

## LCQ3: Torture claims

Following is a question by the Hon Lai Tung-kuok and a reply by the Secretary for Security, Mr Tang Ping-keung, in the Legislative Council today (January 24):

Question:

It has been reported that Hong Kong has long been bothered by the problems of torture claims. As at the end of October last year, about 14 700 claimants were still stranded in Hong Kong. There are views that the Government must adopt decisive measures to eradicate incentives for torture claimants to stay in Hong Kong and take up unlawful employment. In addition, in June last year, the court pointed out in a judgment handed down on a case involving a claimant that those unsubstantiated torture claimants who are detained pending removal from Hong Kong can make the length of detention unreasonably long by refusing to provide co-operation in obtaining the travel document and then applying for a writ of habeas corpus to challenge the legality of their detention. The court further pointed out that to break this impasse, one possible way to consider would be to criminalise such acts of non-co-operation. In this connection, will the Government inform this Council:

- (1) whether it accepts the aforesaid suggestion by the court and the time for its implementation; if it does not accept the suggestion or there is no timetable yet, of the reasons for that;
- (2) of the number of times in the past three years that the authorities exercised the power under section 37ZK of the Immigration Ordinance to detain torture claimants pending final determination of their claims; and
- (3) whether it will consider revising the policy so as to fully exercise the power under section 37ZK of the Immigration Ordinance to detain persons who have lodged torture claims, thereby eliminating the situation of unlawful employment taken up by them?

Reply:

President,

The Government attaches great importance to the issue relating to non-refoulement claims and has all along adopted a multi-pronged strategy. The Security Bureau (SB) amended the legislation in 2023 to include the Nei Kwo Correctional Institution as a place of detention of the Immigration Department (ImmD), thereby increasing the total number of detention capacity by 33 per cent to 900. The ImmD is committed to making gainful use of the existing facilities to detain claimants who pose higher security risks to the community in accordance with the law. On the other hand, since the introduction of the updated removal policy with effect from December 7, 2022,

the ImmD will generally proceed with the removal of unsubstantiated claimants from Hong Kong upon dismissal of their judicial review or relevant leave applications pertaining to their non-refoulement claims by the Court of First Instance (CFI), irrespective of whether there are outstanding court proceedings. Since the implementation of the updated policy until end-2023, the ImmD has removed a total of 1 851 claimants from Hong Kong, including 215 under the updated policy. The number in 2023 has significantly increased by 63 per cent compared to 2022.

In response to the respective parts of the question raised by the Hon Lai, my reply is as follows:

(1) The Government amended the Immigration Ordinance (the Ordinance) in 2021 to include provisions addressing claimants' delaying tactics, which is applicable to assess the reasonableness and lawfulness of the detention period, such as whether the claimants have been co-operative in obtaining travel documents for returning to their countries of origin, and whether they have caused any hindrance to the removal process.

The judgment referred to in the question suggests making reference to a piece of legislation in the United Kingdom which specifies that it is a criminal offence for a non-refoulement claimant to be unco-operative in obtaining a travel document causing delays to his/her removal. The period of imprisonment is not subject to the principles of administrative detention. We have studied the judgment concerned and considered that even similar legislations were made, those unco-operative claimants can still insist to be unco-operative after serving their prison terms. Repeatedly using the relevant provisions to prosecute the same consistently unco-operative detainee may not only induce controversy and legal challenges on the lawfulness, but also involves substantial resources in processing the investigation of criminal cases, thereby we must be prudent.

Recently, another judgment laid down by the Court of Appeal (CA) could better help solve claimants' unco-operative behaviours. In July 2023, the Government lodged an appeal (CACV 229/2023) against the CFI of the High Court for allowing the habeas corpus application of a claimant who had been sentenced to imprisonment for rape. In November 2023, three Justices of Appeal of the CA unanimously allowed the appeal. The relevant judgment specified that any period of prolonged detention or delay in the processing of a non-refoulement claim caused by a detainee's own unco-operative or unreasonable behaviours should not be regarded or counted as an unreasonable period of detention. Otherwise, it would result in an absurd situation where the more unco-operatively the detainee behaves in the removal procedures, the more likely he/she is to be released. That is against the intention of the relevant common law principles. This judgment directly provides clear legal guidance on relevant common law principles, which greatly facilitates the Government in detaining claimants in accordance with the law, without the need to make separate legislation and then spend time and resources on subsequent criminal prosecutions.

(2) & (3) According to Section 37ZK of the Ordinance, a claimant pending

final determination of his claim may be detained. From 2021 to 2023, the numbers of claimants detained by the ImmD under Section 37ZK are 263, 241 and 538 respectively, which accounted for 10 per cent, 19 per cent and 25 per cent respectively against the number of new claimants in that year.

When considering detention under Section 37ZK, the Government must carefully consider the legal issues, the use of resources, and the security. The Government is required to follow the relevant legislations, legal principles established by the Court under the common law, such as proportionality and reasonableness as well as the detention policy, and takes into account the individual case circumstances, including whether the final determination of the claim can be obtained within a reasonable time; whether the individual concerned has previously committed a serious crime and if so whether he/she is likely to pose a threat or security risk to the community if not being detained; and whether there is any risk of the individual absconding, offending or re-offending. In 2014, the Court of Final Appeal ruled that the Hardial Singh principles under the common law must be observed by the ImmD during the course of removal procedures, i.e. such illegal immigrant may only be detained for a period that is reasonable; and the ImmD cannot continue to detain that person if it becomes apparent that it will not be able to effect removal within that reasonable period.

On the use of resources front, the Government must take into account the efficient use of public money and the sustainability of the policy. Based on the number of new claims of some 2 100 received in 2023, and that claimants remained in Hong Kong for an average of three years over the past three years as the estimation basis, invoking Section 37ZK or other provisions in full would require around 6 300 additional detention places. Taking the Stanley Prison as an example, which is the largest correctional institution with a capacity of around 1 500, in order to increase the number of detention places by 6 300, the Government will need to build an additional detention facility with a scale equivalent to four Stanley Prisons. The Government will also need to reserve billions of operating funding and employ an additional thousands of officers to implement such policy, which we must carefully consider.

On the security front, the risks and security issues brought by large scale detention of claimants cannot be underestimated. In the past, Vietnamese migrants were involved in gang-fighting in the closed camps day after day, and even triggered several riots which led to deaths and casualties. For example, in 1992, Vietnamese migrants assaulted each other inside the Shek Kong Detention Centre and set fire to a hut, which led to 24 deaths. Currently, claimants come from different countries, with different cultures and religious backgrounds, which will pose greater security risks.

We have taken into consideration factors including law, financial resources and security, and considered that the suggestion of full detention of all claimants is not appropriate. The Government will continue to gainfully make use of the existing detention facilities to detain claimants who pose higher security risks to the community, and expedite the removal of unsubstantiated claimants from Hong Kong. The law enforcement agencies will

also step up enforcement actions against immigration offences and illegal employment, in order to lower the economic incentives of claimants.

Thank you, President.