



Submission on Immigration (Amendment) Bill 2009

The Law Society's Working Party on Torture Claimants and Asylum Seekers ("WP") has considered the Immigration (Amendment) Bill 2009, and has the following comments:

1. While the WP is not opposed to the Administration taking appropriate measures to deter illegal immigrants from taking employment or engaging in business, it sees the problem in a wider context. The WP refers the Administration and Legco members to the two Joint Position Papers of the Law Society and the Bar Association on Asylum Seekers and Convention Against Torture ("CAT") claimants, dated 31 March 2009 and 3 July 2009.
2. From this "wider context" a number of important points become apparent. The first is that this "new" situation is only one example of the problems created by the Administration not putting in place a comprehensive framework to deal with claims made by asylum seekers and CAT claimants. United Nations bodies and experts have been calling on the Administration for years to reform this area. It is the continuing legislative vacuum and present unfair and inefficient dual system of managing asylum seekers and CAT claimants that has contributed to abuse as much or more than the recent case of *Iqbal*.
3. It is important to remember that the target of the amendment are illegal immigrants, *some* of whom may after their arrival make claims for protection under CAT. There are many persons who seek protection under CAT who arrived in Hong Kong legally, on valid passports, and sought asylum with the UNHCR in a timely fashion, many during their limit of stay. As the Law Society has recently stated (in a Joint Submission to the LegCo Security Panel dated 3 July 2009), the current measures in place for assessment of CAT claimants *require* a potential claimant to become an overstayer before a claim will be considered.
4. It is therefore vital that the Administration not tar all CAT claimants with the same "illegal immigrant" brush, as this could have the unfortunate effect of giving the impression to some impartial observers that the Administration is predisposed towards disbelieving claims made under CAT.
5. Therefore, it is important to remind the Administration, in its attempts to manage this problem, to be mindful of its obligations to genuine claimants under CAT,

and asylum seekers under customary international law, and not to categorize all as illegal immigrants. The Administration should also be mindful of any interdiction measures it has – i.e. measures aimed at preventing or at least deterring migrants from reaching the territory, the net result of which undermine the non-refoulement obligations. At present, the WP does not know what happens at interception points if the HKSAR is overaggressive and wrongly labels all as illegal immigrants.

6. Indeed the WP has offered its assistance to take part in putting in place a system that fairly and efficiently determines the genuine applicants from those seeking to abuse the system—including those seeking illegal employment.
7. In the context of the existing controls, and their alleged inadequacies, two points can be made. The first is that the lack of a specific condition prohibiting illegal immigrants from taking up unapproved employment does not mean that a potential employer will be able to lawfully employ them. Quite the contrary: s17I(1) of the Immigration Ordinance still applies:

Any person who is the employer of an employee who is not lawfully employable commits an offence and is liable to a fine of \$350,000 and to imprisonment for 3 years.

8. The second point harkens back to the previous comment on the lack of a comprehensive system. The new proposals would have the effect of prohibiting persons who are in Hong Kong having illegally arrived, or those who, having arrived lawfully, have been made the subject of deportation or removal orders. The new law will *not* affect those CAT claimants who have entered Hong Kong lawfully and remain here on recognizance pending the outcome of their screening yet have not been made the subject of a specific removal or deportation order.
9. The WP assumes that this omission is deliberate. If it raises the question as to whether or not the Administration plans to implement a new policy that *all* CAT claimants who are not illegal immigrants must be made the subject of a removal order, simply so that they can be prohibited under this law from engaging in employment or establishing a business.
10. The WP, while mindful of the ongoing need to be vigilant against illegal immigration and illegal employment, asks what consideration has been given to the rights of successful CAT claimants and refugees and genuine CAT claimants and asylum seekers in the knowledge that at present they are provided minimal assistance (no financial support) and are effectively left in limbo – which is particularly dehumanizing since the systems designed to assess their claims are not yet up and running. While the Refugee Convention has not been extended to the Hong Kong SAR (it has to Macao and the Mainland) the WP asks what consideration has been given to the principle in Article 17 of the Refugee Convention that:

The Contracting State shall accord to refugees lawfully staying in their territory the most favoured treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

11. The WP is aware of refugees in the Hong Kong SAR who may have no prospect of “resettlement” yet would not be allowed to work in Hong Kong. Similarly, the plight of those successful CAT claimants (and stateless individuals) has not been considered. Would it not be preferable to allow this group to be allowed to take up employment and engage in business and contribute to society as opposed to continue to leave them in a state of destitution or reliant on government assistance?

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