

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 18 October 2018

October 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 18 October 2018.

As there has been no major policy development since the meeting of the Panel on Security of the Legislative Council on 10 July 2018, Justice Centre takes this opportunity to reiterate the concerns and recommendations made in previous submissions:

- Submission to the Panel on Security on proposed legislative amendments relating to non-refoulement claims for its meeting on 10 July 2018;¹
- 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;²
- Submission to the Panel on Administration of Justice and Legal Services on legal aid for its meeting on 18 July 2017;³

¹ 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>.

² 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.

³ 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>.

PROTECTING FORCED MIGRANTS' RIGHTS

- 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;⁴
- Submission to the Subcommittee on Children's Rights on the establishment of a data bank for its meeting on 4 April 2018;⁵ and
- Submission to the Subcommittee on Children's Rights on refugee children's rights for its meeting on 14 July 2017.⁶

Since the meeting of the Panel on Security of the Legislative Council on 10 July 2018, the United Nations Committee on the Elimination of Racial Discrimination (CERD) published concluding observations on the combined fourteenth to seventeenth periodic reports of China, including Hong Kong and Macao.⁷ Justice Centre calls upon the Administration to accept and implement the recommendations made by CERD relating to refugees, namely:

- Adopt comprehensive laws on refugee status in conformity with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol;
- Conduct training programmes on racist hate crimes for police, prosecutors, members of the judiciary and other law enforcement officers, including on the difficulties faced by victims in reporting such crimes;
- Ensure that law enforcement officials consistently monitor, record, investigate, prosecute and sanction racist hate crimes;
- Establish specialized prosecutors on hate crimes, and encourage them to initiate proceedings ex officio in cases of racist hate crimes and racist hate speech, as proposed in CERD's general recommendation No. 31;
- Ensure that victims of racist hate crimes and hate speech receive support to facilitate reporting and are provided with appropriate remedies; and
- Ensure that politicians publicly condemn racist hate speech and hate crimes.

⁴ 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.

⁵ 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.

⁶ 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>.

⁷ Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China", CERD/C/CHN/CO/14-17, 30 August 2018, available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CHN/CERD_C_CHN_CO_14-17_32237_E.pdf.

Moreover, the Hong Kong UPR Coalition, a coalition of civil society organisations that Justice Centre facilitates, made a joint civil society Universal Periodic Review (UPR) submission to the Office of the United Nations High Commissioner for Human Rights (OHCHR) for the Third Cycle UPR on China, including Hong Kong.⁸ Recommendations for the Hong Kong Government on the rights of asylum seekers and refugees are raised in the submission, which is wholly or partly endorsed by 45 civil society organisations. Included in those recommendations is also a proposal for central monitoring and evaluation mechanism of treaty body and UPR recommendations. Currently there is no transparent process monitoring their implementation, including the recent CERD concluding observations.

Leakage of personal data of claimants by a Torture Claims Appeal Board adjudicator

Justice Centre would like to draw the Subcommittee's attention to a case of leakage of personal data by a Torture Claims Appeal Board (TCAB) adjudicator that has happened since the meeting of the Panel on Security on 10 July 2018.⁹ According to the government press release issued on 14 September 2018, a personal laptop of a TCAB adjudicator, which contained the names and nationalities of about 30 non-refoulement claimants who were pending hearing and decisions of the TCAB, was suspected of being stolen overseas. The number of TCAB decisions that the laptop contained was not made publicly available in the press release.

This incident is concerning. Not only has the personal privacy of non-refoulement claimants been breached, their personal security is now at risk. Non-refoulement claimants are often traced by those they are fleeing persecution, torture or murder from. The leakage of their names, nationalities and decisions, which contain their experiences as grounds for claiming non-refoulement protection, can inform those who are tracing them of their presence in Hong Kong. This raises concern over the Administration's compliance with the Convention against Torture, particularly Article 2 on the prevention of torture, as well as the Hong Kong Bill of Rights Ordinance, particularly Article 2 providing for the right on life and Article 3 providing for the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

It is regrettable that the Administration explained in its press release about the incident that it did not involve the data of any residents of Hong Kong. It seems that the Administration discriminates against non-residents, considering them to be less worthy of protection of their personal data and the right to security. Moreover, non-refoulement

⁸ Hong Kong UPR Coalition, "Joint civil society submission", March 2018, available at http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf.

⁹ Hong Kong Government, "Statement by Torture Claims Appeal Board", press release, 14 September 2018, available at <http://www.info.gov.hk/gia/general/201809/14/P2018091401022.htm>.

claimants can never become residents because the Administration has been considering them as 'illegal immigrants' and refusing to grant them access to residency despite calls from civil society and United Nations treaty bodies.¹⁰

This incident is indicative of the broader issue of accountability of TCAB adjudicators. From Justice Centre's experience of providing legal and psychosocial assistance to non-refoulement claimants, we observe significant problems in the decision-making of the TCAB. Basic mistakes are frequently noted including such as where the country claimants come from (in more than one case) and TCAB adjudicators using information from Wikipedia as country of origin evidence to determine claims.¹¹ In a specific case of a client assisted by Justice Centre, the adjudicator insisted the hearing continue despite the pregnant claimant going into labour, which has been found by the High Court to be unlawful, failing to adhere to a high standard of fairness.¹² Contrary to the recommendation of the Committee against Torture and despite repeated calls from civil society and Legislative Councillors,¹³ TCAB decisions are not published. This makes it challenging to monitor the decision-making of the TCAB, limiting transparency and accountability.

Claimants have limited access to justice and redress for wrongdoings of TCAB adjudicators. 91% of non-refoulement claimants were not legally represented at the TCAB stage in 2017.¹⁴ It is entirely for the duty lawyers who represented the claimants at the Immigration Department stage to decide whether to continue the representation at the TCAB stage. However, there is a lack of information about any guidelines issued by the TCAB or the Legal Aid Department for duty lawyers to determine whether a claimant should be represented. Justice Centre is not aware of any oversight. This is detrimental to claimants' right to a fair hearing and to the prompt and efficient operation of the TCAB. Claimants have no right to work in Hong Kong and rely on Government allowances of about HKD\$3,000 for all expenses, including housing, food and transportation. It is extremely unlikely for claimants to be able to afford a private lawyer for their claims.

¹⁰ Committee on the Elimination of Racial Discrimination, "Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China"; and Committee against Torture, Concluding observations on the fifth periodic report of China with respect to HKSAR, China, CAT/C/CHN-HKG/CO/5, 3 February 2016, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHNHKG%2fCO%2f5&Lang=en.

¹¹ See, for example, *Md Nazir Ahmed Sarkbar v Torture Claims Appeal Board* [2018] HKCFI 801, available at: http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114733&QS=%2B&TP=JU.

¹² *Villarico Loutheliz Talag v. Torture Claims Appeal Board* [2018] HKCFI 468; HCAL 179/2017, available at: <http://hklii.hk/eng/hk/cases/hkcfi/2018/468.html>.

¹³ Committee against Torture, Concluding observations on the fifth periodic report of China with respect to HKSAR, China.

¹⁴ Theresa Lee, for Secretary for Security, response to data request titled "Torture Claims Appeal Board Operations", 28 June 2018, available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_oper.

With respect to the TCAB, Justice Centre recommends the Administration:

- 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; and
- Make arrangements for further increasing resources for the Immigration Department and the TCAB for handling non-refoulement claims.

Late delivery of Administration papers prior to meetings

Lastly, Justice Centre expresses serious concern over the decision to release the Administration's paper for the meeting after 4 October 2018, the deadline for civil society and the public to make written submissions to the Subcommittee. As of 4 October 2018, it is still unclear when the paper will be released. This is not the first time the Administration's paper for a meeting of the Legislative Council is made available so close to the meeting that insufficient time is left for civil society and the public to prepare written submissions. For the meeting of the Panel on Security on 10 July 2018 on proposed legislative amendments relating to non-refoulement claims, the Administration's paper was made available in Chinese until late afternoon two working days beforehand, and in English, an official language in Hong Kong, until the afternoon before the meeting. For this meeting, Justice Centre has requested in writing that the Administration release its paper for this meeting at least one week before the deadline for civil society and the public to make written submissions, but the paper is still not made available as of 4 October 2018. This raises serious concern over whether Panel members have adequate time to prepare for the meeting and how informed the discussions will be. This also suggests that the Administration does not see the importance of consulting civil society actors or non-refoulement claimants.

As Justice Centre has noted in its submissions to the 2017-2018 Policy Address¹⁵ and 2018-2019 Budget,¹⁶ proper consultation delivers better outcomes. This ensures that every practical and viable policy alternative has been considered, helps to confirm accuracy of government data and ensures that there are no implementation barriers. Justice Centre supports the development of a proper and effective Regulatory Impact Assessment mechanism. In particular, a proposal that complies with the principles of transparency, accountability, proportionality and

¹⁵ Justice Centre Hong Kong, "Submission for the 2017-18 Policy Address Consultation", September 2017, available at http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-Policy-Address-Consultation-Submission_updated.pdf.

¹⁶ Justice Centre Hong Kong, "Submission for the 2018-19 Budget Consultation", January 2018, available at <http://www.justicecentre.org.hk/framework/uploads/2013/08/Justice-Centre-Hong-Kong-Budget-2018-19-Consultation-Submission.pdf>.

consistency. Given the challenges civil society face in engaging with the Government, enhanced emphasis should be placed on consultation.

Recommendations

The Subcommittee should express opposition to the following legislative amendments considered by the Administration:

- Shortening the time for claimants to prepare and submit a claim form/ notices of appeal and to submit evidence;
- Allowing an Immigration Department screening interview or a TCAB hearing to be conducted in a language other than the claimant's most proficient if the Immigration Department or the TCAB can presume the claimant can communicate in the second language; and
- Limiting the opportunity for claimants to give supplementary evidence.

The Administration should:

- 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;
- Not set an inappropriate high threshold for granting international protection;
- 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;
- 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;
- 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?

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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 forced migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

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