Refugee law in Hong Kong: building the legal infrastructure

香港難民法例：法律基礎設施的建立

Mark Daly discusses advances in refugee law as a result of recent judicial review 'test' cases, arguing that a comprehensive legislative regime is needed to complete a protective framework for asylum seekers, refugees and CAT claimants, as well as proper procedures that the legal profession can positively engage with in order to safeguard the rights of applicants

帝理邁律師論述香港的難民法例因著近期的司法覆核「測試」個案而有所改善，並指出香港需要建立一個全面性的法律體制，以完成一個為尋求庇護者、難民及《禁止酷刑公約》聲請人而設的保護框架，並訂立讓法律界得以積極參與的適當程序以保障申請人的權利

I moved to Hong Kong from Toronto, Canada in 1995 as a newly minted barrister and solicitor. I had studied refugee law and international human rights law at Osgoode Hall Law School and, given my wish to practice human rights law, I was fortuitous to have the opportunity to work with Pam Baker & Company. We regularly made the long trek from our tiny one-room office in Mong Kok, the entrance to which was hidden from view by vegetable stalls, to the detention camps for the Vietnamese asylum-seekers, located in High Island, Whitehead and Tai A Chau. There we would interview clients in preparation for refugee submissions, judicial reviews or *habeas corpus* applications. Much of the work was done *pro bono* (I supplemented my income by teaching tennis; Peter Barnes by teaching piano), although we would occasionally receive baskets of fruit from grateful clients. We tried not to fight over the large mangoes.

I mention this background not simply to reminisce but rather to illustrate the backdrop against which the refugee law in the Hong Kong SAR has developed.

No legal framework

In those days, Hong Kong had legislation, namely 'Part IIIA: Vietnamese Refugees' of the Immigration Ordinance (Cap 115), that provided for the refugee status determination (RSD) only of those former residents of Vietnam who fled en-masse and sought asylum in various parts of Asia, including Hong Kong. The legal regime

我於1995年從加拿大的多倫多來到香港，那時是一名新入行的訟務和事務律師。我在Osgoode Hall Law School唸書時修讀難民法和國際人權法，而由於我希望從事人權法方面的工作，當時剛好便有機會在貝嘉蓮律師行工作。我們經常從位於旺角的只有一個房間的辦公室(它的入口被一個菜檔所遮擋)，長途跋涉前往萬宜羈留中心、白石羈留中心和大鴉洲羈留中心探望來自越南的尋求庇護者。在那兒我們會見當事人，處理難民身份的申述、司法覆核或人身保護令申請等方面的工作。我們大多數的工作都是*志願性*的(我是靠教人打網球而彭思傑是靠教人彈琴來幫補我們的收入)，雖然間或會收到一些當事人為表謝意而送給我們的水果籃，但我們不企求獲得巨額報酬。

我陳述這一往事，主要不是為了緬懷過去，而是要說明香港特別行政區難民法例的發展背景。

欠缺法律框架

當時的香港訂有《入境事務條例》(第115章)「第IIIA部：越南難民」的法規，為當時集體逃離越南，在亞洲各地(包括香港)尋求庇護的前越南居民

included, *inter alia*, the setting up of an independent Refugee Status Review Board (RSRB), the procedural details for RSD and provisions regarding detention.

These provisions were effectively removed from the Immigration Ordinance with effect as of 9 January 1998. Thus, except for former residents of Vietnam arriving in Hong Kong between 1988 and 1998 (prior to which time all Vietnamese immigrants arriving in Hong Kong were automatically given refugee status), there was and is a complete lack of legislation, regulation and/or coherent overall policy to deal with asylum seekers, refugees and now a growing number of Convention Against Torture (CAT) claimants.

It has been said that cats and dogs have more protection under Hong Kong law than refugees do ('Pets better served than refugees, say lawyers', *South China Morning Post*, 5 December 2004). Cats and dogs enjoy a dedicated statute, right of appeal to an independent board and specific provisions regulating decisions which vary length of detention. Not humans. To a young lawyer from Canada, it was remarkable that such an important area of law effectively did not exist in Hong Kong despite the trumpeted importance of the rule of law in this jurisdiction.

Unlike most jurisdictions with developed legal systems, Hong Kong does not make its own decisions on refugee status but instead relies on the United Nations High Commissioner for Refugees (UNHCR) for such decisions. At the same time, the Hong Kong administration is now devising a system to determine whether someone may face torture if returned to their country of origin.

作出了如何確定其難民身份的規定。該法定制度，包括設立獨立運作的難民身分覆檢委員會，訂立確定難民身份的程序細節和有關羈留的規定。

然而，這些規定於1998年1月9日起已自《入境事務條例》中刪除。因此，除了該些在1988年至1998年期間抵達香港的越南居民外(在這時期之前，所有抵達香港的越南入境者均自動獲得難民身份)，自那時起直到現在，均沒有與尋求庇護者、難民，以及數目正在不斷增加的《禁止酷刑公約》聲請人有關的法例、法規及／或連貫性的整體政策被通過。

有人說，在香港的法例下貓狗所享有的保障更勝於難民(參看「寵物所獲得的服侍較難民為佳，律師們如是說」，*南華早報*，2004年12月5日)。貓狗享有為它們專門制訂的法例、向獨立委員會上訴的權利，以及對羈留時間長短所作的更改作出規管的具體規定，但人類卻沒有這般的待遇。對於一名來自加拿大的年青律師來說，一個這麼重要的法律範疇竟然在香港尚付闕如，這實在令人感到驚訝，儘管我們時常宣稱法治是如何重要。

與許多擁有發達法律體系的司法管轄區不同，香港決定難民身份的工作並非由她自行處理，而是倚賴聯合國難民事務高級專員辦事處在這方面所作的決定。香港政府現時正在計劃設立一個制度，以確定某些人如被遣返其來源國時會否遭到酷刑對待。

The Law Society and Bar Association have recently added their voices to the chorus of concerns about having two separate systems. In the *Joint Position Paper by the Law Society of Hong Kong and the Hong Kong Bar Association on the Framework for Convention Against Torture (CAT) Claimants and Asylum Seekers* issued on 31 March 2009, they stated:

> "Both the Law Society and the Bar Association are also aware of the procedural deficiencies and potential for abuse in having a separate assessment process for refugee status determination (RSD) in the HKSAR which is presently carried out by the United Nations High Commissioner for Refugees (UNHCR). 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. Indeed, the UNHCR itself has been calling on the HKSAR to legislate and carry out RSD for a number of years."

To fully appreciate this anomalous situation and its inherent unfairness and inefficiency, one must appreciate the legal developments arising out of the case of *Prabakar*.

Prabakar

Hong Kong's 1999 report to the United Nations Committee Against Torture stated:

> "Should potential removees or deportees claim that they would be subjected to torture in the country to which they are to be returned, *the claim would be carefully assessed, by both the Director of Immigration and the Secretary for Security or, where the subject has appealed to the Chief Executive, by the Chief Executive in Council*. Where such a claim was considered to be well-founded, the subject's return would not be ordered. In considering such a claim, the Government would take into account all relevant considerations, including the human rights situation in the state concerned, as required by Article 3.2 of the Convention. However, there have been no cases so far where the question of torture has been an issue. Thus Article 3.2 has not been applied in any particular case." [emphasis added]

Despite this proclamation, publicly presented by the Hong Kong administration to an international committee of experts, the reality proved to be far different. This was exposed in the judicial review against the Secretary for Security which culminated in the Hong Kong Court of Final Appeal judgment in the case of *Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289 (FACV 16 of 2003, 8 June 2004). The CFA found:

> "Both the Director and the Secretary had not given any consideration as to whether the respondent's claim that he would be subjected to torture if returned was well-founded. Instead,

香港律師會和香港大律師公會近期加入表達對存在兩個不同制度的關注。在2009年3月31日發出的*《香港律師會和香港大律師公會關於禁止酷刑公約聲請人和尋求庇護者框架的共同立場文件》*中，他們指出：

> 「香港律師會和香港大律師公會亦關注到香港特別行政區存在對難民身份確定的單獨評核程序(現時由「聯合國難民事務高級專員辦事處」(以下簡稱「聯合國難民專員辦事處」)負責執行)，於程序上存在的不足之處，以及有被濫用的可能。假如「聯合國難民專員辦事處」的評核程序須受制於香港法院的司法管轄，則它將不會符合高度公平的準則，並會基於*FB*案件中的同樣理由，被法庭宣告為不合法。此外，「聯合國難民專員辦事處」對個別人士的難民身份的最終決定不須接受司法審查，這是不公平和有欠常理的，而「聯合國難民專員辦事處」本身在過去的數年間，已曾要求香港特別行政區進行立法和執行難民身份確定的工作。」

我們如要認識這一不正常、不公平和有欠效率的情況，便必須了解*Prabakar*一案所促成的法律發展。

Prabakar案例

香港在其於1999年向聯合國制止酷刑委員會提交的報告中稱：

> 「假如將要被遷移或遞解的人士，聲稱他們會在被遣送回去的國家中遭到酷刑對待，*則入境事務處處長及保安局局長會仔細評核該等聲稱，而假如該名人士已向行政長官提出上訴，則將會由行政長官會同行政會議進行評核*。假如該等聲稱被確定為有事實根據，則該名人士並不會被遣返。在考慮這一聲稱時，政府會根據公約第3.2條的規定，對所有相關情況作出考慮，包括有關國家的人權狀況。然而，至目前為止並沒有涉及酷刑的個案發生。因此，第3.2條並未適用於任何特定個案中。」[文中的強調乃作者自加]

儘管香港政府向一個由專家組成的國際委員會公開作出了如此宣告，但卻被證明為事實遠非這樣。這情形在針對保安局局長的司法覆核中被揭示，並帶來香港終審法院對*Secretary for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289 (FACV 16 of 2 003, 8 June 2004)一案的判決。終審法院裁定：

they relied wholly on UNHCR's refusal of refugee status, which, as far as they were concerned, was unexplained."

Critical to an understanding of the dangerous flaw in the decision-making process is the fact that the definition of a refugee is different to the legal test for a person fearing return to torture.

Mr Prabakar was a young Tamil who had been detained and tortured at the notorious Sixth Floor of the Central Investigation Department Headquarters in Colombo. Despite the applicant meeting the 'gold standard' for refugee and/or torture claims – as it was put by Mr Nicholas Blake QC, one of his counsel at the hearing – Mr Prabakar had repeatedly been denied refugee status by the UNHCR in Hong Kong. However, after a letter before action from Mr Prabaker's lawyers dated 9 December 1999, providing the Secretary for Security with a deadline of 20 December 1999 to rescind a deportation order, the UNHCR, in a letter dated 17 December 1999, recognised Mr Prabakar as 'a refugee under the Mandate of UNHCR'. This was an unexplained about-face; the UNHCR had previously written to the Director of Immigration on 21 July and 27 September 1999 stating that it was maintaining its original rejection of refugee status and had not informed Mr Prabakar or his lawyers.

Despite being directed by the CFA to implement a process in accordance with 'high standards of fairness', the administration has not promulgated a single legislative or regulatory provision dealing with screening and related issues.

雖然終審法院裁定，政府須根據「高度公平標準」來執行一項程序，但它卻沒有頒布任何處理甄別和相關問題的法律或規例條文。

Despite this, the deportation order was not rescinded and Mr Prabakar was eventually resettled in Canada. The litigation centered on the fairness of the decision-making process. Mr Prabakar's judicial review was dismissed by the Honourable Mr Justice Hartmann at the Court of First Instance on 20 September 2001, but was successful at the Court of Appeal in a judgment dated 27 November 2002. Because of the public importance of the matter, the CFA heard the case in May 2004.

Noting that the UNHCR 'does not usually give reasons for the rejection of refugee status' and that 'it enjoys immunity from suit and legal process and its decisions are not subject to the jurisdiction of the courts in Hong Kong', the CFA rejected the submission that the Secretary could rely merely on the UNHCR's rejection of refugee status in rejecting a torture claim and making the decision to deport.

Chief Justice Li stated:

"This submission cannot be right and must be rejected. As held above, high standards of fairness are required in this situation. Such standards could not possibly be met by the Secretary merely following UNHCR's unexplained rejection of refugee

「入境事務處處長及保安局局長均沒有就答辯人所作的，其於遣返後將會遭到酷刑對待的聲稱是否有事實根據作出任何考慮。相反，他們完全依賴「聯合國難民專員辦事處」所作出的拒絕給予難民身份的決定，但該處並沒有就該等決定提供任何解釋。」

要了解決策過程所存在的危險缺陷，很重要的一點是難民的定義，與對一名恐懼在回去時受到酷刑對待的人士所作的法律驗證不同。

Mr Prabakar是一名年青泰米爾人，他曾在惡名昭彰的科倫坡中央調查部門總部6樓遭到拘留和酷刑對待。儘管該申請人符合難民及／或酷刑聲請的「黃金準則」—正如在聆訊當中，他的其中一名代表律師Mr Nicholas Blake QC所述的一般—但Mr Prabakar仍多次被香港「聯合國難民專員辦事處」拒絕給予難民身份。當Mr Prabakar的律師於1999年12月9日發出一封訴訟前函件，要求保安局局長在1999年12月20日的限期前須將一道遞解令撤銷後，「聯合國難民專員辦事處」便於一封日期為1999年12月17日的函件中，承認Mr Prabakar於聯合國難民專員辦事處訓令下的難民身份。這是一個沒有提供任何解釋的180度轉向。「聯合國難民專員辦事處」之前曾於1999年的7月21日及9月27日致函入境事務處處長，表明它維持其拒絕給予難民身份的決定，並且沒有通知Mr Prabakar或其律師。

儘管如此，該遞解令並沒有被撤銷，而Mr Prabakar最後定居於加拿大。有關的訴訟，圍繞在決策過程的公平性方面。Mr Prabakar的司法覆核於2001年9月20日在原訟法庭被夏正民法官駁回，但於上訴法庭在2002年11月27日所頒發的判決中勝訴。基於該宗案件對社會的重要性，終審法院於2004年5月對該宗案件進行聆訊。

鑒於聯合國難民專員辦事處「通常並不就其拒絕給予難民身份提供任何理由」，而「它享有可免於面對起訴和法律程序的豁免權，它所作的決定並不受香港法院的管限」，因此終審法院拒絕接納保安局局長的陳述稱，他在拒絕接納酷刑聲請和作出遞解決定時，有權單憑聯合國難民專員辦事處所作出的拒絕給予難民身份決定。

終審法院首席法官李國能稱：

「保安局局長的這一陳述並不正確，必須對其加以否定。如以上所言，這種情況必須蘊含高度的公平標準，而這一高度公平標準，不能通

status, with the Secretary being in a state of ignorance of the reasons for such rejection. Determining the potential deportee's torture claim in this way, without undertaking any independent assessment, would fall well below the high standards of fairness required."

Referring to the fatal flaw in the decision-making process, Mr Justice Bokhary in separate reasons stated:

"So extraordinary is such a state of affairs that it has crossed my mind that this deportation order is open to attack not only for procedural unfairness but also for irrationality or even for the lack of a decision by anyone to whom our law entrusts the power to decide on deportation."

From a human rights perspective, or for those who wish to see jurisprudential progress, particularly in the area of international human rights law, it is regrettable that Hong Kong's highest court did not anchor Hong Kong's obligations in any of the grounds argued such as the Basic Law, the Bill of Rights, customary international law and legitimate expectation. Instead, responding to the Hong Kong administration's position that it had no legal duty to follow its policy of not deporting a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well-founded, the CFA stated:

"For the purposes of this appeal, the court will assume without deciding that the Secretary is under a legal duty to follow the policy as a matter of domestic law. In proceeding on the basis of such an assumption, the court must not be taken to be agreeing with the views expressed in the judgments below that such a legal duty exists."

FB: fairness in CAT screening procedures

As a result of *Prabakar*, the Hong Kong administration implemented 'discretionary', 'non-statutory' screening procedures for CAT claimants. Despite being directed by the CFA to implement a process in accordance with 'high standards of fairness', the administration has not promulgated a single legislative or regulatory provision dealing with screening and related issues. As such, the procedures have not benefited from the scrutiny and debate which accompany the legislative process.

Cheung and Wong have documented a 'JR test' which government proposals have undergone during the formulation stage to ensure that they will withstand judicial review (see Anthony BL Cheung and Max WL Wong, 'Judicial Review and Policy Making in Hong Kong: Changing Interface Between the Legal and the Political', *Asia Pacific Journal of Public Administration*, Vol 28 No 2 (December 2006), p 117). The proposed amendments there examined, the legality of which was subject to a detailed review, concerned the prohibition of backyard poultry farming.

It does not appear that a similar process was following in the area of asylum-seekers, refugees and CAT claimants – humans thereby taking a back seat to animals once again. This extraordinary state of affairs pointed to a lack of rigour in the setting up of the administrative screening procedures. The inevitable result was a wide-

過依靠聯合國難民專員辦事處在沒有解釋下所作出的拒絕給予難民身份決定，而局長全不曉得申請人是基於甚麼理由被拒絕的情況下達至。以如此方式來處理可能被遞解人士所提出的酷刑聲請，而不予進行任何獨立評估，是遠遠低於所要求的高度公平標準。」

包致金法官在論述決策過程中所存在的重大缺陷時亦指出：

「這一情況是如此的不尋常，令我想到這一遞解令備受抨擊，不單是因為程序上的不公平，也是因著它的不合理，甚至是由於獲得我們的法律授予其權力作出遞解決定的該些人士並沒有作出如此的決定所致。」

從人權的角度看，或是從希望見到法律進步的人士的角度看(特別是在國際人權法方面)，香港的最高層級法院並沒有按《基本法》、《人權法案》、傳統國際法及合法預期等法理依據來確定香港的責任，這是令人感到遺憾的。相反，對於香港政府指它並沒有法律責任不遞解任何人至他聲稱會遭到酷刑對待的國家，而聲請人所提出的理由，被認為是具有充份理據時，終審法院作出了如下的回應：

「就這一上訴而言，本法院假定(而不作出決定)根據本地法例，保安局局長有法律責任遵循該項政策。在依據這一項假定來作出處理時，不應認為本法院同意下級法庭的判決所稱的這一法律責任確實存在。」

FB：《禁止酷刑公約》甄別程序的公正性

因著*Prabakar*一案，香港政府對《禁止酷刑公約》聲請人實施了「酌處性」和「非法定」的甄別程序。雖然終審法院裁定，政府須根據「高度公平標準」來執行一項程序，但它卻沒有頒布任何處理甄別和相關問題的法律或規例條文。因此，該等程序無法從伴隨立法程序而進行的審查和辯論中得到確立。

張炳良及王慧麟提出了政府的建議在制定過程中的「司法覆核驗證」，以確保其經得起所面對的司法覆核挑戰 (參見張炳良／王慧麟的'Judicial Review and Policy Making in Hong Kong: Changing Interface Between the Legal and the Political', *Asia Pacific Journal of Public Administration*, Vol 28 No 2 (December 2006), p 117)，而當中就禁止後園家禽飼養所提出的修訂作出了查驗，並對其合法性進行了詳細審查。

政府對於尋求庇護人士、難民及《禁止酷刑公約》聲請人，看來並沒有實施類似的程序一這再次顯示人不如動物。這一不尋常事態的出現，顯示政

ranging challenge to the fairness of the CAT screening procedures by judicial review, heard in the High Court over a period of ten days from the end of April 2008 to 26 September 2008: the case of *FB v Director of Immigration* [2009] 1 HKC 133 (HCAL 51, 105, 106, 107, 125 and 126 of 2007, 5 December 2008).

The six 'test' cases challenged the legality of the process of assessment of the applicants' claims for protection under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. The grounds included, *inter alia*, challenges to: the blanket refusal to provide legal representation to all Convention claimants regardless of disability and at all stages of the process; the blanket refusal to permit the attendance of legal representatives during all CAT interviews; the competence and expertise of the assessors; and the lack of a requirement for timely determination. Further, there were no procedural safeguards in respect of the common law privilege against self-incrimination.

The applicants argued, *inter alia*, that these basic requirements are necessary to meet the 'high standards of fairness' required by the Court of Final Appeal in *Prabakar*. One of the more remarkable aspects of the case included the fact that the success rate for the 200-plus claimants in the CAT process was 0%, until the claim by one of the test case applicants was found to be successful during the hearing. This solitary success, over five years after the applicant initiated his claim, came only after the Honourable Mr Justice Saunders in open court raised concerns directed at the respondent's lack of progress in determining the claim.

That was far from the last of the inadequacies exposed. It was not until the challenge was initiated that decisions began to be translated into the various languages of the applicants. A number of the decision-makers had not had any specific training on the Convention Against Torture. One of the applicants had been interviewed in respect of his claim over 123 times – the equivalent of 60 court days worth of time – and unsurprisingly had become suicidal. There is evidence that it was not until 2006/2007, more than two years after the CFA's

府並沒有積極地訂立甄別程序。無可避免地產生的結果是，一系列對《禁止酷刑公約》甄別程序公平性的質疑透過了司法覆核提出，並自2008年的4月底至同年的9月26日的一個10日期間，於高等法院進行了聆訊：*FB v Director of Immigration* [2009] 1 HKC 133 (HCAL 51, 105, 106, 107, 125 and 126 of 2007, 5 December 2008)。

該六宗「驗證」案例，對申請人要求獲得《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》第3條下之保障所涉及的評核程序的合法性提出質疑。該等質疑包括：一概拒絕所有為公約聲請人提供法律代表的要求，不論其是否無行為能力以及處於程序的哪一階段；一概拒絕讓法律代表在所有涉及《禁止酷刑公約》的會見中有份出席；評核人的能力和專門知識；缺乏須適時作出決定的規定。此外，在自證其罪的普通法特權方面，亦缺乏程序上的保障措施。

各申請人稱，對於符合終審法院於*Prabakar*一案所要求的「高度公平標準」而言，該等基本規定是必須的。該案的其中一個較顯著地方，是其中一名申請人的聲請在聆訊中被裁定勝訴以前，200多名《禁止酷刑公約》聲請人的聲請成功率是零。這唯一的勝訴，是經過該名申請人於提出了聲請後5年，在高等法院法官辛達誠於法庭的公開審訊過程中，就答辯人對該等聲請遲遲未能作出決定而表達關注後才取得。

然而，其所揭示的不足之處遠非止於此。只有在有關的質疑提出之後，該等裁決才被翻譯成為各申請人的不同語言文字；而一些決策者並未接受過關於《禁止酷刑公約》的具體培訓。有一名申請人曾就其提出的聲請被會見了超過123次(相當於60天的法庭審訊時間)，並毫不驚訝地令他有自毀傾向。有證據顯示，入境事務處處長是於2006/2007年以後(超過終審法院在*Prabakar*一案的裁決作出之後兩年，以及上訴法庭就該案件作出裁決之後四年)，才成立一個由7名人員組成的評核小組來對公約下的聲請進行研究。2007年，據報導稱，「只有7名入境事務處人員正式負責處理根據聯合國的《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》(《禁止酷刑公約》)而提出的聲請，並有19名人員是從其他部門臨時借調過來」(參看「更多人員被聘處理數目上升的聲請」，*南華早報*，2007年5月18日)。

最後，基於聯合國禁止酷刑委員會的持續關注，以及基於終審法院在*Prabakar*案件中所提出的質疑仍未獲得解答，香港政府乃聲稱在本地法例下，香港無須承擔《禁止酷刑公約》第3條下的義務。

*FB*裁決的重要之處，是它引來了人們的廣泛關注，包括在上月的《香港律師》的封面專題中，由莫樹聯資深大律師所撰寫的題為「法律代理權利：

Prabakar decision (and four years after the Court of Appeal's decision in the same matter) that the Director set up an assessment team of seven officers to consider Convention claims. In 2007 it was reported that 'just seven immigration officers are officially processing claims made under the UN's Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), while 19 have been temporarily borrowed from other units' ('More staff being hired to handle rising number of claims', *South China Morning Post*, 18 May 2007).

Finally, to the continuing concern of the UN Committee Against Torture, and as a result of the question left unanswered by the Court of Final Appeal in *Prabakar*, the Hong Kong administration maintains that there is no obligation under domestic law in Hong Kong arising from Article 3 of the Convention Against Torture.

The significance of the decision in *FB* has attracted much attention, including in the cover story of last month's edition of *Hong Kong Lawyer,* 'The Right to Legal Representation: The Fast-Developing Jurisprudence' by Johnny Mok SC. In his article, Mr Mok twice comments that the decision in *FB* is 'radical' in nature. Two points should be made. First, it should be noted that Mr Mok was counsel for the respondent in *FB*. The respondent was unsuccessful and the conduct of its case was criticised by the court (at paragraph 8 of the judgment). Second, Mr Mok's characterisation of the decision in *FB* as 'radical' loses force when one considers that many developed legal systems have long histories of legal aid schemes, and that litigation of the *FB* type therefore would be unnecessary in those jurisdictions. Put another way, *FB* may result in Hong Kong building some of the infrastructure that it should have had long ago.

The 'momentous importance' of the decision in *FB* was recognised by the then President of the Law Society, Mr Lester Huang, and resulted in the issuance of the unprecedented LSHK-HKBA Joint Position Paper (JPP) referred to above. The JPP begins by setting out the unfair and unlawful aspects of the CAT assessment procedures as found in *FB*, and calls upon the administration to address these issues by implementing a legislative or regulatory framework to ensure high standards of fairness.

The JPP continues by pointing out that the Hong Kong SAR is at a critical juncture in this area of the law and highlights the illogicality of considering designing a new administrative scheme for CAT claimants only but not for asylum-seekers and refugees generally:

> "The Law Society and the Bar Association are of the view that this is a critical juncture and an opportunity to implement a coherent and comprehensive system. Legislation should be passed to help prevent abuse which may affect not only CAT claimants but asylum seekers and claimants. An inadequate system will only invite abusive claims that exploit weaknesses in the system, and further poor decision-making and legal

正在迅速發展的法理」的文章。莫樹聯資深大律師在他的文章中，兩似論及*FB*裁決的性質為「極端」。有兩點必須在這裡提出。第一，在*FB*案件中，莫樹聯資深大律師乃答辯人的代表律師；答辯人在該宗案件中敗訴，而該宗案件的處理受到法庭的批評(判詞第8段)。第二，許多發達的法律體系早已建立了法律援助計劃，故莫樹聯資深大律師將裁決的性質評為「極端」便顯得有點欠缺說服力，而*FB*一類的訴訟亦不大可能在該等司法管轄區中發生。然而，*FB*一案也許能促使香港建立起一些它本該早已建立的基礎設施。

*FB*一案的裁決具「無比的重要性」，並獲得當時的香港律師會會長黃嘉純承認，同時促致史無前例的《香港律師會和香港大律師公會的共同立場文件》(以下簡稱《共同立場文件》)的發出。《共同立場文件》一開首便論及如*FB*所指的《禁止酷刑公約》評核程序的不公平和不合法地方，並要求政府通過立法或規管框架，確保能達至高度公平標準，從而將問題解決。

The Law Society and the Bar Association are of the view that this is a critical juncture and an opportunity to implement a coherent and comprehensive system.

香港律師會和香港大律師公會均認為這是一個重要的接合點，以及是實施一個連貫和全面性制度的機會。

《共同立場文件》繼續指出，香港特別行政區在這一法律範疇方面正面對一個重要的接合點，並強調如考慮制訂一個只為《禁止酷刑公約》聲請人而設，卻並不包括尋求庇護者和難民的行政計劃其不合邏輯之處：

> 「香港律師會和香港大律師公會均認為這是一個重要的接合點，以及是實施一個連貫和全面性制度的機會。香港必須進行立法以協助防止濫用，而該等情況不單會影響《禁止酷刑公約》聲請人，亦會影響尋求庇護者和聲請人。一個不足的制度，會招來利用這個制度之弱點的濫用聲請，並衍生劣質的決策和帶來對法律的挑戰。上訴法庭在*A & others and DOI* (CACV 134/2007)一案中，批評香港缺乏規管羈留《禁止酷刑公約》聲請人的法例，和詳盡及可以理解的政策，並會招致香港特別行政區面對不合法羈留的指控，從而可能需要承擔數以百萬計的法律費用及損害賠償。」

challenges. The lack of legislation or a detailed and accessible policy governing detention of CAT claimants was criticized by the Court of Appeal in *A & others and DOI* (CACV 134/2007) and may result in costing the HKSARG millions in legal fees and damages for unlawful detention."

The voice of the local legal profession has now been added to a series of international criticisms with respect to Hong Kong's treatment of asylum-seekers, refugees and CAT claimants.

International criticism

The state of affairs in Hong Kong with regard to asylum-seekers, refugees and CAT claimants has attracted increasing international criticism. Recently, the United Nations CAT Committee, before which I represented the Hong Kong Human Rights Monitor (a locally based NGO), stated in its Concluding Observations (CAT/C/HKG/CO/4, 21 November 2008, Advance Unedited Version):

"While the Committee appreciates the cooperation of HKSAR authorities with UNHCR to ensure respect for the principle of non-refoulement and protection of refugees and asylum seekers, it is still concerned that there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure. The Committee is also concerned that there are no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol.

The HKSAR should:

(a) incorporate the provisions contained in article 3 of the Convention under the Crimes (Torture) Ordinance;
(b) consider adopting a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of its obligations under article 3 of the Convention, the merits of each individual case;
(c) ensure that adequate mechanisms for the review of the decision are in place for each person subject to removal, expulsion or extradition;
(d) increase protection, including recovery and reintegration, to trafficked persons, especially women and children, who should be treated as victims and not criminalized;
(e) ensure effective post-return monitoring arrangements; and
(f) consider the extension of the 1951 Refugee Convention and 1967 Protocol to Hong Kong."

This followed a number of statements from the various United Nations Committees that have been critical of the way Hong Kong has treated asylum seekers, refugees and CAT claimants. In contrast, the Macau SAR has implemented legislation in respect of refugees in 2004 (and has had the Refugee Convention extended to it) and the Mainland is drafting legal regulations.

Other judicial reviews

In addition to *FB*, *Prabakar* spawned a number of judicial reviews a challenge to the detention of CAT claimants; challenges to the

國際間一系列就香港對待尋求庇護者、難民和《禁止酷刑公約》聲請人的手法所作的批評，現時亦加入了本地法律界的聲音。

國際間的批評

香港在對待尋求庇護者、難民和《禁止酷刑公約》聲請人方面的手法，已招來不斷增加的國際批評。最近，在聯合國的禁止酷刑公約委員會(我作為香港人權監察(一個本地非政府機構)的代表出席了該會議)的審議結論(《禁止酷刑公約》/C/HKG/CO/4, 21 November 2008, Advance Unedited Version) 中指出：

「雖然委員會很讚賞香港特別行政區當局與聯合國難民專員辦事處充分合作，確保不遣返原則及保護難民和尋求庇護者原則獲得充分尊重，但仍關注香港欠缺規管庇護和建立公平有效的難民身份確定程序的法律制度。委員會亦關注到，香港並沒有計劃將《1951年聯合國難民地位公約》及其1967年的《議定書》伸延至香港特別行政區。

香港特別行政區應：

(a) 將載於《公約》第3條的規定收納於《刑事罪行（酷刑）條例》；
(b) 考慮設納一個有關政治庇護的法律制度，建立廣泛和有效的程序，在確定《公約》第3條下其義務的適用情況時，詳盡查證每一宗個案的是非曲直；
(c) 確保存在一個充分機制，對每一位被遷移、驅逐或引渡的人士所作的決定進行覆核；
(d) 增加對被販運人士的保護(包括復原和重新融合)，特別是女性和兒童，並應將她們視作受害者而非當作罪犯看待；
(e) 確保存在有效的遣返後監察安排；及
(f) 考慮將《1951年聯合國難民地位公約》及其1967年的《議定書》伸延至香港。」

這些意見，是隨著各個聯合國委員會針對香港對待尋求庇護者、難民及《禁止酷刑公約》聲請人的手法所作出的批評聲明之後提出。相反，澳門特別行政區已於2004年實施了有關難民的法例(並將難民公約伸延至該地)，而中國大陸亦正在草擬有關的法規。

其他司法覆核

除了*FB*一案外，*Prabakar*一案亦引起若干司法覆核的提出，對羈留《禁止酷刑公約》聲請人，以及對

A chorus of condemnation

"[It is] noted with concern that practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with Article 3 of the Convention."

- UN Committee Against Torture, May 2000

"In the light of the fact that the Covenant is applied in HKSAR subject to a reservation that seriously affects the application of Article 13 in relation to decision-making procedures in deportation cases, the Committee remains concerned that persons facing a risk of imposition of the death penalty or of torture, or inhuman, cruel or degrading treatment as a consequence of their deportation from HKSAR may not enjoy effective protection.

In order to secure compliance with Articles 6 and 7 in deportation cases, the HKSAR should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment."

- UN Human Rights Committee, November 1999

"The Committee remains concerned at the absence of adequate legal protection of individuals against deportation to locations where they might be subjected to grave human rights violations, such as those contrary to Articles 6 and 7 of the Covenant. The HKSAR should establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims of grave human rights violations to which they may be returned."

- UN Human Rights Committee, April 2006

"The Committee is concerned about the persistence of discrimination against refugee, asylum-seeking and undocumented migrant children in the Hong Kong SAR ... the Committee notes that refugee children and undocumented migrant children are not guaranteed access to education.

The Committee recommends that the State party extend all human rights guarantees in its Constitution and in the Convention to all children within its jurisdiction on both the mainland and the SARs, including refugees, asylum-seekers and other undocumented migrants. In particular, the Committee recommends that the State party ... [a]mend legislation and regulations to ensure that all refugee, asylum-seeking or undocumented migrant children in the Hong Kong SAR are able to attend school without undue delay."

- UN Committee on the Rights of the Child, November 2005

"The Committee is concerned that the HKSAR lacks a clear asylum policy and that the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, to which China is a party, are not extended to the HKSAR. In particular, the Committee regrets the position of the HKSAR that it does not foresee any necessity to have the Convention and the Protocol extended to its territorial jurisdiction."

– UN Committee on Economic, Social and Cultural Rights, May 2005

齊聲譴責

「[我們]關注到，香港特別行政區關於對待難民的做法，可能並非完全符合公約第3條的規定。」

– UN Committee Against Torture, May 2000

「基於公約的適用於香港特別行政區，須受一項保留條款所規限，而該條款會嚴重影響第13條關於遞解個案的決策程序的適用，委員會依然關注到該些因被香港特別行政區遞解離境，無法享有有效保護，而面對處死、酷刑、不人道、殘忍或有辱人格對待的風險的人士。

為了確保遞解個案能遵守第6條及第7條的規定，香港特別行政區應確保其遞解程序能就面對處死、酷刑、不人道、殘忍或有辱人格對待的風險提供有效保護。」

– UN Human Rights Committee, November 1999

「委員會仍然關注個別人士在面對被遞解往他們可能會受到人權嚴重侵犯(例如該等違反公約第6條及第7條的情況)的地方而缺乏充分法律保護。香港特別行政區應建立一個適當的機制以評核該些表示害怕在回去後，會成為人權受到嚴重侵犯的受害者的人士所面對的風險。」

– UN Human Rights Committee, April 2006

「委員會關注到在香港特別行政區的難民、尋求庇護者及無證外來兒童…委員會注意到難民兒童及無證外來兒童並沒有獲得接受教育的保證。

委員會建議訂約國將其憲法和公約中的所有人權保證，伸延至內地及特別行政區的司法管轄區內的所有兒童，包括難民、尋求庇護者及其他無證的移居者。尤其是，委員會建議訂約國…修訂立法和規例，以確保在香港特別行政區的所有難民、尋求庇護者或無證外來兒童能夠上學而免受任何不適當的遲延。」

– UN Committee on the Rights of the Child, November 2005

「委員會關注到香港特別行政區缺乏清晰的尋求庇護政策，而《1951年聯合國難民地位公約》及其1967年的《議定書》(中國乃其中一個訂約國)並未伸延至香港特別行政區。尤其是，香港特別行政區並沒有預見到將該公約和議定書伸延至其管轄區域的需要，委員會對此實感到遺憾。」

– UN Committee on Economic, Social and Cultural Rights, May 2005

failure to provide, *inter alia*, food and accommodation for CAT claimants and asylum seekers (see 'the bag of rice' cases discussed below); a review of the prosecution policy for immigration offences for those fleeing persecution or torture (see *RV v Director of Immigration* [2008] 2 HKC 209 (HCAL 2 of 2008, 10 March 2008) and *Iqbal Shahid v Secretary for Justice* [2009] HKCU 301 (HCAL 150/2008, 2 March 2009)); and a challenge to the failure to assess asylum claims independently of the UNHCR (see *C v Director of Immigration* [2008] 2 HKC 165 (HCAL 132/2006 and 1, 43, 44 and 82/2007, 18 February 2008), presently being appealed to the Court of Appeal). The common thread tying these cases together is the lack of comprehensive legislation governing these areas to manage asylum-seekers, refugees and CAT claimants.

Detention

Another area in which there is an absence of legislation, administrative foresight and coherent policy, inviting judicial review, is that of unlawful administrative detention. Administrative acts have on several occasions contravened the 1999 UNHCR Guidelines which reaffirm the general principle that asylum seekers should not be detained.

The problems in this area have been highlighted by the arrest and release of asylum seekers at the HKSAR/International Social Service (ISS) shelter and the continuing detention of asylum seekers/CAT claimants (hunger strikers) at the Castle Peak Bay Immigration Centre (CIC). On 29 June 2006 (ironically, the same day the 'destitution cases' discussed below were being heard in the High Court), the HKSAR/ISS shelter (which was on offer for some of the applicants in the destitution litigation to accept as accommodation) was raided by the police because the inhabitants were suspected 'overstayers'. They were in fact asylum seekers. Despite holding certificates from the UNHCR, they were arrested and detained, although in this case they were held only briefly.

The episode again emphasised the incoherent policy by which the HKSAR allows the UNHCR to carry out RSD for it but ignores and/or reserves the right to prosecute or detain asylum-seekers holding UNHCR papers. While these persons were released after having to report to the Director of Immigration the following day and only after the intervention of NGOs and lawyers, many asylum seekers and CAT claimants remained detained in CIC. The justification for the detention remained unclear. Detainees suffered from delays in having their legal aid applications processed and the lack of an administrative detention review procedure.

In the cases of *A, F, AS and YA v Director of Immigration* [2008] HKCU 1109 (CACV 314-317 of 2007, 18 July 2008), involving CAT claimants and asylum seekers administratively detained for periods between three and 22 months, the Court of Appeal found that the Director of Immigration's policy on detention was not sufficient and accessible and therefore did not meet the requirements of Article 5(1) of the Hong Kong Bill of Rights addressing arbitrary detention. The court observed:

> "Mr Chow's primary submission is that the Director does not have a policy, and that the law does not require him to have one. We have already dealt with these submissions. We add only that it is inconceivable that the Director has no policy at all."

未能為《禁止酷刑公約》聲請人及尋求庇護者提供食物和住宿提出了質疑 (參見下文所述的「米包」案件)；對與逃離迫害或酷刑對待的人士有關的非法入境罪行之檢控政策進行檢討(參見*RV v Director of Immigration* [2008] 2 HKC 209 (HCAL 2 of 2008, 10 March 2008) and *Iqbal Shahid v Secretary for Justice* [2009] HKCU 301 (HCAL 150/2008, 2 March 2009))；以及對未能自行評估尋求庇護的聲請並獨立於聯合國難民專員辦事處提出質疑(參見*C v Director of Immigration* [2008] 2 HKC 165 (HCAL 132/2006 and 1, 43, 44 and 82/2007, 18 February 2008)，現時正向上訴法庭提出上訴)。這些個案的一個共同地方，就是在處理尋求庇護者、難民及《禁止酷刑公約》聲請人的問題方面，均缺乏規管這一範疇的全面立法。

羈留

另一因缺乏立法、行政遠見和連貫政策，導致司法覆核出現的地方，乃不合法的行政羈留。政府的若干行事乃違反了1999年的聯合國難民專員辦事處的指引，而當中強調一項基本原則，就是尋求庇護者不應被羈留。

這方面所存在的問題，因著拘捕和釋放在「香港國際社會服務社暫居中心」(ISS)的尋求庇護者，以及繼續羈留在「青山灣入境事務中心」(CIC)的尋求庇護者／《禁止酷刑公約》聲請人(絕食)而被突顯出來。2006年6月29日(下述的「貧困案例」諷刺地是於同一天在高等法院進行聆訊)，香港國際社會服務社暫居中心(為貧困訴訟中的一些申請人提供住宿)被警方突擊搜查，理由是中心內的居住者被懷疑是「過期逗留人士」，而他們實際上是尋求庇護者。儘管他們持有「聯合國難民專員辦事處」發出的證明書，但仍被拘捕和羈留，雖然在這一宗案件中他們只是被短暫拘留。

該事件再次突顯香港特別行政區的不連貫政策，允許聯合國難民專員辦事處為它進行難民身份確定，但忽視及／或保留檢控或羈留持有聯合國難民專員辦事處證明文件的尋求庇護者的權利。雖然這些人士於翌日向入境事務處處長報到，並於非政府機構和律師的介入後獲得釋放，但仍有很多尋求庇護者和《禁止酷刑公約》聲請人被羈留於青山灣入境事務中心，而他們被羈留的理由仍不清楚。此外，對被羈留人士的法律援助申請處理亦遭到耽延，並缺乏行政羈留的覆檢程序。

在*A, F, AS*和*YA v Director of Immigration* [2008] HKCU 1109 (CACV 314-317 of 2007, 18 July 2008)等案件中，《禁止酷刑公約》聲請人和尋求庇護者被行政羈留達3個月至22個月不等。上訴法庭裁定，入境事務處處長的羈留政策乃不充分和難以理解，因

The government's alternative submission was that the policy is said to be contained in a document entitled 'Supplementary information in relation to situation of refugees, asylum seekers, and torture claimants' supplied to the Legislative Council. The paper, found to be cursory in nature, was not produced before the judge at the Court of First Instance. Moreover, the supposed policy paper was dated 1 December 2006 and therefore was not in existence when A, F and AS were detained. The court did 'not believe such piecemeal disclosure of policies would satisfy Article 5(1)'s requirement that the grounds be certain and accessible'.

While this appeal decision was widely reported as a success, it is regrettable from one perspective that the government did not appeal and allow the Court of Final Appeal an opportunity to consider the wider, and primary, argument, rejected by the Court of Appeal, that, in general terms, *Prabakar* and the subsequent developments did not neatly fit within the existing immigration legislation. Part of the problem with judicial review is that in egregious cases of legislative inaction, such as in this area of the law, the courts may not be able to tackle the problems in an holistic way. It is not the court's role to legislate.

Subsequent to the Court of Appeal judgment, it appears that the Hong Kong administration still has not sorted out its detention policy. In the case of *Hashimi Habib Halim v Director of Immigration* [2008] HKCU 1576 (HCAL 139 of 2007, 15 October 2008), Saunders J criticised the Director for not carefully examining what

而並不符合《香港人權法案》第5(1)條關於任意羈留的規定。上訴法庭指出：

> 「周先生的主要陳述為，處長並沒有訂立政策，而法例並沒有要求他必須訂立政策。法庭已對該等申述作出處理，故只在此補充一點，就是：處長完全欠缺這一方面的政策，而這實在是不可想像的。」

政府作出的申述是，該政策乃載於其向立法會提交的一份名為《有關難民、尋求庇護者和酷刑聲請人情況的補充資料》文件中。該份文件略嫌粗略，而且並沒有向原訟法庭法官呈交。此外，當中所指的政策文件的日期為2006年12月1日，故當A, F及AS被羈留時，其事實上並不存在。法庭「並不相信這一逐少披露的政策，符合第5(1)條所規定一理據的提出必須明確和可以理解」。

雖然這一上訴裁定，被廣泛地報導為乃一項勝利，但從某一角度看卻是令人遺憾的，因為政府並沒有提出上訴，讓終審法院有機會考慮該被上訴法庭否定的更廣泛基本爭論，即是：*Prabakar*一案及其後的發展基本上與現行的入境事務法例格格不入。

might constitute an appropriate policy despite 'having been given the advantage of knowing of the policy adopted by the Home Secretary in N (Kenya)'.

Destitution

A further major category of refugee-related judicial review was demonstrated by the 'bag of rice' cases. The Hong Kong administration considers that it is not obliged to assist CAT claimants, asylum seekers or refugees by providing comprehensive support, such as accommodation, food, medical assistance or education for children. Even after *Prabakar*, applicants were left in a state of destitution, reduced to begging for assistance from NGOs. At the same time, and despite the lengthy screening processes, the Hong Kong government does not allow applicants to be employed to support themselves.

An applicant in this situation, who was given a bag of uncooked rice by the Social Welfare Department, wrote the following in 2005:

> "Up till now I have been unable to eat the food [supplies collected from St James Settlement] because [they] are raw and I don't have any facility to cook them. I don't even have a place to keep the food stuffs since I am homeless. I am force[d] to carry these food stuffs with me any where I go and it is too heavy and has just added to my problem. I desperately need shelter, basic daily eatable food and basic financial allowance to aid me."

This state of affairs resulted in a series of cases in which the applicants argued that the Hong Kong administration breached its legal obligations including those under the ICCPR and the Bill of Rights Ordinance, the ICESCR, the Convention on the Rights of the Child (CRC) and the common law: see *D v Director of Social Welfare* (HCAL 163 of 2005), *N v DSW* (HCAL 25 of 2006) and *G v DSW* (HCAL 31 of 2006).

The initiation of judicial reviews has resulted in some changes being made, such as setting up the present DSW/ISS system, but problems remain. These again include a lack of legislation, and also the continuing problems with administering an 'in kind' assistance

在司法覆核中提出的部分問題是：即使沒有採取諸如這一法律範疇的立法行動，法庭仍不能以全盤考慮的方式來處理此等問題，因為法庭的職能並非立法。

在上訴法庭作出判決後，香港政府看來仍沒有訂立羈留政策。在*Hashimi Habib Halim v Director of Immigration* [2008] HKCU 1576 (HCAL 139 of 2007, 15 October 2008)一案中，辛達誠法官批評入境事務處處長並未仔細審視可構成適當政策的各種情況，儘管其「已獲告知N(肯尼亞)的民政部長所實施的政策」。

貧困

與難民相關的另一主要司法覆核類別，可以透過「米包」案件來說明。香港政府認為它並沒有義務協助《禁止酷刑公約》聲請人、尋求庇護者或難民並向其提供廣泛的支援，例如住宿、食物、醫療或兒童教育。即使在*Prabakar*一案後，各申請人仍然處於貧困境況中，需要乞助於非政府機構。同時，雖然甄別程序如此冗長，但香港政府並不批准申請人外出工作以維持其生活。

一名在這情況中獲得社會福利署給予一包米的申請人於2005年時如此記述：

> 「到目前為止我仍然不能吃到該些食物[由聖雅各福群會供應]，因為[它們]是未熟的，而我並沒有煮食設備。由於我無家可歸，所以我並沒有任何地方放置該些食物。無論到哪裡去，我都被迫要將該些食物帶在身邊，但它們實在很重，給我徒添了不少困難。我非常需要有安身之所、每天的基本食物，以及基本的金錢津貼來幫助我。」

這一情形，導致出現連串的申請人指香港政府違背其法律責任的情況，包括在《公民權利和政治權利國際公約》、《人權法案條例》、《經濟、社會、文化權利國際公約》、《兒童權利公約》及普通法下的責任：參見*D v Director of Social Welfare* (HCAL 163 of 2005), *N v DSW* (HCAL 25 of 2006) and *G v DSW* (HCAL 31 of 2006)。

司法覆核的提出，導致一些改變出現，例如現時的DSW/ISS制度的設立，但問題依舊。這還是因著缺乏立法，以及「實物」援助計劃的實施，導致無效率的情形發生。例如：社會福利人員須花費多個小時為申請人購物，及陪伴他們前往看病，而非向他們提供符合最低限度要求的現金津貼。該制度只是於2006年2月的司法覆核聆訊展開前才設立，而ISS是於2006年4月才成立，儘管問題在這以前已早被知悉。

program – which has resulted in inefficiencies such as social welfare staff spending hours shopping for applicants and escorting them to medical appointments rather than providing a minimal cash allowance. It was only shortly before the judicial review hearing in February 2006 that the system was created, and ISS was contracted only in April 2006 despite knowledge of the problem long before then.

A new system

As a result of the 'test' cases outlined above, in particular *FB*, it has become clear that a new system is necessary. As the JPP states, we are at a critical juncture in the development of the legal infrastructure in this area, which affects fundamental rights of the most serious kind.

> "Given that the HKSAR has an obligation to screen CAT claimants and by its own numbers there are more persons availing themselves of that process than the procedurally unfair UNHCR process (3196 vs 1591 [at the time of this paper]) and given the similarity in the nature of the processes, the Law Society and the Bar Association invite the HKSAR to consider responding favourably to the recommendations of the UN CAT and put in place comprehensive legislation for refugee status determination (RSD) and CAT screening. Undoubtedly the majority of applicants will claim both. Since the HKSAR must interview for CAT, and if increasing resources are to be spent on a complete revision of the process, and a decision on refugee status can be made based on the same interview process (as is done in other developed jurisdictions), there does not seem to be any impediment to the HKSAR taking control, in a fair and efficient way, of the entire process and putting in place a comprehensive legislative framework. This would include, *inter alia*, basic screening legislation, including the setting up of an independent tribunal, legislation governing immigration status pending a decision and legislation for related issues such as provision of social assistance during the process. All of these are presently lacking."

The successful implementation of a new screening process will require practitioners to be trained to assist CAT claimants and asylum seekers. The Hong Kong government, the Duty Lawyer Service, the Law Society and the Bar Association are presently discussing issues of training and funding. This is not only an important time for the future of this area of the law in Hong Kong. Developments here can be used as a template by similar jurisdictions in the region at various stages of their own development.

For lawyers interested in human rights work, this is an opportunity to get involved and use their legal skills to assist those who need them the most. Speaking about *pro bono* work, Ontario Chief Justice (and former Canadian Attorney General) Roy McMurtry has said:

> "In my view, a just society is one that enables each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of their legal rights, obligations and freedoms under the law ... it is therefore absolutely essential that government, with strong support of the legal profession,

新制度

基於上述的「驗證」個案，特別是*FB*，香港很明顯需要建立一個新制度。這正如《共同立場文件》所指出的，在這一範疇的法律基礎設施發展方面，我們正處於一個重要接合點，影響著份屬基本的權利。

> 「由於香港特別行政區有責任甄別《禁止酷刑公約》聲請人，而由於現時等候進行甄別的人士，較有欠公平的「聯合國難民專員辦事處」的程序所處理的數目為多(3196 vs 1591 [於本文件發出之時])，而基於該等處理程序的性質類似，香港律師會和香港大律師公會要求香港特別行政區對聯合國《禁止酷刑公約》的建議作出正面的回應，並就難民身份的確定及《禁止酷刑公約》的甄別制定全面的法例。無疑，大部分的申請人將會同時提出這兩方面的聲請。由於香港特別行政區必須會見《禁止酷刑公約》的聲請人，假如能夠將更多資源投放於對該程序的全面性檢討，以及能夠根據同樣的會見程序來決定難民的身份(有如其他先進司法管轄區所實行的一般)，這看來並不會對香港特別行政區以公平和有效率的方式來控制整個程序及訂立全面的立法框架構成妨害。而這將會包含基本的甄別立法，包括成立一個獨立審裁處、為聽候裁決人士之入境身份制訂規管法例，以及制定涉及相關問題的法例，例如在過程中向該些人士提供社會協助。目前所有這種種皆付闕如。」

一個新訂立的甄別程序的成功實行，有賴法律執業者所獲得的培訓，從而對《禁止酷刑公約》聲請人和尋求庇護者提供協助。香港政府、律師當值服務、香港律師會及香港大律師公會現時均正就培訓和資助等問題進行討論。現時不單是香港在這一法律範疇的未來方面的重要時刻，事實上我們的發展更可以成為區內處於不同發展階段的相類司法管轄區的範式。

對於有志從事人權工作的律師而言，這是一個參與和運用其法律技能以協助最有需要的人士的機會。就志願工作而言，安大略的首席大法官(及加拿大的前律政總長) Roy McMurtry曾說過：

> 「我認為一個公平的社會，可以能夠讓其所有成員在了解及主張其於法律下所享有的法定權利、義務和自由方面，獲得所須的法律協助…因此政府必須在法律界的強而有力支持下，確保存在一個獲得充足資助的法律援助計劃，作為捍衛個人自由的民主社會中的一個堡壘。」

ensure that adequately funded legal aid be a bastion of a democratic society as a guardian of individual liberties."

Thus, while lawyers should always be mindful of the public interest, and there will always be areas where *pro bono* assistance is required in order to ensure access to justice, *pro bono* work should not be relied upon in place of a properly functioning legal system, with the primary duty being on government to ensure access to justice. Lawyers interested in training in this area and getting involved in human rights work, given its complexities and the serious issues at stake, should not have to work for mangoes.

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The essence of this article was presented as a keynote speech at the International Symposium on Refugee Protection in the New Era and Civil Society, 13 June 2009, Tokyo, Japan. It is appropriate for the purposes of this paper to disclose that the writer's firm has been lawyers for the applicants in most of the cases referred to relating to asylum seekers and/or CAT claimants.

因此，雖然律師應經常關注公眾利益，但有很多情況都需要提供志願性的協助，確保人們能夠取得司法服務。但我們不能單純以志願工作，取代一個正常發揮其功能的法律制度，及由政府肩負該確保人們能夠取得司法服務的重要責任。對於參與這一範疇的培訓和對人權工作有興趣的律師而言，因著該等問題的複雜性以及目前所面對的嚴重情況，我們不應只是為著可觀的報酬而工作。

帝理邁
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彭思帝理律師行

本文的內容，主要是2009年6月13日在日本東京舉行的一個名為《在新時代及公民社會中的難民保護國際研討會》上所發表的演說。需要指出的是，本文作者所服務的律師行，乃所述的與尋求庇護者及／或《禁止酷刑公約》聲請人有關的大部分個案申請人的代表律師。