as their responses to individual surveys that were conducted at the beginning of the sessions. The data shows that, in these early days of the USM, protection claimants are extremely confused about the procedures to file a claim, and they have many concerns about the quality of the new system, including processing times, access to quality legal aid and interpretation services, evidentiary requirements to support a claim, appealing decisions and the potential success rate of the new system.

The feedback also shows that protection claimants, who do not have any legal status and are barred from working, truly struggle to survive in Hong Kong on the humanitarian assistance package provided by the government while their claim is pending. The fact that the government has not provided concrete details about what long-term solutions (such as local integration or resettlement to a third country) will be available for successful claimants is a glaring omission and the source of confusion, anxiety and frustration among this community.

The findings in this study are not an exhaustive list of the challenges in the new USM, but represent the main gaps that come from protection claimants' own experiences in trying to understand and enter into this new system. More issues are certain to come to the fore in time, as protection claimants begin to have their claims processed. As with any policy change, there will be unexpected challenges that could not have been foreseen, but precisely for this reason it is important to monitor, evaluate and adjust the system accordingly. Having open communication with agencies working on the ground with protection claimants is essential to this process.

The briefing shows that much is left to be desired to make the USM accessible to protection claimants, who have had a difficult time obtaining information on these recent changes, and have faced many challenges in filing a claim and

accessing this new system; navigating this new system is particularly difficult for the most vulnerable clients. Protection claimants are rightfully concerned about their living situation while they await a decision on their claim and what protection will be offered if their claim is substantiated.

The report recommends that information about the USM be more transparent and readily accessible; that information be provided to the public, policy-makers and government officials; that the government develop transparent monitoring and evaluation and information systems on USM claims and collaborate with civil society, legal experts and the UNHCR, and that due attention is given to improving protection claimants' living conditions and building in more robust durable solutions for successful claims.

III. Background to the USM

For many years, the United Nations High Commissioner for Refugees Sub-Office in Hong Kong (UNHCR-HK) conducted refugee status determination (RSD). UNHCR-HK's role in RSD in Hong Kong was due to the Hong Kong Special Administrative Region (HKSAR) Government's adamant refusal to seek the extension of the 1951 Refugee Convention and its 1967 Protocol to its territory.¹ The UNHCR-HK often made clear that it was only "filling the gap" and emphasised that States themselves are better-placed to take on this RSD function.²

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has been extended to Hong Kong since 1992. Over the years, successive judicial reviews gradually resulted in an administrative torture screening mechanism being implemented in 2004 and enhanced in 2009, followed by the instatement of a statutory mechanism in 2012. Out of the 4,969 new torture claims submitted from December 2009 to February 2014, as well as the backlog of 6,395 outstanding claims prior to 2009, the ImmD has only ever found 22 claims to be substantiated or 'accepted' (with 4,733 rejected).³

For years, legal experts and human rights advocates, including HKRAC, argued that the existence of these two separate, but parallel paths for protection was procedurally inefficient, unfair, and prone to abuse, and called for HKSAR to instead adopt a single, government-led screening mechanism. Two recent legal challenges to address these systemic deficiencies, the case of *Ubamaka* and *C* in December 2012 and March 2013, respectively, resulted in landmark judgments by the CFA and precipitated a fundamental shift in HKSAR's landscape for protection.⁴

In *Ubamaka* the CFA determined that the Hong Kong Government must also screen for cruel, inhuman or degrading treatment or punishment in addition to torture in order to be in compliance with the Hong Kong Bill of Rights,

¹ The Hong Kong Government has frequently stated: "We have no plans to extend to Hong Kong the application of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. Hong Kong is small in size and has a high and dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the abovementioned Convention were to be extended to Hong Kong. We have a firm policy of not granting asylum and do not have the obligation to admit individuals seeking refugee status under the 1951 Convention." See, for example, HKSAR Government, Third Report of the Hong Kong Special Administrative Region of the People's Republic of China under the ICESCR, UN Doc.: E/C.12/CHN-HKG/3, 30 June 2010, at para. 2.46.

² Chiu, Joanna, "Refugees at their wits' end without status in Hong Kong", *South China Morning Post*, 2 December 2012

³ HKSAR, "LCQ4: Torture Claims: written reply by the Secretary for Security, Mr Lai Tung-kuok, to a question by the Hon Tang Ka-piu in the Legislative Council today", Press Release, 7 May 2014, available at: <http://www.info.gov.hk/gia/general/201405/07/P201405070624.htm>

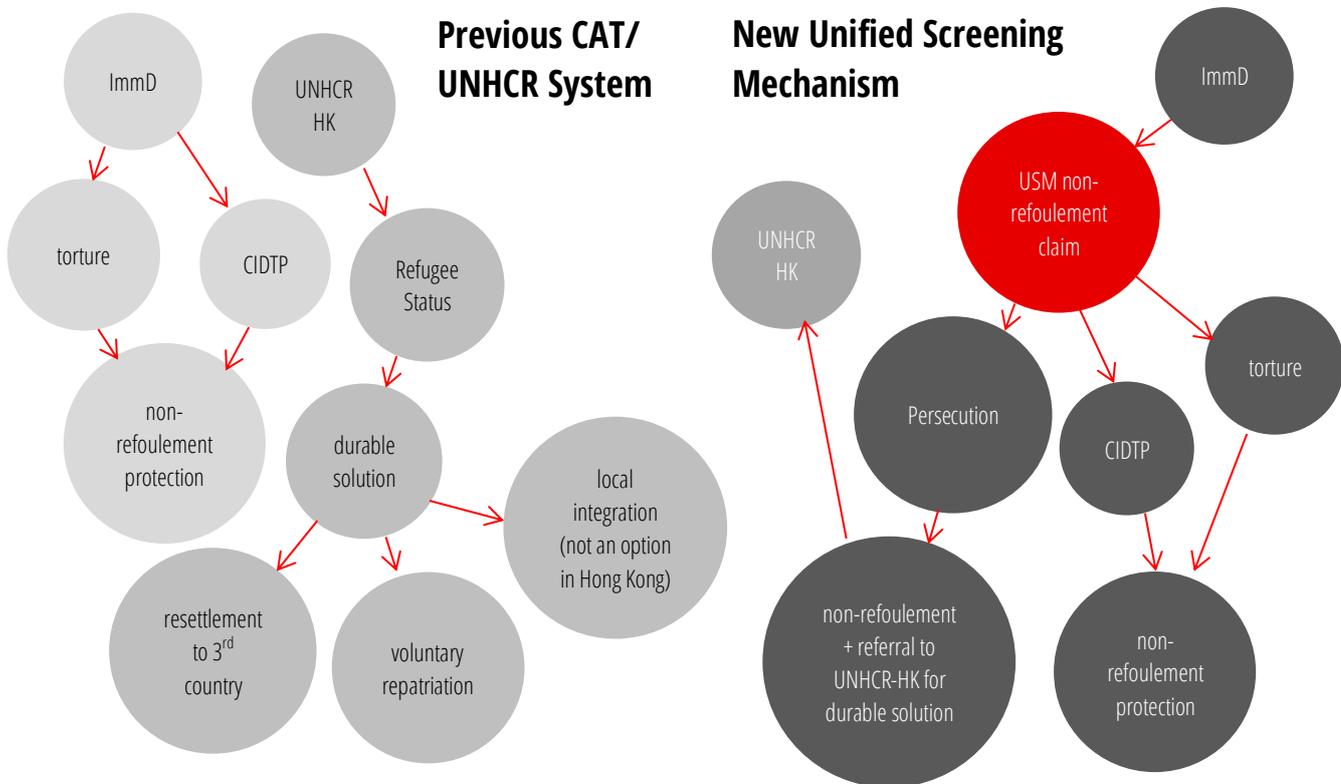
⁴ *Ubamaka Edward Wilson v. The Secretary for Security and Director of Immigration* (FACV No. 15/2011) and *C, KMF and BF v Director of Immigration and Secretary for Security* (FACV Nos. 18/19/20 2011)

implementing its obligations under the International Covenant on Civil and Political Rights (ICCPR). In the case of *C*, the CFA ruled that when the Director of Immigration decides whether to remove a person from the HKSAR territory and considers whether a person is at risk of persecution, he cannot simply outsource the decision to the UNHCR-HK but must instead conduct an independent assessment of that person's claim, satisfying "high standards of fairness" as set out in previous judicial reviews in the Hong Kong Courts.⁵

After months of silence from the government and speculation by legal experts as to the significance of these legal developments, the government finally announced, in a LegCo meeting of the Panel on Security on 2 July 2013,⁶ that it would adopt a "unified screening mechanism" to process "non-refoulement claims", "with a view to commencing its operation by the end of 2013".⁷ The USM would combine i) torture ii) cruel, inhuman or degrading treatment or punishment and iii) persecution claims "in one go".⁸

The principle of non-refoulement in international law

No State should return (re-foule) persons to another State where there exists a risk that that person would face harm, persecution or violations of their fundamental human rights.



⁵ The Courts have elaborated that "high standards of fairness" include a reasonable opportunity to establish the claim, proper assessment of the claim, and provision of reasons for rejection, as well as legal representation during completion of the questionnaire and interviews, free legal representation, the examining officer and the decision maker being the same person, sufficient training for decision makers, and provision for an oral hearing on appeal and legal representation at that hearing. See: *Secretary for Security v. Sakthivel Prabakar* (FAVC 16 of 2003) and *FB v. Director of Immigration and another*, *NS v. Director of Immigration and another*, *M v. Director of Immigration and another*, *RO and others v. Director of Immigration and another*, *PVK v. Director of Immigration and another*, *ND v. Director of Immigration and another*, (HCAL 51/2007 & HCAL 105/2007 & HCAL 106/2007 & HCAL 107/2007 & HCAL 125/2007 & HCAL 126/2007)

⁶ HKSAR, LegCo Panel on Security, Revised Agenda, II. Screening of Non-refoulement Claims, Meeting 2 July 2013, available at: <http://www.legco.gov.hk/yr12-13/english/panels/se/agenda/se20130702.htm>

⁷ HKSAR, Panel on Security of the Legislative Council: Screening of Non-refoulement Claims, LC Paper No. CB(2)1465/12-13(01), available at: <http://www.legco.gov.hk/yr12-13/english/panels/se/papers/se0702cb2-1465-1-e.pdf>

⁸ In more detail: a) Torture as defined under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT claims); (b) Torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights (BOR Article 3 claims); and/or (c) "Persecution" with reference to the principle under Article 33 of the 1951 Convention relating to the Status of Refugees (persecution claims).

As a result of these changes, and based on discussions with the Hong Government and internal pressures within the UNHCR's global operations, the UNHCR-HK began to phase out its RSD last year, even before the details of the USM were fully disclosed. This announcement and the UNHCR-HK response, without any specificity about timetables or transitional arrangements and almost no consultation, caused intense anxiety among the protection claimant community,⁹ who were frustrated about the lack of information made available on policy changes that would bear a significant impact on their lives.

The USM was only ever mentioned again on 7 February 2014, when the Hong Kong Government issued a press release stating that the USM would commence operation on 3 March 2014 - less than a month later.¹⁰ However, no practical information was available about how to navigate this new system. The government rolled out the USM with little fanfare, despite immense confusion among the protection claimant community about how to file a claim and the roles and responsibilities of the Hong Kong Government and the UNHCR-HK.

Steps to Apply for a USM Claim for Non-refoulement Protection

New claimants (including previous UNHCR claims)

People wishing to file a USM claim must provide a "written signification" to the ImmD giving a general indication of the person's reasons for claiming non-refoulement protection in Hong Kong. If the signification fails to give sufficient indication, the claim will be considered to not have been made. A person who has submitted a written signification will receive a written reply from the ImmD as to whether their written signification is satisfactory or not. If sufficient, the newly renamed "Removal Assessment Section (RAS)" (previously the Special Assessment Section) of the ImmD will make arrangements to process their claim. If insufficient, the person will have 14 days to provide further details. Once their claim begins to be processed, they will be called in for a briefing session and will then have access to publicly-funded legal aid through the Duty Lawyer Service (DLS).

Persons with previous torture/CIDTP claims

Torture/CIDTP claimants with open claims (those for whom a decision has not yet been made by ImmD) do not need to file a non-refoulement protection claim and are treated as already being in the new USM system. If they have already begun filling forms and giving interviews, they will be given a supplementary claim form and 21 days to complete it with the assistance of their assigned duty lawyer. If they have not yet begun filling forms and giving interviews, they will be asked to provide all information when they are called to do so.

Surrendering to Immigration

A key eligibility requirement for filing a non-refoulement claim is "being subject or liable to removal from Hong Kong", being unable to return to the Risk State or having the right to land in or return to any other State in which the person would be entitled to protection, or being "a person whose surrender is requested in surrender proceedings" (extradition). In effect, persons who enter HKSAR lawfully (many new protection claimants come on tourist visas) must wait until their visa has expired, thus being forced to overstay and commit an Immigration offence, before they can file a claim.

Recognizance Papers

Once they surrender to the ImmD, protection claimants will have their passport confiscated and will in turn be issued a recognizance paper. They could also be subject to detention. Recognizance documents do not provide any legal status in Hong Kong, and protection claimants are not granted any immigration status that distinguishes them from over-stayers. Rather, recognizance papers serve as proof that the person has discretionary, temporary permission from the Director of Immigration to remain in HKSAR pending the outcome of his/her claim.

⁹ Ngo, Jennifer, "No information for NGOs on new Hong Kong system for asylum seekers", *South China Morning Post*, 3 November 2013, available at: <http://www.scmp.com/news/hong-kong/article/1346216/no-information-ngos-new-hong-kong-system-asylum-seekers>

¹⁰ HKSAR, "Commencement of unified screening mechanism for claims for non-refoulement protection" Press Release, 7 February 2014, available at: <http://www.info.gov.hk/gia/general/201402/07/P201402070307.htm>

IV. HKRAC/Justice Centre Response

The implementation of the USM has been overshadowed by a massive lack of information; the government has no accessible written materials, no dedicated telephone number, no website landing page or information other than the "Notice to Persons Making a Non-refoulement Claim,"¹¹ no public counter or frontline staff who can address claimants' queries. In these early days of implementation, this has, in itself, been a significant barrier preventing protection claimants from being able to access the system, making it unnecessarily and unfairly difficult for them to file a claim.

With the firm belief that access to quality, independent information is a basic human right and certainly a crucial need for claimants in a new system, starting on 19 February 2014, Justice Centre began to offer information sessions on the USM open to all protection claimants, in their own language where possible. The sessions outline for protection claimants in simplified terms what the USM is, how to access it and what their rights and responsibilities are in Hong Kong.

Justice Centre also launched new "Know Your Rights" sessions to help people to understand their rights and responsibilities while living in Hong Kong, as well as a "USM 2" session to help people who have already filed a claim to understand what to expect next in the process and prepare themselves for when their claim begins to be processed. As of 30 April 2014, over 400 people have attended more than 30 USM and Know Your Rights information sessions in more than 15 different languages.

HKRAC had also been active in lobbying the UNHCR - at the Hong Kong Sub-Office, regional Asia-Pacific divisions and the global headquarters level - to meet its obligation to ensure a fair and responsible transition from its own refugee status determination to the government-led USM.¹² HKRAC advocated that the UNHCR hand down decisions (and not simply pass cases over to the USM) on claims of two priority groups: a) those who had completed their RSD interviews and reasonably expected an outcome and b) people who are highly vulnerable and meet the UNHCR's acceleration criteria.¹³ This advocacy saw some success in the second category, with approximately 100 claims continuing to be processed by UNHCR after the commencement of the USM.

V. Methodology of the Study

From 19 February to 9 April 2014, Justice Centre kept a log of concerns raised by protection claimants during the question and answer period of 22 information sessions, which were attended by 260 individuals, with an average of 12 attendees per session. The sample sessions represented a wide variety of languages, including Arabic, Bahasa, Bengali, Cantonese, English, French, Nepali, Somali, Sinhalese, Tagalog, Tamil and Urdu.

A total of 202 questions were coded into five overarching groups or themes, each with several categories and, in some cases, sub-categories. Questions could be coded with up to two categories to take into consideration concerns that may

¹¹ HKSAR Immigration Department, "Notice to Persons Making a Non-refoulement Claim", March 2014, available at: http://www.immd.gov.hk/pdf/Notice%20to%20Persons%20Making%20a%20Non-refoulement%20Claim_March%202014.pdf

¹² Miller, Aleta, "UNHCR must decide its last refugee claims in Hong Kong", *South China Morning Post*, 24 September 2013, available at: <http://www.scmp.com/comment/insight-opinion/article/1316101/unhcr-must-decide-its-last-refugee-claims-hong-kong>

¹³ UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, s. 4.6, available at: <http://www.refworld.org/docid/42d66dd84.html>

span multiple issues. A chart with the full-length titles of the coded groups, categories, and where required, sub-categories can be found in the Annex. The broad themes coming from the information session concerns centre around the need for clarification about the USM procedures, concerns about the quality of the system, understanding the role of the UNHCR-HK and the Hong Kong Government in the new system, living conditions in Hong Kong and, in a handful of cases, personal questions unique to a claimant's individual case or circumstances.

In addition, an anonymous qualitative survey was conducted at the beginning of the sessions with a total of 53 protection claimants, asking them two qualitative questions: "What are the three things you are most concerned about regarding the USM?" and "What are the three things you are most concerned about regarding your life in Hong Kong?" Responses were also coded into categories and analysed. For concerns related to the USM, there were nine broad categories, and for concerns related to living conditions, there were seventeen categories, details of which can be found in the annex.

VI. Findings

PART A: Summary of Questions raised at Justice Centre USM Information Sessions

The findings from the USM information sessions overwhelmingly demonstrate that most attendees' concerns (over half of the total concerns) relate to an urgent need for clarification on USM procedures, particularly the preliminary steps on how to file a letter in order to make a claim and even on a more basic level, information on what the USM actually is, why it has come about and the definitions of torture, CIDTP and persecution.

There is confusion among claimants who filed a claim in the previous CAT system and asylum seekers who were previously under the UNHCR-HK RSD on whether or not they need to file a new claim in the USM system, and what will happen if they do not file. Many protection claimants did not understand where to file a claim, were worried about how to verify one's application status once a claim has been filed in the mail and ensure that the claim would be received by the Immigration Office, and what the next steps in the process would be once the claim was filed.

The quality of the USM system and procedural fairness were also a subject of main concern for attendees of the information session, with around one-third of questions dealing with these issues. There were concerns such as the length of time that would be expected to process a claim, access to free, quality legal aid early in the process as well as the ability to choose one's legal representative, evidence required to support a claim, the appeals process (and the relationship between appealing CAT decisions and being processed under the USM) and the acceptance rate of the new system.

Although the subject matter of the information sessions that were sampled in this study deal with the USM process, many protection claimants' concerns - about one-fourth of the issues raised in the information sessions' Q&A - had to do with their living situation in Hong Kong while they wait to be processed in this new system. Many had to do with immigration matters, and the relationship between filing a claim in the USM and one's immigration status. These included questions about their legal status, recognizance papers, detention and surrendering, being stopped by the police and removal from Hong Kong. Other issues dealt with work, poverty and livelihood concerns.

In relation to these concerns about their living conditions, the most frequent, and understandable, question is what will happen to successful non-refoulement claimants in the new USM? What additional rights will be conferred if a claim is

substantiated, and what options for "durable solutions" (such as resettlement to a third country or voluntary repatriation) will be available?

PART B: Survey Responses: Main Concerns about the USM and Living Conditions

The individual surveys verified many of the concerns stemming from the information session Q&A. What was surprising was how shockingly little protection claimants knew about the USM prior to the info session, with one-third having no knowledge whatsoever about the new system. One-fourth cited fear of having their claim rejected and thus being deported as one of their primary worries. Another concern (11% of those polled) was in relation to what to do to file a claim, the role of various actors, such as the UNHCR-HK and Justice Centre, in this new system (9%) and the lack of information available on the USM, which was a source of frustration (8%).

In relation to living conditions in Hong Kong, a wide range of concerns were raised, however, food (a listed concern for 16%), the inability to work (another 16%), housing (12%) and poverty/livelihood issues (10%) - all of which are interrelated and deal with one's ability to enjoy an adequate standard of living and dignified stay - dominated the survey responses. This was followed by concerns in relation to immigration matters, including legal status/recognition papers (6%) and issues of detention/deportation/refoulement (6%).

VII. Shortcomings of the USM

1. Little information provided to protection claimants and stakeholders about the USM

The commencement of the USM - at the very moment when protection claimants needed information the most - was marred by grossly inadequate communication about changes in procedures. Protection claimants did not understand what was happening, why these changes were occurring and the implication that this had on their cases. This caused intense distress in this already vulnerable group.

The ImmD does not have a dedicated telephone extension for queries on the USM.¹⁴ When Justice Centre Hong Kong phoned the ImmD one working day before the USM start date to obtain basic information on the USM, in reply, a Justice Centre Hong Kong staff member was told to write our question to the general inquiries email address of the ImmD.¹⁵ A visit by Justice Centre staff to Kowloon Bay, also with the aim of obtaining basic information about the new system, found that there was no information counter, and security staff were not aware of the USM. Tellingly, multiple claimants were also at the office at Kowloon Bay seeking information.

In their own words: when they first learned about the USM

RM: "I only found out about the changes through NGOs. The Justice Centre information session was very useful. When I learnt about the USM, I had mixed feelings. I didn't know if to feel excited or sad."

Dixon: "At the beginning we were still in doubt. We are 'old-timers' and have a lot of experience with the [previous CAT] system. It is like a doorbell that keeps ringing the same sound. When we heard 'USM' we thought, 'Wow, a new name, it must be different.' But sometimes it feels like they keep changing the title, but it is the same content, just with a different cover."

Mr B.: "No one knows about the USM and there is no clear information on how things will be processed. We kindly request the Hong Kong Government to let us know how it will work."

¹⁴ HKSAR, Immigration Department, "Simplified Call Flow Diagram" http://www.immd.gov.hk/pdf/callflow_en.pdf

¹⁵ enquiry@immd.gov.hk

There is no landing page on the ImmD website (only a copy of the "Notice to Persons Making a Non-refoulement Claim" under the "other information" box of the homepage) about the USM nor any pamphlets or written materials about it. Letters that protection claimants have received from ImmD following up on their claim, as well as the "Notice", are in English and are so legally technical that they are virtually unintelligible.¹⁶ This is particularly challenging for claimants who are not yet at a point in the USM system at which they are able to access a duty lawyer.

2. Not enough consideration given to the needs of the most vulnerable

Of great concern for Justice Centre is the ability for the most vulnerable of protection claimants - including minors, survivors of torture, trauma or sexual and gender-based violence, illiterate people, single-parent families, those with medical conditions, among others - to navigate the USM and not fall through the cracks. At Justice Centre and earlier as HKRAC, we have specialised experience in this area, screening for vulnerabilities and prioritising these people who meet such criteria for our individual services. Vulnerable claimants may have more difficulty recounting their testimony in a coherent manner and may thus have a greater chance of their claims being mistakenly rejected.

ImmD's "Notice to Persons Making a Non-refoulement Claim" and some letters in response to written significations make passing reference to claimants with "special needs" and the possibility for them to request prioritisation. In the "Determination of Non-refoulement Claims" Note to officers of the Torture Claim Assessment Section of ImmD, it is stated that "case officers should be aware of clients with "special needs" and that these cases should be handled with "due care".¹⁷ However, even if a vulnerable protection claimants somehow becomes aware of this, the criteria for "special needs", the grounds for prioritisation, any vulnerability assessment apart from self-identification, and any supports ImmD may be able to provide are far from clear.

When the UNHCR conducted RSD, it had a social worker who acted as a focal point for this group and liaised with NGOs and other service providers who identified vulnerable people to contact. The UNHCR also employed accelerated RSD processing procedures to which applicants can be referred when there are compelling protection reasons to process the claim on a priority basis. The accelerated procedures incorporate reduced waiting periods at each stage of the RSD procedures and shortened timelines for the issuance of decisions.¹⁸

3. Lack of consultation has resulted in a haphazard transition to the USM

Repeated attempts were made by Justice Centre/HKRAC and other civil society actors, on a number of occasions between the time of the first announcement of the USM in July 2013 and its eventual start date in March 2014 (and afterwards) to engage policy makers in constructive dialogue on the new system.¹⁹ However, the only information

¹⁶ For a copy of such letters, refer to the Hong Kong Bar Association training, "Implementation of Unified Screening Mechanism", Letter template dated 10 February 2014. For notice, see http://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf

¹⁷ Claimants with special needs include, in para. 97 of the note: a) victims of sexual violence b) unaccompanied minors c) those suffering from mental illness or trauma d) female clients with special needs (e.g. some female claimants may not wish to be interviewed by a male officer on religious grounds).

¹⁸ UNHCR, *Procedural Standards*, section 4.6

¹⁹ Justice Centre Hong Kong/HKRAC attempted to do so in the following communications: Written Submission (LC Paper No. CB(2)1669/12-13(02)) dated 26 July 2013 entitled "Response to the invitation for submissions by the Panel on Security to give written views on the Administration's proposed unified mechanism for screening of non-refoulement claims", a letter (LC Paper No. CB(2)317/13-14(01)) dated 12 November 2013 to Members of the LegCo Panel on Security entitled "Follow-up information on the Administration's announcement to adopt a 'Unified Screening Mechanism' (USM) to assess claims for non-refoulement protection" and a letter (LC Paper No. CB(2)1063/13-14(01)) dated 13 March 2014 to the

detailing the system was provided in the context of a handful of trainings for duty lawyers and decision-makers (which were not designed to be open to all civil society), once the USM had already been designed in the beginning of 2014.²⁰

Following the 2 July 2013 LegCo Panel on Security meeting (which was not open to deputations), the Panel created an invitation for submissions to give written views on the Administration's proposed USM. Numerous parties made submissions, and afterwards, Justice Centre made several requests to the Panel for a follow-up discussion in LegCo so that the Hong Kong Government could be answerable about its plans to introduce the USM and accountable to providing operational details. These never materialised, and there was never any opportunity for LegCo or other stakeholders to contribute to the process of designing the USM and scrutinise the government's plans. In fact, this lack of consultation was also criticised by the Hong Kong Bar Association, which stated that the "Security Bureau has never consulted the legal profession on the operational details of the USM."²¹

UNHCR on Transitioning to Government-led Refugee Status Determination

The UNHCR Policy Development and Evaluation Service, a think-tank of the UNHCR global office headquarters, recently issued a report offering a reflection on how the UNHCR can assist States with the assumption of responsibility for refugee status determination.¹ The report finds that the UNHCR has an interest in "professionalising its approach to RSD transition" and "strengthening support" during all phases of transition, noting that "transitions from UNHCR do not end the moment States start operating the new procedure, on the contrary, they have just begun."

The report highlights, "After the start of the new national procedure, responsible strategies may require continued operational UNHCR involvement for a specified period, through joint activities in the national procedure or, if necessary, the continued processing under the mandate of certain categories of asylum applicants. Especially where UNHCR offices are faced with considerable backlogs, UNHCR can facilitate a smooth transition by agreeing to continue processing applications registered before a certain cut-off date."

The report notes that "in some countries, the authorities may still feel uncomfortable with the involvement of legal aid providers, NGOs or even the judiciary in RSD processes and refugee protection more generally. UNHCR is often well placed to foster a different attitude by promoting the quality and non-adversarial nature of local interventions." The review acknowledges that the ability of UNHCR national offices' "to influence matters is predicated on a government's willingness to involve UNHCR and will often also depend on the context specific motives behind the new procedure."

Ultimately, despite repeated requests by civil society for the government to provide an expected commencement date for the USM to begin preparing and adapting services and supporting claimants through the transition process, there was less than a month between the announcement and the eventual start date. This scenario created challenges for stakeholders to adapt to the new system, allocate adequate resources to meet the needs of claimants and communicate these developments to protection claimants. It also meant that the USM was rolled out without many operational details (laid out in many of the written submissions to the Panel on Security) being determined and made publicly available.

Chairperson/Members of the LegCo Panel on Security entitled "Urgent action requested to discuss Unified Screening Mechanism to process "non-refoulement" claims, in operation since 3 March 2014". Our Executive Director also wrote an Op-Ed shortly after the USM announcement. See: Miller, Aleta, "New screening process for asylum seekers must be fair and open", *South China Morning Post*, 10 February 2014, available at: <http://www.scmp.com/comment/insight-opinion/article/1425257/new-screening-process-asylum-seekers-must-be-fair-and-open>

²⁰ These include, in chronological order: A Training by the Security Bureau from 27-29 January 2014 for decision makers on the CAT Scheme and Unified Screening Mechanism implementation; a training by the Hong Kong Bar Association as a Top Up CAT Course- Unified Screening Mechanism on 8 February 2014 and a training by the Academy of Law on Convention against Torture Claims and Refugee Law on 21-22 and 24-25 February 2014.

²¹ Hong Kong Bar Association, "Unified Screening Mechanism for Non-refoulement Claims", Submission to the Hong Kong Government, 14 February 2014, at para. 3, available at: <http://www.hkba.org/whatsnew/misc/img-214175157.pdf>

The importance of UNHCR-HK's role in this transition to the USM should not be overlooked. It should effectively communicate recent changes to people who approach their office seeking asylum. UNHCR-HK offers a wealth of experience which can inform the USM, having conducted RSD for many years in Hong Kong and elsewhere. The UNHCR global headquarters can provide significant guidance and best practices to the government. It is crucial that there be effective and appropriate interaction between the UNHCR-HK and the government, and that the UNHCR-HK plays a proactive role in advising on the new system, advocating for the rights of protection claimants and serving as an intermediary to push for dialogue between the government and civil society actors.

4. Confusion among claimants about how to file a claim

According to the Hong Kong Government, a person who wishes to file a USM claim in Hong Kong must "signify to an immigration officer in writing his intention to seek non-refoulement protection".²² This letter must be submitted, in writing, to the ImmD's office in Kowloon Bay. The government stresses that "no specific express words are required to make a claim in writing" and that, rather, only a "general indication of reasons" is needed. If the general indications provided by the protection claimant are deemed "satisfactory" by the ImmD, then their claim will be considered to have been made, but if they are not deemed satisfactory, then it will not be considered made. Either way, claimants will receive a letter by post about the status of their application.

In their own words: filing a claim in the USM

Mr. C: "It was really challenging in a way that we didn't know how to file a claim and needed lawyers who could help in that process. The confusing part was where to give the request, what to include and how to summarise the claim."

RM: "I don't think I would have been able to know what to do without help. The information was not straightforward. I thought I would have to write 6 or 7 pages to explain my case [when sending written signification to file a claim] but my [NGO] case officer explained to me that it only had to be a few lines."

From the start, there was great confusion about how to write the letter to the ImmD, what information to include, how detailed to make the letter, what languages are acceptable to write in and where and how to file the letter. To better assist protection claimants, Justice Centre developed a template for making a USM claim. However we found that even with this template, many people still needed individual assistance in writing their letter, particularly since at this point in the process, they do not have access to a duty lawyer. The process and written indication required should be simple and broad enough that protection claimants do not need a lawyer or outside help to file a claim.

Justice Centre has also found some variations in the kinds of letters that are deemed "satisfactory" and those which are not. For example, in one case of two claimants who submitted almost identical written significations, one received a reply that the written signification was satisfactory, and the other received a reply requesting further details. The second claimant did not submit further details and later received a reply that the original written signification was satisfactory. The only written information available (the "Notice to Persons Making a Non-refoulement Claim") is only available in English and does not specify in which languages the letter to file a claim may be written, exactly how to apply and how to obtain written proof that a letter has been filed.

This caused confusion as to whether letters had to be written in English or Chinese or could be written in claimants' native languages, whether the written signification should be filed by post or in person and how one could prove that they had filed a claim and were pending a written response by the Immigration Department should they be stopped by the police. Justice Centre has since received clarification from authorities about many of these issues, but only after having

²² Notice to Persons Making a Non-refoulement Claim, at para. 13

directly contacted the ImmD. It is not known if the ImmD itself is communicating these clarifications or amending its written documents to give more specificity about the procedures for filing a claim.

Lastly, the notice to persons filing a non-refoulement claim and the letters that have been sent by post to protection claimants confirming their status in the USM are not translated into the claimants' native language and are so complex, full of technical legal jargon and verbose that they are almost unintelligible.

5. Disregard for new claimants' immediate livelihood needs

A person seeking non-refoulement protection must first overstay their visa and be liable to removal from HKSAR before they are eligible to file a USM claim or they must have no valid travel documents. The time that this would take varies greatly among different nationalities according to time permitted for each under the ImmD's visa rules for each country of origin, but could be anytime from 7 to 90 days. Previously, under the UNHCR-HK RSD, overstaying was not a requirement for being able to file a refugee claim.

A protection claimant is only able to receive humanitarian assistance if they have an open claim; however, they are unable to file a claim until their visa expires. As a result of this requirement, they must wait up to several months before they can receive support and are forced to subsist on whatever they came to Hong Kong with, which for people who have fled for their lives and safety, may be very little. Justice Centre, and NGOs who we work closely with, have noticed an increase in destitution and homelessness among new arrivals in particular. We had communicated this concern to the Hong Kong Government, before the USM was in place, after the Hong Kong Government announced "enhancements" to the humanitarian assistance package, however this issue was not addressed in the Panel on Welfare Services meeting where the enhancements were discussed.²³

In addition, due to the lack of clarity and communication about the transitional arrangements, some claimants who only had UNHCR claims and who were already receiving humanitarian assistance have experienced problems at the Social Welfare Department or International Social Services Hong Kong (ISS) in continuing their assistance. They may have filed a written signification and be awaiting a response, but SWD or ISS may not be satisfied that they have an open claim. In some cases, SWD or ISS have tried unsuccessfully to contact ImmD to confirm, in some cases, resulting in the claimant having to make a second written signification, hand-deliver it to ImmD, and return to SWD or ISS with a stamped received copy to prove that they have an open claim.

6. No long-term outcome for successful claimants in the USM

Worryingly, in the few occasions where the USM has been discussed publicly and in the government's written documents, the issue about what long-term solutions will be available to successful claimants (those with substantiated claims) in the USM has largely been skirted. "Non-refoulement" protection merely protects the claimant from being returned to their country so long as they face a risk of harm, but it does not confer any additional rights to the individual nor does it grant them any legal status in Hong Kong. Successful claimants still do not have the right to work or to even volunteer in Hong Kong and continue to receive the same humanitarian assistance package as before their claim was substantiated.

²³ HKRAC, Letter to Members of the LegCo Panel on Welfare Services and the Panel on Security before its meeting on 13 January 2014, Agenda Item IV: Ways to improve situation of mandated refugees, torture claimants and asylum seekers in Hong Kong, LC Paper No. CB(2)654/13-14(01), available at: <http://www.legco.gov.hk/yr13-14/english/panels/ws/papers/ws0113cb2-654-1-e.pdf>

The government has stated that substantiated claims on persecution grounds will be referred to the UNHCR-HK which will seek to find a durable solution for that person, but the procedure for referral process is unknown. For the other two grounds, torture and CIDTP, which fall out of the scope of the UNHCR's mandate, the government has alluded that they will be able to be resettled to a third country, but has provided no details about how.²⁴ There is no information about how this will happen in practice and the countries, if any, with whom the government has been in negotiations.

Most likely, substantiated claimants will be in a position similar to the few successful torture claimants in the CAT system previous to the USM - legal limbo. These claimants have often been in Hong Kong for several years, with no hope of resettlement, no ability to return to their countries and essentially stranded in an indefinite "waiting room". The inability to have legal status, to be granted the right to work or have access to adult education or to integrate locally takes a significant toll on these claimants' well-being. The longer these protection claimants are forced to rely on the government's low humanitarian assistance package,²⁵ the more they slip into poverty and marginalisation.

If the system is to be fair and sustainable, then it will have to offer successful claimants long-term solutions and improve their living conditions. Justice Centre has repeatedly demanded clarification on this point since the USM was first announced. Without being able to provide protection claimants who come seeking our services with a meaningful response to questions on these matters, we are finding that many lose hope and, in the face of this impossible dilemma, may even feel compelled to risk the danger of returning to their country of origin before it is safe to do so,²⁶ which could even amount to constructive refoulement.²⁷

In their own words: discrimination and social integration

RM: "The living conditions are really difficult. We would like dignity and respect. I do outreach with the Chinese community and sometimes their reaction at first is to look down upon us. We want a chance to make a livelihood, to be together with the locals and to have recognition in the community."

VIII. Conclusion and Recommendations

1. Make information on the USM available and accessible

The findings from this report show that the Hong Kong Government must do more to make the system navigable and user-friendly for protection claimants, particularly for people seeking protection who have not yet filed a claim and are looking for information on how to do so. Some of the issues that Justice Centre has found that protection claimants are seeking clarification on are: a better understanding of the grounds for filing a claim, the process for filing it, expected timeframes and outcomes for processing a claim, and more information on what will happen afterwards once a decision has been made on a claim. It is not enough to make this information available, it must also be accessible - both physically

²⁴ See discussion at the LegCo Panel on Security, Agenda Item II. Screening of Non-refoulement Claims, 2 July 2013.

²⁵ For an in-depth analysis of the challenges of the humanitarian assistance package, and civil society proposals for reform, please see: Refugee Concern Network, "Improving the Living Conditions of Protection Claimants in Hong Kong: Recommendations from the field", October 2013.

²⁶ Kao, Ernest, "I'd rather face death in Somalia than be destitute in Hong Kong", says asylum seeker", South China Morning Post, 22 April 2014, available at: <http://www.scmp.com/news/hong-kong/article/1493770/journalist-forgoes-hong-kong-life-breadline-war-torn-somalia?page=all>

Rather the threat of death than meagre existence as an asylum seeker, persecuted newsman says Somali journalist article

²⁷ "Scholars, NGOs and the UNHCR use the term 'constructive refoulement' to describe a situation where a refugee is forced to return 'voluntarily' because of conditions that are insupportable." Mathew, Penelope, *Reworking the Relationship between Asylum and Employment*, Routledge Press: New York, 2012, at. pp 97-98.

accessible (website, phone, in-person counter) but accessible in a way protection claimants can understand (in plain English and translated into their main languages).

In addition to making information on the USM available and accessible to protection claimants, the government must circulate information to policy-makers and government departments on these changes. We have repeatedly urged the Hong Kong Government to proactively educate the public on the situation of refugees and other people seeking protection in Hong Kong to sensitise them on the issue and to combat misperceptions, negative stereotyping and discrimination. .

2. Ensure an efficient system that meets high standards of fairness

A protracted, unworkable system is in no one's best interests. Many of the protection claimants that we see have already been through various iterations of the previous CAT system and are seeking a process that is transparent, efficient and that will provide them with a resolution. The Hong Kong courts have demanded that such a screening mechanism meet high standards of procedural fairness since fundamental human rights are at stake.²⁸ An incorrect, negative decision could mean the difference between life and death for some protection claimants.

A fair and efficient system can more accurately identify those individuals who meet the relevant international criteria and cannot return safely to their countries of origin. At the same time, a fair and efficient system can more swiftly "screen out" those who do not face danger and can be removed from Hong Kong without risk. In other words, a fair and efficient system can more accurately ascertain who is in real need of protection and reduce incentives for those who may attempt to use (or "abuse") the process for other reasons.

Many protection claimants express concern about the impartiality and competence of the adjudicator in the USM based on prior experiences in the CAT system. They are also concerned about access to interpretation. We emphasise that non-refoulement claimants have faced considerable trauma before arriving in Hong Kong and are therefore less able to communicate their stories in a legally relevant, coherent and chronological manner. For these people in particular, quality legal representation is of crucial importance in order to help them present their claim. Lastly, the USM should develop robust mechanisms to assess for vulnerability and acceleration criteria for these cases, in a similar vein to the UNHCR's procedural standards.

3. Build in systems for transparency, participation and accountability

Justice Centre regrets the lack of openness and collaboration with stakeholders in the design of the USM, and the lack of deliberation in LegCo that was actively requested but never granted in the lead-up to the new system; this only serves in

In their own words: expectations and concerns going forward

Mr. A: "There is no change and we have only gained despair. We don't believe the USM can handle the cases because it doesn't have enough experience to assess the cases for those who are seeking asylum [...] and this may lead to misguided conclusions."

Dixon: "The way the interviews were conducted in previous interviews [under CAT] was terrible. My case officer made mistakes and there were many language misunderstandings. I hope the USM can be useful and lead to change."

Mr. D: "There are no bright expectations so far because we haven't seen any effective steps up to now. I wonder if it will take a long time to process my case and I am concerned about whether I will be recognized as a refugee. I need a clear answer about my future after this USM process."

DM: "I would ask for USM to be fair and just give us a chance to say what we have to say and hear us out. Face-to-face contact is important in the interview process to really understand a case, as well as good interpretation and taking the time to assess our claim, not being in a hurry to make sure things are ok."

²⁸ *Prabakar v Secretary for Security* [2005] 1 HKLRD 289.

detriment of an improved, more legitimate system. However, going forward we encourage the government to create an open channel of communication with stakeholders, including the legal profession, civil society groups and frontline workers who serve this community, the UNHCR-HK office, and protection claimants themselves.

In the spirit of transparency, but also as a matter of good governance and standard practice in other jurisdictions, we encourage the government to establish sound monitoring and evaluation systems, with regular publicly available statistical reports on the number of claims, countries of origin, processing times, number of substantiated claims, and other relevant data. Such monitoring mechanisms are particularly important in the early stages of any system.²⁹

4. Improve the living conditions of claimants and provide long-term solutions

Lastly, the living needs of protection claimants, which have largely been left out of discussions on the USM, must be improved, as this is a critical part of their experience in Hong Kong while they wait for their claim to be processed, which in the past has generally taken several years. As recommended by several expert human rights bodies, claimants must have their basic socioeconomic rights met while awaiting the outcome of their claims.³⁰ The current "humanitarian assistance package" remains manifestly inadequate and thrusts claimants into poverty and destitution. We strongly petition the government to allow claimants to have the right to paid and unpaid employment and adult education and to adopt measures to foster social inclusion and harmony.

In their own words: living in Hong Kong and their future

Dixon: "Problems come down to two issues: food/housing and ImmD processing claims. We don't want food; we want hope that there will be real changes. Why are we here if not for that?"

We are not here for food, we want a future. Perhaps someone dreams of being an engineer in their home country, but their dreams are dead here in Hong Kong. We just want the system to be transparent and for there to be real changes. People are sick and tired of the same thing."

Even for successful claims, the "non-refoulement" protection that is offered under the USM is minimal and is unsustainable as the system moves forward, more people are processed and as more claims are substantiated. The fact that the Hong Kong Government unveiled a system that offers no concrete details on viable solutions for people who successfully go through the system is subject to criticism and leaves claimants in a hopeless situation. Legal limbo, poverty and social marginalisation are not long-term options and the government will have to develop durable solutions.

²⁹ Please see, inter alia: Eurostat's Asylum Statistics at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics#Database; the United Kingdom Statistics at Home Office, quarterly immigration statistics series at <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release>, the U.S. Department of Justice's Executive Office for Immigration Review Asylum Statistics at <http://www.justice.gov/eoir/efoia/foiafreq.htm> and State Department Refugee Admission Statistics at <http://www.state.gov/j/prm/releases/statistics/index.htm>, Canada's Immigration and Refugee Board's Refugee Claims - Statistics, Trends and Projections at <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/RefClaDemStat.aspx>, Australia's Department of Immigration and Border Protection Quarterly Asylum Statistics at: <http://www.immi.gov.au/media/publications/statistics/asylum/>

³⁰ Committee on the Rights of the Child, "Concluding observations on the combined third and fourth periodic reports of China, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013)", UN Doc.: CRC/C/CHN/CO/3-4, 29 October 2013; Committee on the Elimination of Discrimination against Women, "Concluding comments of the Committee on the Elimination of Discrimination against Women: China", UN Doc.: CEDAW/C/CHN/CO/6, 25 August 2006; Committee on Economic, Social and Cultural Rights, "Concluding observations of the Committee on Economic, Social and Cultural Rights, People's Republic of China (including Hong Kong and Macao)", UN Doc.: E/C.12/1/Add.107, 13 May 2005

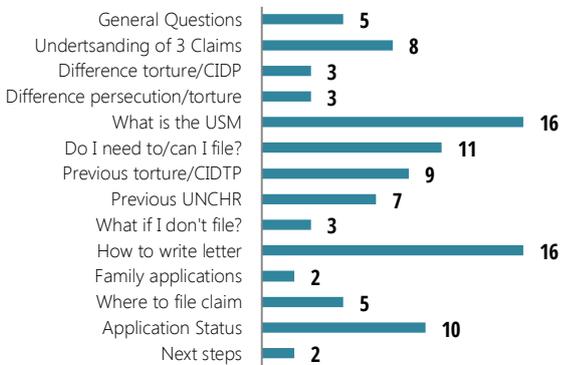
IX. Annex

PART A: Summary of Questions from 22 Justice Centre USM Information Sessions

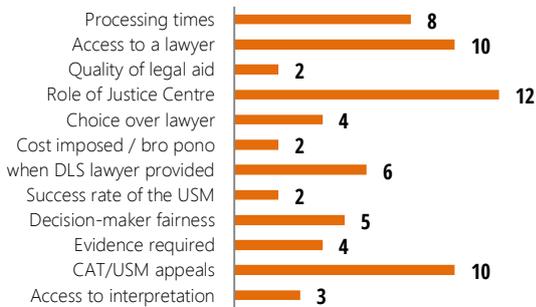
Group Name	No. of Questions
USM Procedures	100
Quality of the System	68
Living Conditions	46
UNHCR-HK Role	26
Personal Issues	6



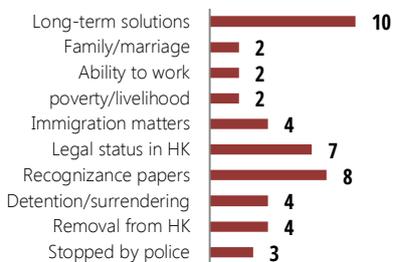
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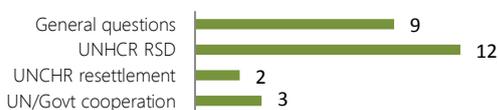
Quality of the System



Living Conditions



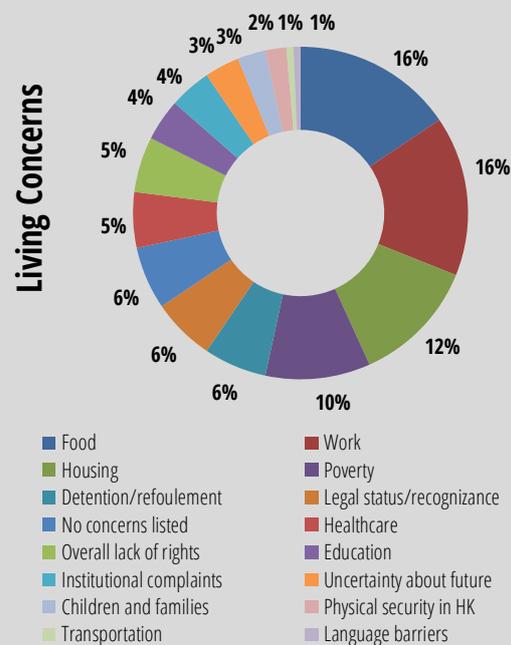
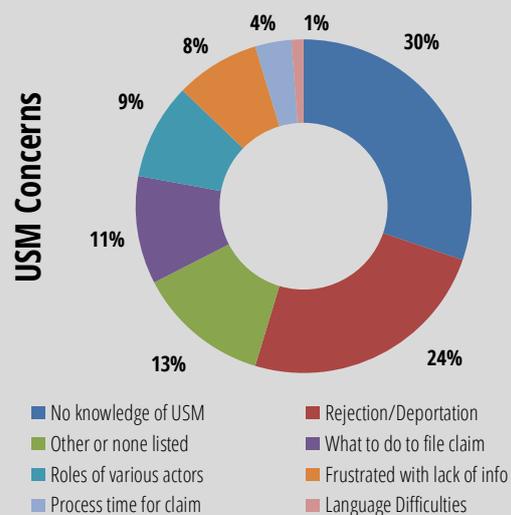
UNHCR-HK Role



Personal Issues



PART B: Survey Responses: Top Concerns about the USM and Living in Hong Kong



PART A: Coding Groups, Categories and Sub-Categories of USM Info Session Questions

GROUP	CATEGORY	SUB-CATEGORY (WHERE NEEDED)
USM Procedures	Understanding of three types of claims	Difference between torture and CIDTP
		Difference between torture and persecution
	Questions about what the USM is and how it has come about	
	Whether they can or need to file	If they had a previous torture or CIDTP claim
		If they had previous refugee claim with UNHCR
		What will happen if they do not file a claim
	How to write “written signification”	How to apply as a family
	Where to file letter to Immigration	
How to obtain confirmation of status of application		
Next steps in the USM process after filing a claim		
Quality of the System	Length of time to process a claim	
	Obtaining access to a lawyer	Quality of legal aid provided
		The role of Justice Centre in the process
		Ability to choose a lawyer in the system
		Cost imposed or whether pro bono
		When in the process a DLS lawyer is provided
	The success rate of the USM	
	Decision-maker fairness	
	Evidence required to support a claim	
Appealing a decision		
Access to interpretation		
Role of the UNHCR-HK	In relation to refugee status determination	
	In relation to resettlement	
	UNHCR/Hong Kong government cooperation	
Living in Hong Kong	Long term solutions for successful claimants	
	Issues related to family/marriage	
	Ability to have the right to work	
	Livelihoods, poverty and standard of living	
	Immigration matters	Legal status in Hong Kong
		Recognizance papers
		Detention/surrendering to Immigration
Removal from Hong Kong		
Being stopped by the police on the streets		
Personal Matters related specifically to individual claim		

PART B: Coding Categories of Individual Survey Responses on Top 3 USM/Living Concerns

Concerns about the Unified Screening Mechanism
Language difficulties as a barrier in claim
Fear of being rejected and refouled
Concerns about detention and jail
Understanding what they need to do to file claim
No knowledge of the USM whatsoever
Frustration about lack of information on changes
Processing length to receive a decision on claim
Roles of the UNHCR, Justice Centre, Hong Kong Government and DLS lawyers
Other – none listed or concerns outside of USM scope
Concerns about Living Conditions in Hong Kong
Poverty
Food
Housing
Work
Access to health
Education
Transportation
Institutional complaints against ISS, Hong Kong Government, etc.
Transportation
Language barriers
Detention/refoulement
General uncertainty about their future
Overall lack of rights in Hong Kong
Legal status/recognizance
Children/families
Physical security
No concerns