<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>Reform on establishing a non-refoulement claim in Hong Kong’s refugee screening system: difficulties and suggestions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Chan, Wing Shan Fiona (陳詠珊)</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td>Chan, W. S. F. (2015). Reform on establishing a non-refoulement claim in Hong Kong’s refugee screening system: Difficulties and suggestions (Outstanding Academic Papers by Students (OAPS)). Retrieved from City University of Hong Kong, CityU Institutional Repository.</td>
</tr>
<tr>
<td><strong>Issue Date</strong></td>
<td>2015</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/2031/8307">http://hdl.handle.net/2031/8307</a></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>This work is protected by copyright. Reproduction or distribution of the work in any format is prohibited without written permission of the copyright owner. Access is unrestricted.</td>
</tr>
</tbody>
</table>
Reform on establishing a non-refoulement claim in Hong Kong’s Refugee Screening System:

Difficulties and Suggestions

Fiona Wing Shan Chan¹

Abstract

This article reviews the possible reasons leading to the low recognition rate of asylum claims in Hong Kong. In the first part of the text, the author briefly introduces the development of the legislative framework of the refugee regime in Hong Kong. Second, the text explores whether the statutory prescribed time limit to file a non-refoulement claim form is effective, in light of the recent implementation of the Unified Screening Mechanism. Third, the author examines the medical examination procedures for asylum seekers under the Immigration Ordinance (Cap. 115 of the Laws of Hong Kong). Fourth, the author studies the practices in the United Kingdom and Canada. Finally, the author makes recommendations on reforms of the refugee screening system in Hong Kong. Indeed, this article is not intended to be a comprehensive review of the refugee system in Hong Kong, but is rather a selection of issues which appear to be controversial.

Introduction

A sound refugee screening system must be able to ensure fairness and promote administrative efficiency. The Unified Screening Mechanism (“the USM”) came into operation in March 2014, claimants who seek to rely on (i) persecution under the 1951 United Nations Convention Relating to the Status of Refugees (“the 1951 Convention”); (ii) Torture under the Convention Against Torture (“CAT”); and (iii) Cruel, inhuman or degrading treatment or punishment pursuant to Article 3 of the Hong Kong Bills of Rights (“CIDTP”) are all screened in one go. Currently, applicants are collectively known as makers of “non-refoulement claims” or “claimants”. Indeed, USM marks the end of the two-path system where the Immigration Department only screens

¹ PCLL Student, City University of Hong Kong. The author had the opportunity to serve as an intern and mini pupil under a number of refugee law lawyers during 2013-2015. Apart from legal internships, she served as a volunteer in a refugee service center in May 2013. The author also wishes to express her gratitude to the following individuals for their guidance in this research article. In alphabetical order, they include the following: Mr. Peter H.C. Barnes, Mr. Mark Daly, Miss Maggie F.T. So, Mr. Mark R.C. Sutherland, Dr. Stephen L.W. Tang, Miss Ayesha K. Wijayalath and Dr. Guobin Zhu.
torture claimants under CAT, and the United Nations High Commissioner for Refugees (“UNHCR”) makes refugee status determination.

However, following the implementation of the USM, 1,873 claims were determined by the end of May 2015, with only 8 substantiated (including 2 substantiated on appeal by the Torture Claim Appeal Board (“TCAP”). Therefore, the author wishes to examine the possible reasons leading to the low recognition rate in this article.

I: The development of the refugee screening process in Hong Kong

1.1 Definition

The definition of refugee is provided in Article 1(A)(2) of the 1951 Convention. If claimants cannot meet the requirements under Article 3(1) of CAT, they can seek to rely on the 1951 Convention which also provides protection for claimants.

1.2 Differences between CAT claimants and Refugees

The requirements needed to be met in order to qualify as a torture claimant under the CAT, and to qualify as a refugee under the 1951 Convention respectively are not the same. However, a person who is outside the protection of the Refugee Convention may nevertheless be protected by CAT. For example, where there are substantial grounds for believing that the person concerned would be in danger of being subjected to torture, if returned to the country concerned for reasons other than one of the Refugee Convention reasons, he would not necessarily be within the Refugee Convention. But he would be within the CAT.

---

2 The Fifth Report of the Hong Kong Special Administrative Region of the People’s Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Hong Kong Bar Association’s Submission to the United Nations Committee Against Torture (17th October 2015) para10.

3 Furthermore, the definition of torture is laid down in Article 1(1) of the CAT. Article 3(1) of CAT states that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.


5 Ibid, para 15.
1.3 Pre 2004 development

The CAT was extended to Hong Kong in 1992. By virtue of Article 153 of the Basic Law, the Convention continues to have application in Hong Kong after the handover on 1st July 1997. However, the Government has upheld its long established practice that the 1951 Convention and its 1967 Protocol Convention would not be applied in Hong Kong. Accordingly, an ad hoc arrangement has been reached with the UNHCR in terms of which, on an independent basis, the UNHCR will determine matters of refugee status. However, there had been no cases so far where the question of torture has been an issue.

Unlike most jurisdictions with developed legal systems, Hong Kong did not make its own independent decisions on refugee status but relied on the UNHCR for such decisions. Before 2004, there was a complete lack of legislation, regulation and/or coherent overall policy to deal with asylum seekers.

1.4 Post Prabakar development

In the case of Secretary for Security v Sakthevel Prabakar, Li CJ found that both the Director of Immigration and the Secretary for Security had not given any consideration as to whether the respondent’s claim that he would be subjected to torture if returned was well-founded. He continued to hold

“The determination of the potential deportee’s torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To

---

6 Legislative council, Panel on Security of the Legislative Council Screening of Non-refoulement Claims (LC Paper No. CB(2)1465/12-13(01) para 7.

7 [2008] 2 HKC 209, 211.


9 Mark Daly, “Refugee Law in Hong Kong: building the legal infrastructure” (Hong Kong Lawyer, September 2009), 1.

10 Ibid.

11 FACV 16 of 2013.

12 Ibid, para 32.
him, life and limb are in jeopardy and his fundamental human rights not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination” 13

[emphasis added]

Finally, Li CJ concluded that without undertaking any independent assessment, a mere reliance on the UNHCR’s decision to deport a claimant would fall well below the high standards of fairness required in such cases.

As a result of Prabakar (supra), the Hong Kong Government implemented “discretionary”, “non-statutory” screening procedures for CAT claimants. 14 As such, the procedures did not benefit from the scrutiny and debate which accompany the legislative process, 15 and went unchecked for a number of years.

Accordingly, a number of aspects of the refugee screening process were challenged in the case of FB v Director of Immigration. 16 Saunders J declared that several aspects of the screening process were not in accordance with the high standards of fairness prescribed in the case of Prabakar (supra). In particular, Saunders J held that it would be unlawful, if, free legal representation is not provided to a CAT claimant who is without means.

In light of the judgment of FB (supra), the Deputy Secretary for Security introduced a legislative framework for the refugee screening process in Hong Kong. Accordingly, the Immigration (Amendment) Ordinance was enacted in 2012 to address the findings of FB (supra) and Prabakar (supra). As a result, Article 3 of CAT was incorporated into the Immigration Ordinance. Also, to address the findings in FB (supra), the Administration subsequently signed an agreement with the Duty Lawyer Scheme (“DLS”), which started to operate in late December 2009, 17 to render legal


14 Mark Daly, “Refugee Law in Hong Kong: building the legal infrastructure” (Hong Kong Lawyer, September 2009), 3. This is also known as the administrative framework.

15 Ibid.

16 [2009] 1 HKC 133.

17 The Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) para 6.
advice to the claimants who are without means. In fact, DLS normally instructs private lawyers in the “CAT panel” for the preparation of the non-refoulement claim, after taking instructions from the claimants.

In *Ubamaka Edward Wilson v Secretary for Security*, the Court of Final Appeal held that protection against cruel, inhuman or degrading treatment or punishment enshrined in Article 3 of the Hong Kong Bill of Rights is an absolute and non-derogable right. Thus, after the ruling of *Ubamaka (supra)*, the Court of Final Appeal confirmed that the Hong Kong Government is obliged to screen claimants who seek to rely on Article 3 of the Hong Kong Bill of Rights.

Subsequently, in the case of *C v Director of Immigration & Ors*, the Court was concerned with the principle of non-refoulement expressed in Article 33 of the 1951 Convention. Although Hong Kong is not a state party to the 1951 Convention, the Court held that the principle of non-refoulement had become a rule of customary international law. Accordingly, the Court held that “It is not sufficient for the Director simply to rely on the UNHCR determinations” and “It is no answer to the Director’s failure to make an independent assessment to say that the power of removal is broad and unqualified and that it imposes upon no duty to make an RSD [Refugee Status Determination]”.

In light of these two decisions, the Director of Immigration introduced and implemented the USM on 3rd March 2014. Under the USM, all three grounds of non-refoulement claims are screened in one go.

Indeed, the current refugee screening mechanism is governed by the Immigration Ordinance. In the following parts of the article, the author will comment on two major difficulties faced by the claimants in establishing his claim, which exist before and even after the implementation of the USM.

---


20 Ibid, para 97.

21 Ibid, para 98.
II: The limitation of the statutory prescribed timeframe in returning the non-refoulement claim form: the 28-day regime

The torture claim form, now known as the non-refoulement claim form, constitutes the basis of a non-refoulement claim. The claim form has totally 25 pages and the claimants are required to provide information in great detail. This includes, *inter alia*, basic information, detailed education and family background of the claimant, as well as a full traveling record of the claimant. More importantly, claimants are expected to set out the circumstances leading to their fears, if they are to go back to their home countries in Question 35 of the claim form.

2.1 The Deadline and the Consequence of not complying with the Deadline

Pursuant to Section 37Y(2) of the Immigration Ordinance, claimants are required to return the claim form within 28 days or within any further period that an immigration officer allows under subsection (3).

Section 37ZG also provides the consequence of not complying with the requirements. It states that “A torture claim must be treated as withdrawn if the person who made the claim fails to return a completed torture claim form as required under Section 37Y(2)”.

2.2 Deadline Extension and its adverse consequences

As a matter of fact, the 28-day deadline can be extended pursuant to Section 37Y(3) of the Immigration Ordinance. Section 37Y(3) of the Immigration Ordinance provides that claimants can, on application, and by reason of special circumstances, be allowed a further period to return the completed form that the immigration officer considers appropriate. It reads as follows

(3) An immigration officer *may*— *(a)* on an application made by a claimant in writing before the expiry of a period for returning a completed torture claim form in respect of the claimant’s torture claim; and *(b)* on being satisfied that, by reason of special circumstances, it *would be unjust not to allow a further period* for the claimant to return the completed form, *allow a further period* that the immigration officer considers appropriate for the claimant to return the completed form.

[emphasis added]
However, the Immigration Ordinance does not stipulate the meaning or give examples of “special circumstances” that can give rise to a deadline extension. It is left to the discretion of the immigration case officer. Hence, if the legal representatives wish to get a deadline extension, they may have to argue with the immigration case officer. As it has been pointed out by the Bar Association, legal representatives do not wish to enter into an argument with the immigration officer in every case, and be at the mercy of their discretion for extension of time. It is noteworthy that legal fees arising from the request of deadline extension is also paid by the taxpayers’ money, as the whole process is funded by the Duty Lawyer Scheme. Furthermore, it is submitted that immigration officers need a considerable amount of time to handle these requests, which also amounts to a waste of government’s resources.

Furthermore, although claimants can ask for a deadline extension, the making of a request can potentially damage their credibility. Section 37ZD(1) of the Immigration Ordinance reads as follows

*In considering a torture claim, an immigration officer or the Appeal Board may take into account, as damaging the claimant’s credibility, the following behaviour of the claimant— (a) any behaviour that the immigration officer or the Appeal Board considers is designed to, or is likely to be designed to— (i) conceal information; (ii) mislead; or (iii) obstruct or delay the handling or determination of the claimant’s torture claim.*

[emphasis added]

Hence, the immigration officer or the TCAP has been given a wide discretion and may take into account a list of behaviors that can damage the claimant’s credibility. No doubt, as a matter of fact, a request for a deadline extension by the claimant can lead to a delay. It can potentially be a behavior “leading to ‘Delay the handling or determination of the claimant’s torture claim’, which can be a factor damaging the claimant’s credibility.

2.3 The Downside of returning the claim form without particulars of the claimants’ fears

---

22 The Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) para 18.
Indeed, claimants can always return the claim form without setting out their claims comprehensively, so that a deadline extension will not be required. However, claimants potentially risk damaging their credibility. According to Section 37ZD of the Immigration Ordinance, “a failure, without reasonable excuse, to make a full disclosure of the material facts in support of the torture claim” can be a behavior taken into account in damaging a claimant’s credibility. Therefore, it is submitted that the claimants are advised to set out his background carefully in the claim form.

2.4. The Difficulties

2.4.1 Supporting Obtaining Country of Origin Information

A strict deadline may prevent the claimants to put his case in a fair manner. More often than not, claimants provide supporting country of origin information in support of their claims. However, it seems that the Immigration Department has not appreciated the difficulties of the claimants in obtaining the Country of Origin Information (“COI”). In fact, COI can be divided into two categories; (i) Personal COI and ii) General COI.

Indeed, whilst the General COI is normally accessible on the internet, the practitioners normally do not have a great difficulty in obtaining such information. However, it is always not easy to obtain the personal COI. In practice, these documents include, *inter alia*, identity cards, medical reports or certificates.23

According to the experience of a number of practitioners, claimants generally need to rely on their families in their hometowns to obtain supporting COI. However, this is far from an easy exercise. Even if the claimants are now in Hong Kong, their families may still be constantly threatened by the political parties in their hometowns. Unfortunately, as it has been pointed out by a practitioner, some claimants worry about the safety of their family members, and are reluctant to collect COI at the beginning. As a result, practitioners may need to spend time, and persuade their clients before they start gathering COI.

---

23 The Refugee Advice Centre, ‘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’ (LC Paper No. CB(2)1669/12-13(02) <http://www.legco.gov.hk/yr12-13/english/panels/se/papers/se0702cb2-1669-2-e.pdf> assessed 30 March 2015.
More often than not, many claimants, having been forced to leave their countries in a hurried fashion, may not necessarily have all their documents on-hand upon arrival to Hong Kong; and are suffering from trauma and stress related to their experience in their countries of origin, as well as their situation upon arrival to Hong Kong\textsuperscript{24}. For instance, a Sri Lankan claimant may have fled from his hometown to the Capital-Colombo first, then fly to Bangkok, Guangzhou and Shenzhen before entering Hong Kong.

The UNHCR has also appreciated the difficulties of obtaining COI in its handbook on procedures and criteria for determining refugee status. In the handbook, it noted “the applicant, as a person fleeing from persecution, may have arrived with the barest necessities, even without personal documents. So he may not be able to support his statements by documentary or other proof”.\textsuperscript{25} This obstacle is commonly found among the claimants. Take the example of Mr. Sakthevel Prabakar in the case of \textit{Prabakar (supra)}, it was stated in Mr. Prabakar’s letter that “proof documents” were available but could not be supplied due to the absence of photocopying facilities in Sri Lanka.\textsuperscript{26}

Furthermore, there is a possible delay in returning completed torture claim forms caused by the long time taken by the Immigration Department in providing personal data to torture claimants.\textsuperscript{27}

\subsection*{2.4.2 Lack of interpreters}

Take the example of a Sri Lankan claimant again, there is a relatively small number of registered Singhalese interpreters in Hong Kong. It is therefore plain that claimants may not have interpreters immediately available, and there are bound to be delays in arranging interpretation. As claimants are mostly not English speaking, a conference is not possible without an interpreter. “The interpreters are busy, for example, they have to serve as a court interpreter, and provide interpretation in the screening interviews, and in conferences” said a barrister.

\subsection*{2.4.3 Criticisms made by the Joint Professions}

\footnotesize
\textsuperscript{24} Ibid.
\textsuperscript{26} (2004) 7 HKCFAR 187, CFA, para 54.
\textsuperscript{27} Legislative Council, \textit{Bills Committee on Immigration (Amendment) Bill 2011} (LC Paper No. CB(2)2300/11-12) 4.
The Law Society and the Bar Association of Hong Kong have criticised the strict deadline since the year of 2011. According to the Joint Submissions of the Law Society and Bar Association on the Immigration (Amendment) Bill 2011 dated 18 November 2011, the Bar and the Law Society are of view that “The prescribed 28-day time limit in the primary legislation is simply unrealistic and harsh”. This view has also been confirmed in the subsequent submission by the Bar Association in 2014 and 2015.

2.4.4 Supplemental Claim Form

Under the USM, claimants who have their CAT claims determined before the implementation of the USM, but intending to seek protection under CIDTP pursuant to Article 3 of the Hong Kong Bill of Rights and/or 1951 Convention need to submit a supplementary claim form within only 21 days. The time limit begins to run beginning from the date of the notice of requirement to submit the form. Indeed, the Bar Association has submitted that this arrangement is even “more unrealistic and harsh”. Although this “supplementary claim form” is submitted by persons with previous torture/CIDTP claim, who has already submitted his/her completed torture claim before the implementation of the USM, it does not mean that the claimants now require less time to submit the supplemental claim form. As it has been illustrated above, the difference between a CAT claim, a CIDTP claim and a 1951 Convention claim are significant. The Bar Association is also of the view that the submission of the supplemental claim form requires “an equal, if not extra, effort”. Indeed, under the existing regime, there is a danger that adherence to strict time limits, whilst ensuring efficiency, may prevent the claimant from putting forward their best case and also lead to the refoulement of those with genuine claims. Therefore, it is submitted that the current strict

---

28 The Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) para 18.

29 Ibid.


31 Ibid, 10.

32 Michael Ramsden, ‘Hong Kong's "high standard of fairness" principle and new statutory torture screening mechanism’ P.L. 2013, Apr, 232, 239.
timeframe is not likely to be able to meet the “high standards of fairness” enshrined in the case of Prabakar (supra) and FB (supra).

III. Medical Evidence

Medical reports contain probative value for the purpose of establishing a non-refoulement claim. Whilst such reports cannot prove definitively that a claimant's injuries are indicative of past torture, they can be a crucial determining factor in the outcome of claims. This is particularly so where a medical report corroborates a generally credible account from the claimant. Indeed, medical evidence that establishes a particular history may have an impact on the approach the decision-maker should take to evidence emanating directly from the asylum claimant.

3.1 The Arrangement of Medical Examination

Section 37ZC of the Immigration Ordinance provides that medical examination is to be conducted by a medical practitioner as arranged by an immigration case officer, the Government decision-maker. As it has been correctly suggested by the Bar Association, Section 37ZC of the Immigration Ordinance denies the claimant the opportunity for presenting his or her own medical expert evidence on the occurrence of past torture. Rather the medical investigation remains on the side of the Government. Furthermore, it is the immigration case officer who makes the final decision on whether a medical examination should take place, although claimants can request for it. Other than that, information pertaining to the arrangements for medical examinations by the Immigration Department with the Hong Kong Department of Health, the Hospital Authority and the number of

33 Mark Syrnes, Peter Jorro: Asylum Law & Practice (LexisNexis 2003) 736.

34 Mark Syrnes, Peter Jorro: Asylum Law & Practice (LexisNexis 2003) 736.

35 The Fifth Report of the Hong Kong Special Administrative Region of the People’s Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Hong Kong Bar Association’s Submission to the United Nations Committee Against Torture (17th October 2015) para 5.

36 According to Section 37ZC(1) of the Immigration Ordinance, “...if the physical or mental condition of the claimant is in dispute and is relevant to the consideration of a torture claim — (a) an immigration officer or (on an appeal) the Appeal Board may require the claimant to undergo a medical examination to be conducted by a medical practitioner as arranged by an immigration officer; or (b) an immigration officer may, at the request of the claimant, arrange for a medical examination of the claimant to be conducted by a medical practitioner.”
practitioners involved is not publicly available.\textsuperscript{37} Hence, the arrangement between the immigration officers and the medical examiners is also not transparent.

3.2 Compulsory Disclosure

The claimants are required to disclose to Director of the Immigration or the Appeal Board his medical report pursuant to Section 37ZC of the Immigration Ordinance. As it has been correctly pointed out by the Bar Association, the procedural requirement of channeling all the medical appointments through the Immigration Department and the Government doctors is not accord with the medical ethics.\textsuperscript{38} The Bar Association further said that “The lack of confidentiality may hamper the full and necessary disclosure to the medical professional and render the examination, if not worthless then very much less effective”.\textsuperscript{39}

This arrangement is likely to discourage claimants who have special needs, especially female claimants who suffered from sexual abuse in their home countries. The Law Society and the Bar Association of Hong Kong commented “Some cases require particular sensitivity which the current system does not follow: e.g. a female rape victim being examined by a medical government doctor. To require a person who may well have suffered torture to attend an examination by a practitioner who is unidentified in advance and who is told to investigate and probe into delicate and traumatic events is in our view grossly inappropriate”. For example, if a female claimant is unwilling to disclose their stories in front of a male doctor, the purpose of medical examination is questionable.

In addition, whilst the Director of Immigration has already recognised that some claimants actually may have some “special needs”, they did not amend the clause in Section 37ZC of the Immigration Ordinance, so that the medical arrangement can be able to meet the needs of this group of claimants. Indeed, in the “Note to officers of the Torture Claim Assessment Section of ImmD”, it states that “case officers should be aware of clients with “special needs” and that these


\textsuperscript{38} The Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) para 20.6.

\textsuperscript{39} Ibid.
cases should be handled with “due care”, the claimants include those a) victims of sexual violence; b) unaccompanied minors; c) those suffering from mental illness or trauma; and d) female clients with special need. Although the government has recognised the existence of these group of claimants, it is submitted that the Government has not taken any remedial measures on the medical treatment to promote fairness to these vulnerable claimants.

3.3 The consequence of not attending a pre-arranged medical examination

Claimants may face a serious consequence if they do not attend a pre-arranged medical examination. Section 37ZD(2)(G) of the Immigration Ordinance provides that “a failure, without reasonable excuse, to— (i) attend a medical examination arranged under Section 37ZC” is also a “credibility damaging behavior” that can be taken into account by the Director of Immigration. Hence, if a claimant does not attend a pre-arranged medical examination, it can possibly damage his credibility.

IV: Comparative Studies: The United Kingdom and Canada

The United Kingdom and Canada are chosen by way of comparative study. The author will focus on the two issues discussed above. These two countries are chosen because of their years of experiences in handling asylum claims.

Indeed, a high acceptance rate in the first instance screenings implies that it is quite possible for a genuine claimant to establish their claims. As a matter of fact, these two countries have a high first instance acceptance rate throughout the years. In the United Kingdom, 36% of asylum applications were accepted initially. Canada even has a higher acceptance rate in the first instance screening-almost 50%. Therefore, the author wishes to examine how asylum seekers can establish their claims under these two regimes. Two neighbouring jurisdictions, Taiwan and Singapore are not chosen, as these two states did not sign the CAT.


42 Nicholas Keung, ‘Canada’s refugee acceptance rate up despite asylum restrictions’ The Stars (Toronto, 1 March 2015).
United Kingdom

The United Kingdom is a contracting state of the 1951 Refugee Convention and is also bound by the European Council Procedures Directives 2005/85/EC which sets out the minimum standards on procedures in EU Member States for granting and withdrawing refugee status.\(^{43}\) The legal provisions governing the asylum regime in the United Kingdom is Part 11 and 11B of the Immigration Rules, the Asylum and Immigration (Treatment of claimants, etc.) Act 2004 and the asylum policies enacted by the Home Office from time to time. Since April 2013, the various functions of initial asylum screening and decision-making have been reintegrated under the more general auspices of the Home Office.\(^{44}\)

4.1.1 Availability of legal aid

Asylum seekers who do not have sufficient financial resources can try to seek free legal aid service. According to paragraph 333B of the Immigration Rules of the United Kingdom, “Applicants for asylum shall be allowed an effective opportunity to consult, at their own expense or at public expense in accordance with provision made for this by the Legal Services Commission or otherwise…” Therefore, claimants shall be provided an “effective opportunity” to consult “at their own expense or at public expense”. However, this is not a statutory guarantee to the right to consult a lawyer at public expense. In reality, few claimants obtain legal advice in the first instance screening process and legal aid is available for appeals, subject to a means test and in England and Wales a merits test, and availability of a representative.\(^{45}\) In the appeal to the First tier tribunal, most applicants are legally represented, although there is evidence of significant regional variation in the availability of legal advice at this stage.\(^{46}\)


\(^{44}\) Ibid.


\(^{46}\) Helen Baillot, Sharom Cowan and Vanessa E. Munro, ‘Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK’ Intl. J.L.C. 105, page 4.
4.1.2 Medical Examination

In the United Kingdom, it is for the legal representatives, rather than the Immigration authority to decide whether a medical examination should take place and how it is conducted. Where a solicitor is funded by legal aid, they can request authority from the Legal Aid Agency for payment for medical reports, and this may be granted depending on the relevance and importance of the report to the claim. The solicitor has authority to spend £400 on an expert report without involving the Legal Aid Agency, but this is often not adequate to fund a full expert’s report.

Medical reports are prepared by private doctors, not the Government doctors. In the United Kingdom, Freedom from Torture, formerly the Medical Foundation for the Care of Victims of Torture is often engaged. The Medical Foundation is a well-established institution and over 50,000 individuals have been referred to them for help. The quality of the work done by the Medical Foundation is also well recognized. In Njehia v SSHA, it was commented that “…The Tribunal is very familiar with the work of the Medical Foundation and is well aware that the Medical Foundation frequently give adverse reports on account of alleged torture and beatings which are presented to them”.

Furthermore, the Court in the England has a high expectation with respect to the quality of the medical report, and held that the doctors conducting the medical examination must have the relevant psychiatric qualification. In the case of Dagir, the Court reiterated that “only someone with relevant qualifications, validated by a recognized body, in this country the Royal College of

---


50 (16523; 14 May 1999).

Psychiatrists” were suitable for conducting medical examination for asylum seekers, as the court reasoned that the medical officers are “rarely subject to cross-examination”.

**4.1.3 Time Limit**

First of all, on the day a claim is made, there will be an initial ‘screening interview’ in which the United Kingdom Border Agency takes the personal details of the applicant and their journey to the United Kingdom, checks if they have claimed asylum in the United Kingdom or Europe before, and gives them a reference number for their application. Second, the claimant meets the case owner, who conducts the claim from the start to finish, within three working days. Finally, by the tenth working day, the representative should submit the claimant’s statement and any supporting evidence.

In other words, asylum seekers in the United Kingdom only have ten working days to submit their statements as well as their supporting evidence. At the same time, similar to Hong Kong, a delay in submitting an asylum claim can be a behaviour that can be taken into account by the decision-maker in relation to a claimant’s credibility. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 also provides that any behavior considered by the decision making body that can “delay the handling or resolution of the claim” can damage the claimant’s credibility.

**Canada**

Canada is a contracting state of the International Covenant on Civil and Political Rights, the 1951 Convention and the CAT. Canada is chosen, as it is the only country to have ever been awarded the prestigious UN Nansen Medal, the highest honour bestowed for protection of refugees. Canada is also one of the first states to recognise gender-based persecution as a ground for establishing

---

52 Ibid, para 7.

53 Ibid, para 7.


56 Ibid.
refugee status. The Immigration and Refugee Protection Act 2002 is the principal source of law governing the refugee regime in Canada. Recently, the Protecting Canada’s Immigration System Act has been passed in 2012 to amend some aspects of the refugee regime in Canada.

4.2.1 Medical procedures

In Canada, all asylum seekers need to undergo a medical examination in support of his asylum claim. Furthermore, the cost of medical examination can be subsidised by the government when the officer is satisfied that the claimant does not have the means to pay for the medical examination. Interim Federal Health (IFH) Program gives effect to a 1957 Order-in Council that authorizes the federal government to pay for in-Canada health care for certain claimants who are unable to pay for expenses related to urgent and essential services. Coverage is provided pending their qualification for other means of payment. If the claimants indicate a need for coverage and officers are otherwise satisfied that the applicants qualify, eligibility will be given without further investigation. However, in Hong Kong, it is the immigration case officer who makes the final decision on whether a medical examination should take place.

In Canada, refugee claimants assessed by the Designated Medical Practitioner are for health and safety factors only. Similar to Hong Kong, the doctor will forward the information to CIC’s


58 Section 16(2)(b) of the Immigration and Refugee Protection Act provides that “Subject to the regulations, the foreign national must submit to a medical examination”. Furthermore, Section 301(a)(v) of the Immigration and Refugee Protection Regulation provides the list of persons who are exempt from medical examinations. However, refugee claimant is not exempted from the list, which reads “(a) foreign nationals other than...(v) foreign nationals who claim refugee protection in Canada”. Therefore, all the asylum seekers have to go through a medical examination in Canada.


60 Ibid.

61 Ibid.
Medical Services Branch who will then forward the results to the CBSA [Canada Border Services Agency] or the CIC [Citizenship and Immigration Canada] Inland office. 

4.2.2 Time Limit

Before the passing of the new law in 2012, upon being referred to the Refugee Protection Division by the immigration officer, the asylum seeker has 28 days to submit a Personal Information Form (“PIF”) which makes up the main part of the application to the RPD. The PIF is much like the questionnaire the asylum seeker fills in for eligibility and gives personal details such as identity, route to Canada, education, employment, family members, criminality, and most importantly explains why the asylum seeker is seeking refuge.

However, the time limit has been drastically shortened following the passing of the Balanced Refugee Reform Act 2012. Section 11(2)(4) of the Balanced Refugee Reform Act reads

“A person whose claim is referred to the Refugee Protection Division must attend an interview with an official of the Board on a date fixed by the referring officer in accordance with the rules of the Board and must at the interview produce all documents and information required by those rules. The date fixed for the interview must not be earlier than 15 days after the day on which the claim is referred, unless the claimant consents to an earlier date”.

[emphasis added]

In other words, claimants have to produce the documents, which formulate the basic of the claim within 15 days, in contrast to filling in an asylum claim form within 28 days. The basic of the claim will be extremely important as an information-gathering exercise. If the claimant omits

62 Ibid.
64 Ibid.
information, it could result in an adverse inference later on.\textsuperscript{65} Indeed, this reform has been severely criticised by the Canadian Bar.

\textbf{V. Arguments for and against reform, and Recommendation}

\textbf{5.1 Medical Procedure}

As we learn from the above, the United Kingdom and Canada adopt different approaches as regards medical examination arrangements. In this part of the article, the author will suggest how a medical examination can be arranged fairly and efficiently, taking into account the interests of both the asylum seekers and the general public, which in turn help the claimants put his case in a fairer manner.

\textbf{The Canadian Approach?}

\textbf{5.1.1 Disclosure of Medical Reports}

As it has been discussed above, in Canada, doctors have to forward the claimants’ medical reports to the Citizenship and Immigration of Canada Inland office after the medical examination. However, it does not mean that Hong Kong should necessarily follow the Canadian practice. As it has been correctly pointed out by the Law Society and the Bar Association of Hong in their submission dated 18 November 2011, “the Hong Kong Medical Association has advised the Joint Profession that ‘it would be unethical for any doctors to release medical reports to any third party, including the Immigration Department without prior consent of the CAT claimants, and hence a breach of doctor/patient confidentiality’”\textsuperscript{66} Therefore, it is submitted that Hong Kong should not blindly follow the Canadian approach on the disclosure of medical reports.

Finally, we should know asylum seekers in Canada are “being provided with a list of designated medical practitioners who are authorized to perform this examination”.\textsuperscript{67} Therefore, asylum

\textsuperscript{65} Canadian Bar Association, ’Bill C-31: Protecting Canada’s Immigration System Act’ (\textit{Canadian Bar Association}, April 2012) executive summary, 3.

\textsuperscript{66} Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) 7-8.

seekers can choose a medical practitioner whom they feel comfortable to meet with. Hence, female claimants can find female doctors, which is likely to be facilitating the progress of medical examinations.

5.1.2 Recommendations

As it has been illustrated above, the medical arrangement in Hong Kong is not transparent, and is conducted by the Government. Therefore, it is submitted that the Hong Kong Government should, at least, follow the Canadian practice and to provide the claimants a list of medical practitioners before a medical examination takes place, if the government is of the view that it is for the Director of Immigration to decide whether a medical examination is to take place in the first instance screening. The practice of sending medical reports directly to the Immigration by the doctor is likely to be a breach of doctor-patient confidentiality. It is submitted that the Hong Kong Government should not blindly follow this Canadian practice.

The British Approach?

5.1.3 Funding

First of all, it has been suggested by some scholars, for example, Ché Singh Kochhar-George, that Hong Kong should follow the practice favoured in the United Kingdom, so that the costs of the medical examination should be borne by the government through the local legal aid scheme. However, after taking into account the interests of the public and the claimants, the author is of the view that this practice should not be strictly followed in Hong Kong, and the author will discuss what modifications will be necessary below.

5.1.4 Government funded legal representatives?

In Hong Kong, as it has been stated above, the DLS assistance came into operation in late December 2009. To be eligible to enjoy the DLS service, the claimants only need to pass the

______________________________

68 Ché Singh Kochhar-George, ‘Recent Development in Hong Kong Recent Torture Screening Process’ 42 HKJ 385.

69 Law Society of Hong Kong and The Hong Kong Bar Association, Immigration (Amendment) Bill 2011 Joint Submissions of the Law Society and Bar Association (18 November 2011) 2.
means test, but not the merits test.\textsuperscript{70} Hence, the claimants can enjoy the service provided by DLS even if their cases do not have strong merits.

In contrast, as we discussed above, not all the asylum seekers in the United Kingdom enjoy free legal advice provided by the legal aid scheme (which is similar to DLS in Hong Kong) in the first instance screening. Consequently, not all the asylum seekers can obtain a medical report reimbursement through their legal representatives in the United Kingdom in their first instance screening.

\textbf{5.1.5 Medical Report reimbursement in the first instance?}

Indeed, if it is allowed, it is likely that the medical costs arising from the medical examination will be tremendous. More importantly, it is not the case that all the asylum seekers in the United Kingdom can reimburse the medical reports in their first instance screenings. Hence, given the differences in the eligibility of acquiring free legal advice in the United Kingdom and in Hong Kong, and after balancing the claimants’ and the society’s interests, it is recommended that the DLS should set a “merit test” in order to determine whether a reimbursement of the medical reports should be conducted in the first-instance screenings.

Indeed, a similar practice has been adopted in the context of an ordinary legally-aided civil claim. According to Section 12 of the Legal Aid Regulations, “The Director may give general authority to solicitors acting for aided persons in any particular class of case to obtain experts’ opinion and to tender expert evidence…” Hence, solicitors acting for the parties in legal aid cases, (who have of course passed the merits test and means test beforehand) can obtain experts’ opinion. Thus, it is recommended that the DLS can model on the Legal Aid approach and grant claimants who have passed a merit test to ask for a reimbursement of medical reports in the first instance screening.

\textbf{5.1.6 Medical Report reimbursement in the appeal}

The author is of the view that this approach should be adopted in the appeal stage. Once again, when we look at the legal aid arrangement in the United Kingdom, as stated above, most of the claimants are legally represented in the appeal stage. As a result, asylum seekers can obtain a

medical report reimbursement through their legal representatives in the appeal stage in the United Kingdom. Indeed, in Hong Kong, not all the claimants lodge an appeal in the torture claim appeal board, quite a number of them return to their home countries voluntarily, after the first instance screening failed. In light of the fact that asylum seekers in the appeal stage can easily obtain a medical report in the United Kingdom through their legal representatives. Therefore, it is submitted that the government should consider if the arrangement of medical report reimbursement can be adopted in the appeal stage, so that a high standards of fairness can be met.

5.1.7 Absence from the medical examination

As we discussed above, Section 37ZD of the Immigration Ordinance is largely modeled on Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in the United Kingdom. However, as it has been illustrated above, this section of taking certain kinds of behavior as damaging one’s credibility is subject to a number of criticisms in Hong Kong and in the United Kingdom. For example, it has been observed that “Examination of the applicant’s travel or behavior in the United Kingdom may tell decision-makers whether they are a “good customer”, whether they are convenient and co-operative, but it will not reveal very much about whether they have a well-founded fear of persecution.”

In any event, in the United Kingdom and in Canada, none of the Immigration provisions provide that an absence from a government-arranged medical examination would be taken into account in damaging a claimant’s credibility. Finally, it has been suggested that it is painful to secure medical evidence from the claimants, it may be re-traumatising from an applicant to experience an intrusive physical examination.

5.2 Summary of recommendations

It is submitted that there is a strong case for a deletion of Section 37ZD(2)(G) of the Immigration Ordinance. The Government should also consider if the legal representatives in the appeal stage should be entitled to reimburse medical reports prepared by the private doctors in order to meet the high standards of fairness. It is also recommended that asylum seekers should be entitled to a


72 Ibid, 16.
medical report reimbursement in the first instance screening if the claimants have passed a merit test.

Furthermore, if, unfortunately, the Government insists that it is the Immigration case officer who makes the final decision on whether a medical examination should take place, it is recommended that the claimants can be given a list of doctors that can perform the medical examination for the claimants, in order to meet the high standards of fairness prescribed in the case of Prabakar (supra).

5.3 The Time Limit

As we learn from the above, both the United Kingdom and Canada also set strict time limit in filling an asylum claim. Asylum seekers in these two jurisdictions both do not enjoy more than 28 days in filling of claim form. In this part of the article, the author will discuss whether we should follow the strict time limit set by the foreign jurisdictions.

5.3.1 Difference in the standard in establishing an asylum claim

In the United Kingdom, however, we should note that the standard in establishing an asylum claim is relatively lower. The United Kingdom Agency suggested “Applicants do not have to convince the decision maker that they are telling the truth. It is possible to establish a credible claim even where the applicant is unable to provide any independent, corroborative evidence to support claims about past and present events and experiences as long as the account is coherent, consistent and plausible when considered in light of the applicants’ profile and any mitigating circumstances”.73 Therefore, it suggests that an applicant does not have to prove that her claim is true, simply that it is credible.

However, in Hong Kong, although it is not mandatory, the claim form does contemplate for filing of supporting documents. In Question 34 of the non-refoulement claim form, claimants are asked “Do you have any documents to submit in support of your claim?” and in Note 6 of Guidelines for Completion of the non-refoulement claim form, it also states that “You must return this completed form together with all documents supporting your claim that are readily available”. Hence, the non-refoulement claim form contemplates for filing of supporting documents.

73 Ibid, 8.
Therefore, the standard of establishing a non-refoulement claim in Hong Kong is likely to be higher. Thus, it is submitted that the government should not blindly follow the strict time limit approach adopted in the foreign states, given the difference in the standard in establishing a refugee claim.

5.3.2 Difference in the level of training received by the Immigration Officers

In the United Kingdom, according to Section 339HA of the Immigration Rules, “The Secretary of State shall ensure that the personnel examining applications for asylum and taking decisions on his behalf have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law”. Hence, the quality of training received by the United Kingdom decision makers is statutory guaranteed. In Canada, the Refugee Protection Division members have also received special training on refugee protection. In Hong Kong, concerns have been raised as to the quality of the training received by the decision makers in Hong Kong. As pointed out by Associate Professor Kelley Loper, Director of the University of Hong Kong’s Master of Laws in Human Rights, said flexibility in the deadline for supporting materials was “particularly important” under the new system. “It’s not appropriate to adopt strict timelines used in other jurisdictions that have much more developed mechanisms and where decision-makers have more experience and knowledge of the standards that need to be applied”. Indeed, the refugee screening process in Hong Kong has only developed for ten years. It is questionable if the decision makers have received adequate training as the foreign counterparts did.

5.3.3 Increasing the burden on the Appealing Authority

Third, if a genuine claimant cannot establish their claims successfully because of the strict timeframe, many of them will appeal. It implies that all these cases are transferred to the Torture Claim Appeal Board and to be assessed again. This result in turn increases the burden of their administration, and amounts to a waste of taxpayers’ money. Indeed, this phenomenon occurs in


75 Samuel Chan, ‘Hong Kong New Asylum System-Harder to exploit’ The South China Morning Post (Hong Kong, 9 September 2013).
the United Kingdom. As lateness in furnishing the claims lead to refusal, many of these decisions are then appealed, the major effect of this is to transfer the “backlog” of cases from the Home Office. In contrast, if they are given more time to adduce supporting evidence, their claim may not be refused in the first instance, and may not need to lodge an appeal.

5.3.4 Criticisms

Finally, the strict time limit approach has been severely criticised by different institutions in both the United Kingdom and Canada. The Canadian Bar Association explained the reason why a strict timetable should not be adopted after the reform in 2012, “Applicants and counsel need time to prepare the case, disclose documents, and in many cases, retain expert witnesses such as psychologists and doctors. Credible expert opinion on psychological conditions often requires multiple meetings between the expert and applicant. In some cases, claimants require time to obtain documents from the country from which they fled, including identity documents, police and medical reports or other evidence to confirm the veracity of their claim. When this documentation is obtained, it often needs to be translated”. They also commented “Important documentation may be missed because of tight timelines”. Similarly, in the United Kingdom, there was considerable objection to the time scales from practitioners and refugee-support groups.

5.3.5 Credibility damaging behavior

Indeed, Section 37ZD of the Hong Kong Immigration Ordinance modeled Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in the United Kingdom. As the author has explained above, a delay in handling the asylum claim can potentially be a behavior to be taken into account by the decision-makers that can damage the claimants’ credibility by virtue of Section 37ZD of the Immigration Ordinance. However, Section 8 of the Asylum and Immigration Act has been severely criticized in the United Kingdom where it was said “The relevance or certainty of


77 Canadian Bar Association, ‘Bill C-31: Protecting Canada’s Immigration System Act’ (Canadian Bar Association, April 2012) 17.

78 Ibid.

such factors to assessing the veracity of an applicant’s claim has, however, been challenged by a number of commentators and practitioners.\(^{80}\)

5.4 Summary of recommendations on the strict timeframe

In view of the above, it is questionable if the Hong Kong Government should blindly follow the strict time limit approached adopted in the other states, given the differences in the level of training a decision maker received, the burden of proof in establishing a claim, and the difficulty of obtaining supporting documents and medical evidence. Hence, it is submitted that as a metropolitan city where human right are apparently well respected, Hong Kong should not blindly follow the practice of the foreign states which have been severely questioned by the overseas institutions.

Therefore, it is recommended that the time limit of the Hong Kong claimants to fill a non-refoulement claim form should be extended. The Government might consider if a 40-day timeframe is feasible, as 40-day timeframe has been suggested by a group of Legislative Council members in 2012.\(^{81}\) In addition, clause 37ZD of the Immigration Ordinance should be deleted so that no delay in handling of the torture claim can be taken into account as a behavior damaging the claimants’ credibility. Finally, it is also submitted that the government should clarify what constitutes “legitimate ground” in granting deadline extension, so that unnecessary arguments between the legal representatives and the Immigration, which amounts to a waste of taxpayers’ money, can be avoided.

VI. Conclusion

As is widely acknowledged, the asylum process—from claim to decision—ought to be conducted quickly, but should always ensure high standards of fairness.\(^{82}\) Hong Kong has been a contracting party of CAT since 1992. However, as we learn from the above, the Hong Kong Government introduces legislative changes and reviews the refugee screening process only after a judicial

\(^{80}\) Helen Baillot, Sharom Cowan and Vanessa E. Munro, ‘Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK’ Intl. J.L.C. 105, page 10.


challenge has been made. The case of *Prabakar (supra)* was a turning point of refugee law in Hong Kong. Subsequently, a numerous of legislative changes have been brought out in this evolving jurisprudence. Indeed, the USM has finally been implemented, in which all the non-refoulement grounds are screened in one go. However, certain aspects of the current screening mechanism remain controversial, and it remains to be difficult for the claimants to put their cases in a fair manner. As the author has illustrated above, the medical examination arrangement and the strict deadline have been severely criticized by the overseas institutions. It is submitted that these practices cannot meet the high standards of fairness guaranteed in the case of *Prabakar (supra)*. By and large, it is recommended that the government should take the initiative and constantly review these two aspects of the refugee screening mechanism, and to consider the recommendations suggested above, so that claimants can put their case fairly. It can also be done by way of studying the approach taken in the foreign jurisdictions. A piecemeal approach does not bring any good to the society and claimants.