Refugee and CAT law in Hong Kong: an update

Hong Kong Lawyer

Refugee and CAT law in Hong Kong: an update

October 2012

Mark Daly

Mark Daly provides an update on the key developments in refugee and Convention Against Torture (CAT) law in Hong Kong, including the CAT screening process, ongoing litigation relevant to asylum-seekers, refugees and CAT claimants, and the new Immigration (Amendment) Ordinance 2012.

The present non-statutory administrative screening process set up to assess the veracity of CAT claims has now been in operation for over two and a half years. As a result of the success of the case of *FB v Director of Immigration* [2009] 1 HKC 133 (see my earlier article 'Refugee law in Hong Kong: building the legal infrastructure'in Hong Kong Lawyer, September 2009, p 14), lawyers (there are 272 lawyers on the CAT panel) are now representing the claimants – one of the developments meant to improve the fairness of the process. The Immigration Department's Torture Claim Assessment Section (TCAS) has recently moved from its beginnings in Shatin to theSkyline Tower in Kowloon Bay. I'm sure most of the participating lawyers are appreciative of the change of venue (not least for the Pacific Coffee in the spacious lobby). What has not changed though is the 0% success rate under the 'enhanced' system and this should be a serious cause for concern for all involved in the process. I will set out some possible explanations below.

The numbers

With effect from 24 December 2009, the Duty Lawyer Service (DLS) had taken up 1854 cases: DLS statistics as at 18 November 2011, LC Paper No CB (2) 503/11-12(01). Of these cases, 1073 have been completed with: 171 withdrawing the CAT claim; 1304 filing a questionnaire; 902 receiving a determination from the Director of Immigration (DOI); 895 applying for an extension for filing the questionnaire; 441 having applied for a refugee claim with the United Nations High Commissioner for Refugees (UNHCR); the average time for submission of the questionnaire declining from 87 days (2010) to 48 days (September to October 2011); the DLS lodging 39 petitions (38 rejected, 1 pending) and 'no claimant has so far been successful in their CAT claims'. According to the Security Bureau (SB) up to 31 May 2012, decisions have been made in 1865 cases and 'none of the claims have been substantiated'. 979 did not lodge a petition and of the 886 who did lodge a petition the Adjudicators decided 788 – all rejected (46 after an oral hearing and 742 upon paper review). There are 5770 torture claims outstanding.

Of paramount importance to the integrity and fairness of this evolving system is the correct identification of, and therefore protection of, persons meeting the CAT definition (similarly the refugee definition). Even the most cynical observers, and those suspecting that many claims would be 'bogus', would have to be surprised, if not concerned, by the present shut out (zero % success). The previous head of the UNHCR Sub-office in Hong Kong had earlier expressed concern at the low success rate and the explanation that all claimants are bogus certainly doesn't seem

lausible. Are the better cases being held back? I am aware of a few cases which I may consider to be more meritorious not proceeding to the interview stage (after submission of the questionnaire and supporting evidence) for over one year but this is an issue for which it is difficult to obtain statistics.

What also leaps out at us from the numbers is that given that the petition phase should be a de novo opportunity to substantiate one's case before an independent decision maker the low number of petitions being advanced is another cause for concern and may contribute to the low success rate. When envisaging the system I would have thought that not taking a case to petition phase would be the exception and not the norm.

Procedural and decision making concerns and judicial review

In an evolving system, it is expected that there will be a number of judicial reviews of early decisions to provide guidance to the decision makers and others in the process, and to further refine and enhance the fairness in the system. There is an argument to be made that these groundbreaking early judicial reviews should be expedited given the gravity of the decisions being made (*Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289; FB) and the possibility of serious systemic flaws in the system, with the 0% success rate sounding the alarm. Having represented applicants at a number of interviews now and discussed generally the decision making with a number of the participating lawyers, there exists a perception that the first level decision makers are 'going through the motions' or adhering to apattern of questioning and boilerplate rejections which cast doubt on the receptivity, openness or understanding of the claims, and country of origin information necessary for the proper discharge of the decision making function. This early sentiment is also found at the petition stage. What is clear however is that unless there is early and critical analysis of these decisions (and perhaps, at least, a trickle of successful claimants) serious questions will remain over the integrity of the process.

Judicial reviews

Procedural and analytical concerns will inevitably be reflected in judicial review challenges. One of the few early judicial reviews is the case of *TK v Michael C Jenkins* [2011] HKCU 2037 (HCAL 126/2010, 21 October 2011). Lam J (as he then was) stated the nature of the case at [24]:

"The challenge of the Applicant in the present proceedings can broadly be summarized into the following heads,(a) Shift of burden of proof;(b) State acquiescence;(c) Internal relocation."

In upholding the Adjudicator's decision, Lam J found that there was no rule of law as to the shift of proof and that 'this court should approach any challenge to the Adjudicator's finding of facts (including an assessment as to whether substantial grounds existed in light of the primary facts as found) by the enhanced Wednesbury test': *ibid*, [44]. The judge discussed the law relating to 'acquiescence', upheld the inquisitorial nature of the hearing, but ultimately found that the decision of the adjudicator did not err in his analysis on internal relocation. The practitioner should note that the judgment is being appealed with the hearing in the Court of Appeal fixed for the 16 October 2012.

In *Jamaluddin v Director of Immigration* [2012] HKCU 500 (HCAL 104/2011, judgment 29 February 2012; reasons 2 March 2012), Au J, in refusing leave to an applicant in person, cited TK and referred to the 'duty' of the DOI of 'understanding the receiving country's conditions at the time of the alleged torture in the past as well as at the present': ibid, [25]. Au J seemed to find it significant that the Constitution of India offered protection of fundamental rights and the Code of Criminal Procedure in India offered a remedy. With the caveat that I do not have the full materials relevant to that case, such an analysis is finding its way into reasons at the administrative levelwith reference to other countries. I would think that it could be a leap of logic, particularly with respect to traditional

countries producing refugees and CAT claimants, to assume that a recitation of the constitutional documents or Criminal Code is necessarily reflective of the reality on the ground. Described as:

"on paper, the most liberal and democratic document of its kind the twentieth century had ever seen ... full of ingenious and admirable devices which seemed to guarantee the working of an almost flawless democracy", was how historian William Shirer described the Weimar Constitution of Nazi Germany. In *Marcelo De Vera Centeno v Director of Immigration* [2012] HKCU 1020 (HCAL 50/2012, 9 May 2012), again an unrepresented litigant sought leave with the issue being a lack of an oral hearing before the adjudicator. In a brief analysis, leave was refused.

I am aware of a number of other judicial reviews that have been filed challenging, *inter alia*, the failure to provide an oral hearing among other grounds. The case of *VR v William Lam* (HCAL 106/2011) is to be heard in the Court of First Instance on 20September 2012 and there are others in the pipeline including a number filed by unrepresented litigants that, to my knowledge, have not resulted in reported judgments to date.

Immigration (Amendment) Ordinance 2012

Another key development that practitioners need to be aware of is the Immigration (Amendment) Ordinance 2012, No 23 of 2012 (IAO). It is expected that the IAO will become operational at the end of 2012. As this article is only a brief update, space here does not allow for a full analysis; however, practitioners should scrutinize the IAO. I also invite the reader to review the Paper for the House Committee meeting on 1 June 2012 (LC Paper No CB(2)2192/11-12), the submissions of various organizations to the Bills Committee and in particular the Joint Submissions of the Law Society and Bar Association dated 18 November 2011, which highlight a number of concerns with the present system and the IAO. The Law Society/Bar report states at [7]:

"The UNHCR assessment process, if it was amenable to the jurisdiction of the Hong Kong courts, *would not meet the high standards of fairness and would most likely be declared unlawful for substantially the same reasons as in FB*. Further, it is unfair and anomalous that the ultimate decision on the individual's refugee status by the UNHCR is not amenable to judicial scrutiny."

In spite of this, the Joint Profession (in this and submissions dated 21 and 30 May 2012) notes that the IAO will introduce a statutory framework for CAT claims *only* (not refugees) and raises a number of concerns including:

• the lack of a provision for temporary permission to stay;• the prescribed time limits being 'unrealistic and harsh';• concerns about the present medical procedures;• concerns about the assessment of credibility; and• concerns about the appeal procedures.

It is regrettable that there appears to be little opportunity for a reasonable, balanced and negotiated approach leaving litigation as often the sole remaining option for claimants.

The big picture

While the imminent coming into force of the IAO, despite major omissions and procedural flaws, and the other concerns with the evolving system may still be seen as the successful culmination of strategic test case litigation, when one steps back and looks at the big picture it is hard not to be disappointed at the lack of a holistic approach by the Hong Kong SAR Government to the detriment of the genuine claimants and the Hong Kong public. There has been little movement by the HKSARG on the issues raised by all of the relevant stakeholders including: the expert UN Committees; the Law Society/Bar Association; the UNHCR; academics; NGOs and church groups. The

HKSARG falls back on tired old discredited justifications ('floodgates') which do not stand up to scrutiny. Since my earlier article, the UN Committee on the Elimination of Racial Discrimination considered the China report (including Hong Kong) (CERD/C/CHN/CO/10-13, 15 September 2009) and concluded at [29]:

"While noting the planned legislative framework for torture claimants in Hong Kong SAR, the Committee is concerned that the State party has not adopted a refugee law as such, including a screening procedure for asylum claims. (art 5 (b))

The Committee recommends the adoption of a law on refugees, with a view to establishing a comprehensive procedure for the screening of individual asylum claims. It furthermore recommends that the rights of asylum-seekers to information, interpretation, legal assistance and judicial remedies be guaranteed. The Committee also encourages the renewed consideration of the ratification of the 1951 Conventionrelating to the Status of Refugees and its 1967 Protocol."

The inconsistent and unfair approach in the HKSAR is illustrated by way of contrast with the system in New Zealand. There, the legal aid lawyer assists the claimant to:

– Identify whether personal account is prima facie within the Refugee Convention definition – Determine whether, prima facie, CAT and/or ICCPR grounds are available.": see Civil Proceedings Steps (October 2011), p 8; available at: www.justice.govt.nz.

Thus, in the HKSAR, unless the DLS assigned lawyer is prepared to represent the claimant through the UNHCR refugee process *pro bono* (which I recommend and which some dedicated lawyers are doing) the claimant may be unrepresented during that process which, in addition to a lack of funded representation, lacks a number of the procedural safeguards which were won as a result of *FB* for the CAT process.

The case of *C v Ors v Director of Immigration & Secretary for Security* [2011] 5 HKC 118 involving the issue of non-refoulement, customary international law and a challenge to the failure of the HKSAR to assess asylum claims independently of the UNHCR, is presently fixed to be heard in the Court of Final Appeal from 5-7 March 2013. I, however, perhaps naively hope that for the reasons set out elsewhere, including the wisdom of the expert UN Committees and the UNHCR, that the HKSAR unifies the system in the twin interests of fairness and efficiency.

Right to work

As lawyers we have to be mindful of the misery created by the lack of a holistic and fair system for these clients. At the time of drafting this update, my firm has just completed a four-day hearing in the Court of Appeal (4-7 September 2012) in the case of *MA v Ors v Director of Immigration* (CACV 44-48/2011). Our clients, four refugees and the only successful CAT claimant (under the original scheme), who have been stranded in Hong Kong for between seven and 12 years, were fortunate to have the assistance of Mr Michael Fordham QC, arguing, inter alia, the scope of: the right to privacy; the freedom from inhuman and degrading treatment; and the right to have an opportunity for gainful employment, in order to determine whether the State can prevent them from taking up available employment. The judgment was reserved.

Training

It is envisaged that there will be a new/revised training in Refugee/CAT law in 2013 and it is hoped that there will be a forum for CAT panel lawyers to raise issues of concern having now engaged in the early years of the process.

難民與香港的《禁止酷刑公約》法例：最新發展

現行評估《禁止酷刑公約》聲請真實性而建立的非法定行政甄別程序，已實施逾兩年半時間。由於*FB v Director of Immigration* [2009] 1 HKC 133一案的成功（見本人早年在《香港律師》所登載的文章「香港難民法例：法律基礎設施的建立」，2009年9月號，第14頁），現時有不少律師（目前共有272名律師在《禁止酷刑公約》委員會內）正作為聲請人的法律代表—而其中一個發展意味著提高程序的公平性。入境事務處的酷刑聲請審理部（TCAS）最近遷址，從它一開始在沙田運作的地方遷至九龍灣宏天廣場。我敢肯定大部分參與的律師都很高興場地的改變（尤其是位於寬敞大堂的太平洋咖啡 Pacific Coffee），但仍維持不變的是「強化」制度下的聲請成功率是零，而這是所有參與這一程序的人最應認真關注的地方。本人將於下文提供一些可能的解釋。

相關數字

自2009年12月24日以來，當值律師服務(DLS)接辦了1854宗案件：見當值律師服務截至2011年11月18日的統計數字，載於立法會CB (2) 503/11-12(01)號文件。在這些個案中，已經完成了1073宗：有171宗個案撤回了《禁止酷刑公約》聲請；1304宗提交了問卷；有902宗收到入境事務處處長的決定；有895宗申請延期提交問卷；有441宗向聯合國難民事務高級專員署(UNHCR)提出難民聲請申請；提交問卷的平均時間從87日（2010年）減至48日（2011年9月至10月）;當值律師服務提交了共39份呈請（38份被拒絕，1份待決），但「至今並無任何聲請人在《禁止酷刑公約》聲請中取得成功」。根據保安局截至2012年5月31日的資料，目前已就1865宗個案作出了決定，但「並沒有任何聲請得到證實」。有979宗個案並沒有遞交呈請，而在遞交了呈請的886宗個案中，審裁員裁決了共788宗 - 但所有個案都被拒諸門外（46宗經口頭聆訊後被拒，742宗經書面審議後被拒）。目前仍有5770宗酷刑聲請有待處理。

對這個不斷發展的制度的完整性和公正性極為重要的，是正確識別並保護符合《禁止酷刑公約》定義（難民的定義也如是）的人士。即使是最為憤世嫉俗的評論員，以及該些懷疑許多聲請都是「虛假」的人士，都不得不因目前聲請全被拒諸門外（零成功率）而感到驚訝（如非關注的話）。聯合國難民事務高級專員署香港分署前主管較早前曾對如此偏低的成功率表示關注，而指所有聲請人都是虛假的解釋無疑看來是巧辭令色。具備較佳理由的個案是否被刻意隱瞞？我知道有若干我認為較有成功機會的個案，竟然輪候逾一年時間仍未（在提交了問卷和支持證據後）進入面試階段，但這一問題卻很難獲得統計數據。

因著這些數字而令我們感到驚訝的是，呈請階段應是聲請人在獨立的裁決者面前再次確立其個案的機會，但提出呈請的數字如此偏低，是我們值得關注的另一問題，而且這可能是導致成功率偏低的原因。在設想這一制度時，我本以為不將個案提交到呈請階段純屬例外情況而非常態。

程序上和決策上所關注的問題及司法覆核

在一個不斷發展的制度中，人們預期將會有一些關於司法覆核的早期裁決，可以為程序中的決策者及其他人提供指引，並進一步完善和提高制度的公平性。鑒於所作決定的重要性(*Secretary for Security v Sakthevel Prabakar* [2005] 1

HKLRD 289; FB)，以及制度中可能存在涉及全系統的嚴重缺陷(零成功率所拉響的警號)，因此一般認為法院應加快處理這些具有開創性的早期司法覆核。目前我們代表一些申請人參與一些會面，以及與一些參與的律師就當局所作的決定進行一般討論，我們感到第一層的裁決人員只是「審查有關動議」或遵從一個樣板式拒絕的模式，使人懷疑對聲請的可接受性、開放態度或諒解，以及所需的原籍國資料有否適當履行決策職能。這種早期的觀點也在呈請階段中表現出來。

但有一點很清楚，除非我們對該等定決定作出了早期和批判性的分析（而也許，至少有三三兩兩的成功聲請者），否則人們對於程序的公平性仍深表懷疑。

司法覆核

對程序和分析性的關注將無可避免地通過提出司法覆核的挑戰反映出來，其中一宗案例*TK v Michael C Jenkins* [2011] HKCU 2037 (HCAL 126/2010，2011年10月21日），就是早期少數的司法覆核之一。原訟法庭法官林文瀚（當時的職位）指出了該宗案件的性質at [24]：

「申請人在本法律程序中所提出的挑戰，大致可歸納為以下項目，(a) 舉證責任的轉移；(b) 國家的默許；(c) 內部遷移。」

在維持審裁員的決定時，林文瀚法官認為在證據的轉移方面並沒有任何法律規則，而「本法院應通過增強的Wednesbury案件測試，就審裁員的事實裁斷所提出的任何挑戰予以處理（包括根據所裁斷的主要事實，就是否存在實質理由作出評估）」：*同上*，[44]。法官討論了與「默許」有關的法律，並維持聆訊的研訊性質，但最後裁定審裁員對內部遷移的分析並無犯錯。執業者應注意到，聲請人已就該判決提出上訴，而上訴法庭已定於2012年10月16日進行聆訊。

在*Jamaluddin v Director of Immigration* [2012] HKCU 500（HCAL 104/2011，2012年2月29日頒下判決；2012年3月2日頒下理由）一案中，區慶祥法官拒絕向一名沒有律師代表的申請人給予許可，並引用了TK一案，及提到入境事務處處長在「了解接收國在過去及目前所指稱酷刑的時候的情況」的「責任」：*同上*，[25]。區慶祥法官似乎認為重要的是《印度憲法》對基本權利所提供的保障，以及《印度刑事訴訟法》所提供的補救措施。有一點要提出的是，由於我並沒掌握與該案相關的全部資料，因此這一分析是在參考其他國家的情況下，在行政管理的層面提供理由。我認為這種想法可能超越了邏輯，特別是有關長期出現難民和《禁止酷刑公約》聲請人的國家方面，假設只需誦讀憲制性文件或《刑法典》必然能夠反映社會的現實情況。

「僅從字面看，二十世紀所曾見到的這一類最開明和民主的文件，當中充滿了巧妙和令人欽佩的設計，而它似乎保證了一個近乎完美的民主運作」

這是歷史學家威廉．夏勒(William Shirer)對納粹德國的《威瑪憲法》所作的描述。

在*Marcelo De Vera Centeno v Director of Immigration* [2012] HKCU 1020 (HCAL 50/2012，2012年5月9日)一案中，無律師代表的訴訟人再次尋求許可，但其問題並沒有獲安排在審裁員前進行口頭聆訊。經過簡短的分析，當局便拒絕給予所尋求的許可。

我知道有一些已提交的其他司法覆核，除其他事項外，對於沒有獲得安排進行口頭聆訊(在其他理由中)提出挑戰。*VR v William Lam* (HCAL 106/2011)一案將於2012年9月20日在原訟法庭進行聆訊，而正在排期的其他案件，據我所知，包括一些由無律師代表的訴訟人所提出，但至今仍未成為經報道的判決。

《2012年入境（修訂）條例》

執業者需要關注的另一重要發展，是《2012年入境（修訂）條例》（2012年第23號）。《2012年入境（修訂）條例》預期2012年年底開始施行。基於版面所限，本文只扼述最新狀況而未能對此作全面分析，但執業者應對《2012年入境（修訂）條例》加以審視。我亦邀請讀者檢視2012年6月1日的內務委員會會議文件 (LC Paper No CB(2)2192/11-12)，各機構向法案委員會提交的意見書，特別是香港律師會和大律師公會於2011年11月18日聯合提交的意見書，當中提出了對現行制度和《2012年入境（修訂）條例》的關注。香港律師會和大律師公會的報告書指出at [7]：

「*如聯合國難民事務高級專員署的評核程序以香港法院的司法管轄權處理，便不會符合公平的高度標準，並且很大可能會依據與FB一案大致上相同的理由被宣布為不合法。*此外，聯合國難民事務高級專員署就個人難民身份的最終決定並不須接受司法審查，也是不公平和不尋常的。」

儘管如此，香港律師會和大律師公會（在這份意見書以及在2012年5月21日和30日提交的意見書中）指出，《2012年入境（修訂）條例》將只為《禁止酷刑公約》的聲請（而不是難民）引入一個法定框架，並且提出了若干需要關注的地方，包括：

- 缺乏准許短暫逗留的規定；
- 訂明時限「不切實際和苛刻」；
- 關注目前的醫療程序；
- 關注可信性的評估；及
- 關注上訴程序。

令人遺憾的是，我們發現當中似乎不大有機會獲得一個屬合理、平衡和協商的處理方式，通常只餘下提起訴訟供聲請人選擇。

整幅圖畫

儘管《2012年入境（修訂）條例》即將生效（即使它存在重大遺漏和程序上的缺陷，並對不斷發展的制度提出其他關注），但這仍可看作為策略性測試案件訴訟的最大成果。當我們退一步看整幅圖畫的時候，很難不對香港特區政府缺乏全盤方法，以致真正的聲請人和香港普羅大眾為此受損而感到失望。香港特區政府針對所有相關持份者所提出的問題沒有採取實質行動。該些持份者包括：聯合國專家委員會；香港律師會 / 香港大律師公會；聯合國難民事務高級

專員署；學者；非政府組織及教會團體。香港特區政府倚靠陳舊且不可靠的理由（「大量難民湧入」）根本站不住腳。自本人早年的文章刊登以來，聯合國消除種族歧視委員會審議了中國（包括香港）報告(CERD/C/CHN/CO/10-13,15 September 2009)，並得出如下結論at [29]：

「儘管注意到香港特別行政區計劃制定酷刑聲請人的立法框架，但委員會關注到，締約國尚未通過一項如此的難民法，包括為庇護聲請提供甄別程序。（第5 (b)條）

委員會建議通過一項關於難民的法律，旨在為個別庇護聲請提供全面的甄別程序。此外，它還建議保障尋求庇護者在資訊、傳譯、法律援助及司法補救措施方面的權利。委員會還鼓勵重新考慮對《1951年關於難民地位的公約》及其《1967年難民地位議定書》所作出的認可。」

香港特區採取的不一致和不公平做法，可藉著比照新西蘭制度予以說明。在新西蘭，當地的法律援助律師協助聲請人：

– 確定個人帳戶表面上是否在《難民公約》的定義範圍內；– 決定《禁止酷刑公約》及/或《公民權利和政治權利國際公約》的理由表面上是否可以運用：見Civil Proceedings Steps (October 2011), p 8; available at: www.justice.govt.nz。

因此，在香港特別行政區，除非當值律師服務所指派的律師正準備通過聯合國難民事務高級專員署的難民程序，以無償方式（由我所提出的建議並有一些富有奉獻精神的律師正這樣做）擔任聲請人的法律代表，否則聲請人在該程序中可能會沒有律師作為其代表。這樣，聲請人除了可能得不到由政府提供經費的法律代表外，還缺乏在FB一案中就《禁止酷刑公約》程序而在程序上獲得保障。

C v Ors v Director of Immigration & Secretary for Security [2011] 5 HKC 118一案涉及不遣返原則、國際慣例，以及對香港特別行政區未能獨立於聯合國難民事務高級專員署對庇護聲請進行評核的做法提出挑戰等問題，現正排期於2013年3月5-7日在終審法院進行聆訊。但是，我也許天真地希望，基於在其他地方所述的原因，包括聯合國專家委員會和聯合國難民事務高級專員署的明智作為，香港特別行政區會將該制度統一於公平與效率這雙重利益中。

工作權利

作為律師，我們必須考慮到缺乏一個全面而公平的制度給這些當事人所帶來的痛苦。在撰寫這一篇報道最新狀況的文章時，我的律師事務所剛剛就 *MA v Ors v Director of Immigration* (CACV 44-48/2011)一案，完成了在上訴法庭為期四日的聆訊（2012年9月4至7日）。我們的當事人，包括四名難民以及在《禁止酷刑公約》下唯一成功的聲請人(在原計劃下)，都在香港滯留了7至12年不等。承蒙Mr Michael Fordham QC的協助，除其他事項外，就以下範圍的事宜提出爭辯，包括：私隱的權利、免受不人道和有辱人格待遇的自由、享有機會獲得有酬工作的權利等，以決定該國家是否有權剝奪他們的就業機會。該判決已被保留。

培訓

我們預計在2013年將會進行一個新的 / 經修訂的難民 / 《禁止酷刑公約》法例的培訓，並期望將會有一個為《禁止酷刑公約》委員會律師而設的論壇，讓他們可以就現時所參與的早年程序提出所關注的問題。

End of Document