

Article 3: Torture as a ground for refusal to expel, return or extradite

3.1 In paragraphs 65 and 66 of the previous report, we informed the Committee that we had, having regard to the high standards of fairness laid down by our Court of Final Appeal in the case of *Secretary for Security vs Sakthevel Prabakar*, put in place administrative procedures for assessing torture claims made under Article 3.1. The position remains essentially the same as explained in paragraphs 67 and 68 of the previous report in regard of Hong Kong's obligation under the Convention to persons subject to removal and deportation, and in paragraphs 69 and 70 in regard to fugitive offenders requested for surrender².

3.2 In paragraph 7 of the previous Concluding Observations, the Committee recommended, inter alia, that HKSAR should incorporate the provisions contained in Article 3 of the Convention under our domestic law; adopt a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of our obligations under Article 3 of the Convention, the merits of each individual case; as well as ensure that adequate mechanisms for the review of the decision are in place for each person subject to removal, expulsion or surrender.

Enhanced Screening Mechanism for Torture Claims

3.3 In December 2009, following the decision of the Court of First Instance in the case of *FB vs Director of Immigration and Secretary for Security*, we enhanced the administrative screening procedures to ensure that the required high standards of fairness would be met. Under the enhanced procedures, torture claimants may receive publicly-funded legal assistance by duty lawyers throughout the screening process. Claimants aggrieved by the ImmD's decision on their torture claims may lodge a petition, which would be considered by adjudicators (all of whom are former judges or magistrates).

² As at October 2012, we had signed a total of 18 bilateral agreements on the surrender of fugitive offenders.

3.4 Claimants have every reasonable opportunity to establish their claims. They will complete a torture claim form (with the assistance of duty lawyers and interpreters as appropriate) to provide grounds and evidence to substantiate their claims. Upon receipt of the forms, the ImmD will arrange for screening interviews with the claimants to clarify or supplement the information provided in the claim form.

3.5 If there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if he or she is expelled, returned or surrendered from Hong Kong to a foreign country, the ImmD must accept the claim as substantiated. In the event that the claim is not substantiated, the ImmD will notify the claimant in writing of the decision with detailed reasons provided, as well as his or her right to lodge a petition against the decision.

3.6 As mentioned in paragraph 3.3, claimants may receive publicly-funded legal assistance during the screening process, including completion of the torture claim form, attendance at the screening interview, as well as lodging of a petition and attendance at an oral hearing for the petition (where applicable). Such assistance is being provided by our Duty Lawyer Service, under which some 260 barristers and solicitors have registered to provide assistance to torture claimants.

3.7 As at 30 June 2012, 1 983 claims made under Article 3 of Convention were determined under the enhanced screening mechanism. Around 5 600 outstanding torture claims are pending screening in Hong Kong.

3.8 We also introduced the Immigration (Amendment) Bill 2011 into the Legislative Council (LegCo) in July 2011. The Bill aimed to underpin the enhanced screening mechanism by adding new statutory provisions to the Immigration Ordinance (Cap. 115). Its object is to provide for a statutory process for making claims under Article 3 of the Convention and determining such claims, including how a torture claim is made and the effect thereof (i.e. non-refoulement protection), the requirements for the ImmD to arrange screening interview with claimants, to take into account all relevant considerations in determining a claim, and to inform the claimant of the decision with reasons for the decision

by written notice, etc. The Bill also stipulates that a claimant who is aggrieved by the ImmD's decision may lodge an appeal, which will be handled by a statutory Torture Claims Appeal Board, and provides for other related matters. Under the Bill, a person whose surrender is requested in surrender proceedings may also claim non-refoulement protection under Article 3 of the Convention against the surrender of that person from Hong Kong to a torture risk State. The Bill was enacted into law in July 2012 (Ordinance No. 23 of 2012). The statutory framework will come into operation on 3 December 2012. Under the statutory scheme, a claimant will not be removed to his or her home country until his or her claim is finally determined and found not substantiated. Hence we do not see a need for the establishment of a post-removal monitoring mechanism.

Refugee Convention and its 1967 Protocol

3.9 The Committee also recommend in paragraph 7 of the previous Concluding Observations that HKSAR should consider the extension of the 1951 Refugee Convention and its 1967 Protocol to Hong Kong. In this regard, it has all along been our established policy not to extend the Refugee Convention to Hong Kong. Given our developed economy and liberal visa regime, doing so will subject our immigration regime to abuses and thus undermining public interest, especially the interest of the local labour force.

3.10 That notwithstanding, asylum requests in Hong Kong are handled by the Hong Kong Sub-office of the United Nations High Commissioner for Refugees (UNHCR). The Director of Immigration will also consider whether or not to exercise his discretion on compassionate grounds to withhold the removal of an asylum seeker pending determination of his refugee status by the UNHCR (or a mandated refugee pending resettlement arrangement) on a case by case basis. We understand that as at 30 June 2012, there are some 500 asylum claims pending determination by the Hong Kong Sub-office of the UNHCR, and around 150 mandated refugees pending resettlement.

3.11 The HKSAR Government has all along been supporting the operation of the UNHCR's Hong Kong Sub-office through provision of

office accommodation at nominal rent. Asylum seekers, torture claimants and mandated refugees in need may also receive humanitarian assistance through non-governmental organisations (NGOs) commissioned by our Social Welfare Department (SWD).