

SUBMISSION TO THE SUBCOMMITTEE TO FOLLOW UP ISSUES RELATING TO THE UNIFIED SCREENING MECHANISM FOR NON-REFOULEMENT CLAIMS OF THE LEGISLATIVE COUNCIL

For its meeting on 27 November 2018

November 2018

Justice Centre Hong Kong (Justice Centre) makes the following submissions to the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims (the Subcommittee) of the Legislative Council of the Hong Kong Special Administrative Region, China (Hong Kong) for its meeting on 27 November 2018 on government proposals to amend the Immigration Ordinance in relation to non-refoulement claims.

Justice Centre recommends members of the Subcommittee oppose the proposals that the Administration makes or considers making to amend the Immigration Ordinance, Cap.115, the Firearms and Ammunition Ordinance, Cap. 238 and the Weapons Ordinance, Cap. 217.¹ As stated in Justice Centre's previous submission to the Panel on Security for its meeting on 10 July 2018, the Administration's proposed legislative amendments raise serious concern regarding the impact they would have upon the fairness of the Unified Screening Mechanism (USM), and thus the protection of the rights of non-refoulement claimants.²

Justice Centre is also of the view that they would not achieve the apparent aim of improving efficiency of the USM, and will likely lead to judicial review challenges, causing unnecessary further delay and avoidable public expenditure. We are concerned that the Administration has proceeded from considering these proposals to making them, despite

¹ Security Bureau and Immigration Department, "Legislative Council Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims: Proposals to Amend the Immigration Ordinance", LC Paper No. CB(2)307/18-19(01), November 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181127cb2-307-1-e.pdf and Security Bureau and Immigration Department, "Legislative Council Panel on Security: An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims- Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No. CB(2)1751/17-18(01), July 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1751-1-e.pdf>.

² Justice Centre Hong Kong, "Submissions to the Panel on Security of the Legislative Council on the Comprehensive Review of the Strategy of Handling Non-Refoulement Claims", LC Paper No. CB(2)1794/17-18(01), July 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1794-1-e.pdf>.

PROTECTING FORCED MIGRANTS' RIGHTS

opposition from Legislative Council members, the legal community and civil society.³ Given attempts Justice Centre has made to establish a constructive dialogue with the Administration on these issues, it is disappointing that consultation was not undertaken prior to discussion in the Subcommittee.

Justice Centre takes this opportunity to reiterate the concerns and recommendations made in other previous submissions:

- Submission to the Subcommittee for its meeting on 18 October 2018;⁴
- Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims on the screening of non-refoulement claims and appeal procedures for its meeting on 21 May 2018;⁵
- Submission to the Panel on Administration of Justice and Legal Services on legal aid for its meeting on 18 July 2017;⁶
- Submission to the Panel on Security on the comprehensive review of the strategy of handling non-refoulement claims for its meeting on 6 June 2017;⁷
- Submission to the Subcommittee on Children's Rights on the establishment of a data bank for its meeting on 4 April 2018;⁸ and

³ See, for example, Raquel Carvalho and Alvin Lum, "Rights lawyers slam Hong Kong plans to tighten asylum procedures, calling proposals 'wholly unreasonable'", *South China Morning Post*, 7 July 2018, available at: <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2154233/rights-lawyers-slam-hong-kong-plans-tighten>.

⁴ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims", LC Paper No. CB(2)38/18-19(01), October 2018, available at: <http://www.justicecentre.org.hk/framework/uploads/2018/11/upload.pdf>.

⁵ Justice Centre Hong Kong, "Submission to the Subcommittee to Follow up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims on the Screening of Non-Refoulement Claims and Appeal Procedures", LC Paper No. CB(2)1432/17-18(01), May 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1432-1-e.pdf.

⁶ Justice Centre Hong Kong, "Submission to the Panel on Administration of Justice and Legal Services: Legal aid for non-refoulement claimants", LC Paper No. CB(4)1427/16-17(01), July 2017, available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-submissions-to-AJLS-v.2.pdf>.

⁷ Justice Centre Hong Kong, "Submission to the Panel on Security: Comprehensive Review of Strategy of Handling Non-Refoulement Claims", LC Paper No. CB(2)1432/17-18(01), June 2017, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1432-1-e.pdf.

⁸ Justice Centre Hong Kong, "Speech Delivered by Annie Li, Research and Policy Officer, in the Meeting of the Subcommittee on Children's Rights of the Legislative Council on Establishing a Central Data Bank for Children", 4 April 2018, available at: http://www.justicecentre.org.hk/framework/uploads/2014/03/20180404-LegCo-Subcommittee-on-Children-Speech_Final.pdf.

- Submission to the Subcommittee on Children's Rights on refugee children's rights for its meeting on 14 July 2017.⁹

Since the last meeting of the Subcommittee, the Third Cycle Universal Periodic Review (UPR) of China, including Hong Kong and the Macau Special Administrative Region, has taken place on 6 November 2018. Among the recommendations for Hong Kong, Croatia recommended that Hong Kong introduce internal legislation to implement the Convention on the Rights of the Child. If implemented, it will enhance the protection of the rights of children, including non-refoulement claimants.¹⁰ This recommendation had been made by the Hong Kong UPR Coalition, which Justice Centre facilitates, in its UPR submission to the Human Rights Council.¹¹ Justice Centre and the Hong Kong UPR Coalition urge the Administration to accept and implement this recommendation.

Late delivery of Administration papers prior to meetings

Justice Centre is concerned that the Administration's paper for the meeting was not made publicly available until 19 November 2018. This was not the first time the Administration's paper for a meeting of the Legislative Council was made public so close to the meeting, leaving insufficient time is left for key stakeholders, including civil society, to prepare written submissions. This limits the space for civil society actors to be involved in public policy and legislative developments, leading to less effective discussions in the Subcommittee and limiting the diversity of information available to Legislative Council members. For information about previous occurrences of this problem, please see Justice Centre's submission to the Subcommittee for its meeting on 18 October 2018.¹²

Recommendations

The Subcommittee should express opposition to the following legislative amendments proposed by the Administration in its paper for this meeting and those that the Administration considers proposing as set out in its paper for the meeting of the Panel on Security on 10 July 2018.¹³

⁹ Justice Centre Hong Kong, "Submissions to the Subcommittee on Children's Rights of the Legislative Council", LC Paper No. CB(4)1432/16-17(03), July 2017, available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-submissions-to-Subcommittee-on-Childrens-Rights.pdf>.

¹⁰ See the draft report of the working group on the Universal Periodic Review. Working Group on the Universal Periodic Review, Human Rights Council, "Draft report of the Working Group on the Universal Periodic Review: China", A/HRC/WG.6/31/L.3, 8 November 2018, available at: https://www.ishr.ch/sites/default/files/documents/cina-draft-report-a_hrc_wg_6_31_l_3.docx.

¹¹ Hong Kong UPR Coalition, "Joint Civil Society Submission from the Hong Kong UPR Coalition", March 2018, paragraph 85, available at: http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf.

¹² Note 4 above.

¹³ Security Bureau and Immigration Department, "Legislative Council Panel on Security: An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims- Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No.

The Administration should:

- Accept Croatia's UPR recommendation and introduce a bill to domestically incorporate the Convention on the Rights of the Child, particularly Article 3 to consider the best interests of the child in all statutory and administrative decision-making, and Article 12 to ensure the views of children are expressed and heard, within three years;
- Propose a comprehensive bill on refugees status in conformity with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and combat hate speech according to the recommendations made by CERD;
- In light of strong concerns over very low substantiation rates within the USM, conduct an independent review of the policies and practices of ImmD to ensure quality of decision-making and that the appropriate threshold for granting international protection is being applied.;
- Provide quality information about the USM to non-refoulement claimants or potential claimants at the earliest opportunity;
- Ensure early access to legal advice and legal representation to non-refoulement claimants immediately upon the registration of claims;
- Provide more comprehensive training to lawyers in relation to non-refoulement and refugee law than is currently in place, and require Duty Lawyer Service panel lawyers to attend an annual training refresher on non-refoulement law to remain on the panel;
- Commission an independent review of the quality of decision making of the Immigration Department and the TCAB;
- Increase transparency about the evaluation of non-refoulement claims, including publishing redacted TCAB decisions;
- Commission an independent study on the reasons for the distinctly small number of non-refoulement claimants represented at the TCAB to ensure the protection of the right to a fair hearing of every claimant;
- Allow open TCAB hearings while retaining the right of an appellant to private hearings where requested;
- Make arrangements for further increasing resources for the Immigration Department and the TCAB for handling non-refoulement claims;
- Introduce a bill providing equal rights to access permanent residency for children of asylum seekers, refugees and all migrant workers, consistent with the children of other migrants under Article 24 of the Basic Law within one year;
- Ensure that children of migrant workers, refugee and asylum-seeking children have equal access to basic services, including health, education and other social services;
- Grant asylum seekers and refugees the right to work immediately;

- Ensure that all children, including asylum-seeking and refugee children, have free access to compulsory education on an equal basis immediately;
- Provide scholarships and resource support for education for asylum seekers and refugees immediately;
- Amend the Race Discrimination Ordinance within one year so that it applies to government functions and powers, and covers the grounds of nationality, citizenship, residence status, and language; and
- Establish a database of treaty body and UPR recommendations and a transparent central monitoring and evaluation mechanism for their implementation, following meaningful consultation with civil society, within one year.

Justice Centre also recommends China extend the Convention Relating to the Status of Refugees and its 1967 Protocol to Hong Kong within one year.

Regarding consultation with civil society and the public, the Administration should:

- Ensure that Administration papers are made available in both Chinese and English at least two weeks in advance of the deadline for civil society to make submissions for a meeting; and
- Implement a Regulatory Impact Assessment mechanism to enhance transparency and deliver better policy outcomes.

Questions for the Administration

- When will the Administration implement each of the following recommendations made by the Committee against Torture:
 - Ensure unhindered access to the unified screening mechanism to all individuals wishing to claim protection, irrespective of their immigration status;
 - Enhance the fairness and transparency of the screening process by, inter alia, ensuring that non-refoulement claims are thoroughly and individually examined; 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; and publishing redacted versions of the decisions of the TCAB;
 - Develop mechanisms for the early identification of victims of torture, their priority access to the unified screening mechanism and their immediate access to redress;
 - Grant an alternative immigration status to refugees and substantiated unified screening mechanism claimants that would allow them to remain legally in Hong Kong, China until the end of the process and facilitate their access to legal work in order to avoid destitution and degrading treatment; and
 - Consider extending to it the 1951 Convention relating to the Status of Refugees and its 1967 Protocol?
- How does the Administration ensure there will be adequate opportunity for non-refoulement claimants, especially those who are impacted by trauma or have suffered sexual and gender based violence or torture, to give evidence, if the timeline for submission is shortened?

- Has the Administration maintained data to track delays, if any, in the USM? How long did the handling of non-refoulement claims take on average in each of the years from 2014 to 2018? What was the longest time taken? How many claims were delayed?
- The Administration apparently claims that non-refoulement claimants have delayed the process of handling non-refoulement claims. How has this been determined? What was the number of such cases in each of the years from 2014 to 2018? What level of immigration officers made that judgment?
- What is the Administration's position on the proposal to establish and fund non-for-profit legal representation such as community legal centres to reduce the costs of the provision of legal advice and representation and to train specialised refugee lawyers?
- How much public expenditure will be involved in allowing immigration officers to possess arms and ammunition?
- In the lead up to the Budget 2019-2020, where is the Administration seeking or anticipating additional expenditure to manage non-refoulement claims? Will the Administration be seeking additional staffing resources? If so, in which branches will additional resources be sought?

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About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

For more information please visit: www.justicecentre.org.hk