

**Hong Kong Human Rights Commission
Society for Community Organization
New Immigrants' Mutual Aid Association
Asylum Seekers' and Refugees' Voice**

**Comments on the Hong Kong Special Administrative Region
report under the International Convention on Elimination of
All Forms of Racial Discrimination**

Submission to the Committee on the
Elimination of All Forms of Racial Discrimination
75th Session (3-28 August 2009)
regarding the Tenth to Thirteenth Reports of the People's Republic of China under the
International Convention on the Elimination of All Forms of Racial Discrimination –
Part two: Hong Kong Special Administrative Region

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A. Introduction

This document represents our submission to the Committee on the Elimination of All Forms of Racial Discrimination (the Committee) regarding the Tenth to Thirteenth Reports of the People's Republic of China under the International Convention on the Elimination of All Forms of Racial Discrimination ('the report') which was issued on 3 October 2008 by the Constitutional and Mainland Affairs Bureau of the HKSAR government. The hearing of the report will take place in the 75th session (3-28 August 2009) of the Committee.

B. Article 2(1)(d)– Legislation to eliminate racial discrimination

1. Racial Discrimination Ordinance does not cover new immigrants

The Race Discrimination Ordinance (RDO) was gazetted on 18 July 2008 and will come into full effect during 2009. Despite repeated calls from the public to make comprehensive legislation, the RDO still excludes important groups from protection under the law. The RDO does not recognize new immigrants as a distinct ethnic group and does not extend to all public authorities in their functions and powers.

1.1 New immigrants from Mainland China excluded

The government has excluded the new immigrants from Mainland China from the RDO. It does not recognize immigration status as a basis of race discrimination nor does it recognize new immigrants as a separate ethnic group.

The government has emphasized that racial discrimination only refers to discrimination on the ground of race, colour, descent, national or ethnic origin of the person and that this does not include immigration status. Thus section 8(3) of the RDO states that the following grounds are *not* considered as relating to race:

“[whether the person:]

- (i) is or is not a Hong Kong permanent resident;*
- (ii) has or has not the right of abode or the right to land in Hong Kong;*
- (iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap 115); or*
- (iv) has or has not been given the permission to land or remain in*

Hong Kong under the Immigration Ordinance (Cap 115);

(c) *the length of residence in Hong Kong of the person; or*

(d) *the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place.*

We strongly suggest that the exception on immigration status be removed, and that new immigrants from Mainland China be included as a protected group.

The government should observe the CERD General Recommendation No. 30 on Discrimination against Non-citizens, especially paragraph 7, which states that the government should ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation does not have a discriminatory effect on non-citizens.

1.1.1 Background

During discussions of the Race Discrimination Bill the Hong Kong SAR Government stated clearly that the status being an immigrant from Mainland China is not considered as a ground of discrimination because the new immigrants were viewed as being of the same ethnic group as local Chinese. The Government explained that the discriminatory treatment experienced by new immigrants is based on *social* rather than racial grounds. However, the Government does not provide any legal or administrative means to protect the new immigrants against discrimination although the Hong Kong Government recognizes that social discrimination against new immigrants from Mainland China is serious.

Every day, there are about 150 people from Mainland China who settle in Hong Kong for family reunion. However, the Hong Kong Government and the public do not treat them friendly. The government distinguishes them through different policies. New immigrants from Mainland China do not enjoy the same treatment as the local Hong Kong permanent residents under the Government policies. The rights to political participation and welfare are only enjoyed by the Hong Kong permanent residents with 7 years; residence or above. New immigrants are less privileged than the Hong Kong permanent residents.

Discrimination against new immigrants has been serious in the past ten years. According to surveys and reports by NGOs¹ as well as newspapers², new immigrants

1 Society for Community Organization, Research report on the situation of racial discrimination against new immigrants from mainland, 2001 (www.soco.org.hk 5/4/2004); Coalition for Racial Equality and Hong Kong Human Rights Commission, Joint Submission to the United Nations

suffer from severe racial discrimination. In a survey conducted by Society for Community Organization in 2001, it was found that over 80% complained that they had experienced discrimination because of their new immigrant identity, behaviour or appearance³. This figure rose to be more than 91% in 2004⁴. Regarding discrimination nearly 30% were denied employment when the employer saw that their identity card did not show permanent residence status or because their dialect was different from that of Hong Kong people. Nearly 40% received lower wages than those of local people. Nearly 60% received inferior service or treatment than that of local people when the service provider recognized them as a new immigrant. 60% have been racially vilified in public area. Over 90% felt that local Hongkongers racially discriminated against new immigrants. It was also found that over 60% encountered racial discrimination when they sought help from government departments.

According to a survey in 2009⁵, 81.6% of interviewees complained that their working hours were longer than that of local workers while their wages were lower. Their monthly median wage is HK\$5,000 which is much lower than that of local women (HK\$8,000). 55.1% complained that they were assigned more job tasks, as they are new immigrants. 47.2% complained that it is difficult for them to find a job because of their immigrant status.

It is crystal clear that the new immigrants are considered a different group from local Hong Kongers and that they experience serious discrimination. They need legal

Committee on the Elimination of Racial Discrimination on the First Report in respect of Hong Kong Special Administrative Region of the People's Republic of China under International Convention on the Elimination of All Forms of Racial Discrimination, July 2001 (www.hkhrc.org.hk, 12/4/2004); Society for Community Organization, Research on the life adaptation of migrant youth, 4/4/1998, (www.soco.org.hk 2/4/2004).

2 "Thousand of New Immigrants complained of being racial discriminated against", Ming Pao, (明報, 新移民歧視投訴達千宗) 22 June 2003.

"Being called animal, new immigrant university student committed suicide", Ming Pao, 7 October 2003, p.A3(明報, 被歧視喚畜生, 新移民大學生燒炭亡).

3 Society for Community Organization, Research report on the situation of racial discrimination against new immigrants from mainland, 2001 (www.soco.org.hk 5/4/2004); Coalition for Racial Equality and Hong Kong Human Rights Commission, Joint Submission to the United Nations Committee on the Elimination of Racial Discrimination on the First Report in respect of Hong Kong Special Administrative Region of the People's Republic of China under International Convention on the Elimination of All Forms of Racial Discrimination, July 2001 (www.hkhrc.org.hk, 12/4/2004); Society for Community Organization, Research on the life adaptation of migrant youth, 4/4/1998, (www.soco.org.hk 2/4/2004).

4 Society for Community Organization 2004 《內地來港新移民受種族歧視情況及對「禁止種族歧視法例」期望問卷調查 Survey on the new immigrants' expectation on the race bill and their situation, September 2004. Society for Community Organization, "Study on the New immigrant women's employment situation 新移民婦女的就業情況調查", 2009(www.soco.org.hk)

5 Society for Community Organization, "Study on the New immigrant women's employment situation 新移民婦女的就業情況調查", 2009(www.soco.org.hk)⁵

protection.

Actually, the treatment afforded by the Government to new immigrants from Mainland China was different before June 2003. The status of being a new immigrant from China was considered grounds for discrimination on the basis that racial discrimination against identifiable minorities is included in race related issues under the concern of international bodies⁶. In 2000, in its submission to the Committee on the Elimination of All Forms of Racial Discrimination, new immigrants were also considered as a protected group.⁷ On 12 March 2003, the legislative councilor, Ms. Audrey Yu, moved on a motion debate in the Legislative Council. The motion requested the Hong Kong Government to legislate against racial discrimination and that the protected groups should include new immigrants from Mainland China, ethnic minorities and foreign domestic helpers. The legislative councilors passed the motion unanimously. This demonstrates that there is substantial social support for the legal protection for new immigrants as a protected group under the Race Discrimination Ordinance.

Also the Hong Kong Census and Statistics Department has conducted special reports to provide a profile of new immigrants who have resided in Hong Kong for less than 7 years. In the past 7 years, about 380,000 new immigrants have settled in Hong Kong.

Although the government argues that new immigrants are no different from the local Chinese, the government does in fact distinguish them through different policies. As mentioned above new immigrants from Mainland China do not enjoy the same treatment as do local Hong Kong permanent residents under the Government's policies. Only Hong Kong permanent residents with 7 years residence or above, enjoy the rights to political participation and welfare. New immigrants are less privileged than Hong Kong permanent residents. They constitute a minority in society and legal protection should be given to them.

There is also a legal and social case for treating new immigrants from Mainland China as a protected group under the RDO. The general recommendations 8, 14 and 24 of the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) state the importance of self-identification of the affected group.

6 Hong Kong Home Affairs Branch, "Consultation paper on Equal opportunities: A study of discrimination on the ground of race", Hong Kong, 1997.

7 Hong Kong Special Administrative Region, Report of the Hong Kong Special Administrative Region under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, 2000, paragraph 23-24, 43-55, CERD/C/357/Add.4 (Part II), 19 April 2001, (www.hab.gov.hk 10/5/2004).

In its concluding observation (2005) the Committee on Economic, Social and Cultural Rights has strongly urged the HKSAR to extend the protection afforded by the proposed racial discrimination law to internal migrants from the Mainland, and to put a stop to the widespread discriminatory practices against them on the basis of their origin.

All case law from common law countries, such as United Kingdom, Australia, New Zealand, has defined the meaning of ethnic origin to include both social and cultural perspectives. In *Commission for Racial Equality v Dutton* [1989] and *King-Ansell v. Police* [1979] 2 N.Z.L.R. 531, 543, it was held that the essential criteria for identifying an ethnic group are not based on the seven conditions⁸, but how the group perceives themselves and how the others perceives the group. Besides, the Court declared it is not necessary to come within all seven conditions.

Ethnic groups are identified by their historical or cultural background or sometimes by their self-identification⁹. In *King-Ansell v Police* [1979] 2 N.Z.L.R. 531, 543, the Court provided that self-perception and the perception from others are the two essential guidelines in identifying a racial group by ethnic origin. Historically, some ethnic minorities claimed to be Han Chinese, or Han Chinese claimed to be an ethnic minority. In the Hong Kong situation, it is not enough simply to define Han Chinese or ethnic minorities. Rather it is a question of distinguishing mainlanders from Hongkongers as well as immigrants from locally born. It is not only an issue of biological ethnicity, but also an understanding of the legal and social development of ethnicity or nationality. The proportion of locally born residents within the whole population was about 30% in the 1960's, but now it is about 60%¹⁰. Thus more and more people are being born locally, and their national origin is Hong Kong. They have little concept about China. This is different from being a new immigrant born in China. The Hong Kong Government should take this social development into consideration.

⁸ The seven conditions include: 1.a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive, 2.a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance, 3. either a common geographical origin, or descent from a small number of common ancestors, 4. a common language, not necessarily peculiar to the group, 5.a common literature peculiar to the group, 6. a common religion different from that of neighbouring groups or from the general community surrounding it, 7. being a minority or being an oppressed or a dominant group within a larger community.

⁹ Rosett Arthur, "Legal Structures for Special Treatment of Minorities in the People's Republic of China", (1991), Norte Dame Law Review.

¹⁰ Hong Kong Census and Statistical Department, 2001 Population Census – Summary Reports, 2002.

According to a survey, over 80% of new immigrants consider themselves different from Hongkongers and feel that they are discriminated against by Hongkongers. In Chung Ting-yiu's public opinion program survey entitled: "Integration or Segregation: The political attitude of new arrivals",¹¹ it was found that there was a substantial gap between new immigrants and the locally born. 48.5% of new immigrants perceived themselves as "Chinese", while only 10.3% perceived themselves as "Hongkongers". 21.2% of locally born people perceived themselves as "Chinese", but 40.6% perceived themselves as "Hongkongers". It cannot, therefore be denied that the new immigrants perceived themselves as a different group from the local people. General Comment 8 of the ICERD has made clear that self-identification is an extremely important component in identifying a group and provides protection to the group.

If ethnic origin is taken in its broader meaning to include self-perception of the group, then the status of being a new immigrant from Mainland China can be categorized as a ground of discrimination on the basis of ethnic origin.

Lastly, differences among Chinese are recognized on the basis of national or ethnic origin in Mainland China. According to the citizens' national or ethnic origin, the Chinese Government provides legal protection according to ICERD even though the different ethnicities and national groups are all Chinese. Some of the recognized minority nationalities in China are not genetically distinguishable from the Han, but their claim for status as minorities is still recognized. Likewise new immigrants are ethnic Chinese just as local Hong Kong people, but this does not mean that their cultural, linguistic and historical attributes are the same as that of local people. Thus their national and ethnic origin should be assessed.

The Hong Kong legal system is based on the essential principles of common law including the principles of equality before the law. The separate legal system also affects Hong Kong's international relationship and its status with respect to international treaties and organizations. There is one country, but two international legal personalities. The new immigrants from Mainland China can be protected under the ground of national origin.

Discrimination against new arrivals from the Mainland is a serious social problem and firm action should be taken to address it. It is recommended that the Racial

11 Chung Ting Yiu, Chapter 11: Integration or Segregation: The political attitude of new arrivals, Johannes Chan & Bart Rwezaura general editors, *Immigration Law in Hong Kong, An Interdisciplinary Study* (Hong Kong: Sweet & Maxwell Asia, 2003).

Discrimination Ordinance should include new arrivals from Mainland China. The ordinance should prohibit discrimination against new immigrants from Mainland China on the ground of national origin or ethnic origin or new immigrants from Mainland China. The status being a new immigrant from Mainland China should be recognized as a ground of discrimination in the law¹².

2. The Race Discrimination Ordinance does not cover all government acts

Although the RDO does cover the government it does not cover all government functions and powers. The RDO only cover areas such as education, employment, and provision of goods and services. It is recommended that the RDO covers all public authorities, along the lines of section 19B of the Race Relations Act 1976 in the United Kingdom.

The Government argues that public authority acts are still covered under the Bill of Rights. However the Bill of Rights does not necessarily cover the day-to-day performance of functions and duties by the Government. Also, the Bill does not cover economic, social and cultural rights but only those stated in the ICCPR.

Furthermore, if a person wants to make a case under the Bill of Rights, there would be several limitations. Compared with the remedies that one could obtain through the RDO, the remedies under the Bill of Rights are less desirable, while remedies under the Equal Opportunities Commission (EOC), implements the RDO, could be apologies and money damages.

Also EOC has no authority to enforce the Bill of Rights. That means that EOC would have no power to conduct formal investigations or initiate an action for judicial review¹³. Lastly, most victims cannot afford to pursue a complaint without the EOC's assistance. With EOC assistance there is free investigation and conciliation assistance.

12 For details please see http://www.soco.org.hk/news/new_e.htm : Racial Discrimination in Hong Kong: A Focus on the Treatment of New Immigrants from Mainland China under the Future Racial Discrimination Ordinance, Society for Community Organization (2004), Hong Kong.

13 E.g. as in *EOC v. Director of Education* [2001] 2 HKLRD 690, where EOC challenged the government's separate queues for boys and girls for band allocation and fixed gender quotas. The policy resulted in boys being allocated to lower bands than girls with lower academic results.

C. Article 2(1)(a) No discrimination by public authorities

3. Government fails to monitor racial discrimination by law enforcement agencies

3.1 Government denies discrimination by law enforcement personnel

In its report the HKSAR government denies that any kind of racial discrimination takes place by the Immigration Department, the Correctional Services Department and the Police.

The report states that: “[The] staff of the Police and Correctional Service Department act in accordance with the laws of Hong Kong, all binding international conventions and other applicable laws.” (para. 116).

However, this blank denial of the discrimination does not fit the reality or the experiences of ethnic minorities.

SoCO released a research in May 2007 about detention of asylum seekers, which surveyed 51 people¹⁴. As all asylum seekers are non-Chinese the research can give a good indicator of the treatment of ethnic minorities by law enforcement personnel.

The research showed that many detainees felt the detention staff did not respect them during body searches. The respondents were insulted (34%) and their private parts joked about (36.2%) by the officers. Many believe that this is due to widespread racial discrimination in the detention centres. In fact half of the respondents actually felt that they were discriminated because of their race and 44.9% reported to have been insulted by staff.

The report also states that “[the] rights of detained persons are made known to the detainees” and that “[translation] service is also arranged where necessary” (para. 115). However, our recent interviews with former ethnic minority detainees show that interpretation is only arranged when they have to give statements. When they are given a copy of their rights, it is in English and these are not translated. Secondly, there is no arrangement of interpreters when they want to make complaints to the different departments or in the day-to-day operation of the law enforcement agencies.

¹⁴ ‘Research on the Condition of asylum seekers and refugees in detention centres’, released 6 May 2007, Society for Community Organization.

It thus seems that despite the training provided to personnel, racial discrimination still takes place. It is recommended that there be independent monitoring to prevent and detect racial discrimination by the law enforcement personnel.

3.2 No legal framework to protect against racial discrimination by law enforcement agencies

The report stays silent on the fact that law enforcement agencies are not fully covered by the Race Discrimination Ordinance as it only covers areas such as employment, education, and provision of goods and services. However, as act done by law enforcement personnel are related to discipline and law enforcement the people who are racially discriminated do not have any legislation to protect them against such discrimination.

Regarding complaints of racial discrimination, victims of discrimination can only complain to the complaint units of the respective departments. However, these are not independent and thus the number of substantiated cases has been minimal. For instance, the Complaints Investigation Unit of the Correctional Services Department received 172 grievances in 2006. Of the 90 cases that were fully investigated at that time, only **3.3% (3 cases)** were been partly or fully substantiated. The rest were deemed to be false, faultless or unsubstantiated.

It is recommended that the government provide legislative measures to protect ethnic minorities against racial discrimination from all public authorities and also set up effective monitoring systems.

3.3 Government should allow independent monitoring to prevent racial discrimination against people deprived of their liberty

The United Nations (UN) has issued guidelines regarding the form and content of reports to be submitted by States parties (“Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties” (HRI/GEN/2/Rev.5)). According to the guidelines (Chap 1, para. 24) the majority of reports to the UN should consist of a common core document about the human rights situation and secondly a treaty-specific document about the specific

treaty, in this case the ICERD.

Regarding the core document, the government should provide information about international human rights instruments, which it has not yet ratified (Chap 1, para. 40(a)). However, it fails completely to make such a list and to explain why different instruments have not been signed.

Such as list should mention that Hong Kong is not a signatory to the Optional Protocol to the Convention Against Torture (OPCAT), concerning regular visits by national and international institutions to places of detention (2002). The HKSAR report does not mention whether or when it envisages acceding to this instrument.

By acceding to the OPCAT, there could be an independent review of the problems of racial discrimination in any places where persons are deprived of their liberty, because it would allow an independent United Nations body to visit places of detention.

Currently there is no independent review of the different departments involved in deprivation of people's liberty. With the lack of a national human rights institution in Hong Kong and the fact that all complaint bodies of the Police, Immigration Department and the Correctional Services Department are not independent, it is even more important for an international body to monitor the status of human rights in detention.

It is recommended that the government follow the new guidelines of the UN and explain why certain instruments have not been acceded to. Especially it should explain why it has not yet allowed regular visits by international institutions to places of detention, including police stations, detention centres, prisons, and immigration centers, which could help monitor racial discrimination.

D. Article 5(b) Right to security

4. Refugee Convention not signed by HKSAR

4.1 Introduction

There are currently 996 people¹⁵ in Hong Kong who seek asylum under the International Convention Relating to the Status of Refugees (Refugee Convention) at the United Nations High Commissioner for Refugees' Hong Kong sub-office (UNHCR-HK). The UNHCR-HK has granted 101 people refugee status. In addition to the Refugee Convention, people who escape their countries and seek refuge in Hong Kong may also seek protection accorded by the Convention Against Torture (CAT). The screening of these cases is made by the Hong Kong Immigration Department. There are currently 4,800¹⁶ claimants under the Convention Against Torture.

The government has repeatedly stated that it has no plans to extend the Refugee Convention to Hong Kong or to take up its responsibility of screening asylum seekers' claims. This is despite the fact that China and Macao have already ratified the Convention Relating to the Status of Refugees, which now already has 144¹⁷ States Parties.

The government has also ignored the concluding observations of several UN committees. In the concluding observations of the Committee on Economic Social and Cultural Rights (E/C.12/1/Add.107) May 2005, the Committee expressed concern "[...] that 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 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."

Also, in its concluding observations of November 2008¹⁸ the Committee Against Torture has expressed concern that "there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure. The

15 Figure as of 26 May 2009, provided by the UNHCR Hong Kong.

16 Figure as of April 2009. Of the 4,800 cases 100 are cases to be re-screened.

17 As of 1 October 2008. (<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>)

18 Concluding observations of the Committee against Torture, Hong Kong Special Administrative Region (CAT/C/HKG/CO/4)

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.”¹⁹ It further urges the government to 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”²⁰.

4.2 Government should screen asylum seeker claims

Both the UNHCR mechanism and the CAT mechanism have long suffered from lack of procedural fairness. Because of a judicial review of the CAT mechanism²¹, the Immigration Department has been forced to review the system and plans to change the CAT screening procedure. Human rights lawyers, NGOs and asylum seekers have long argued that it would be beneficial if the HKSAR government signed the Refugee Convention and set up a single mechanism to screen cases under the Refugee Convention and the Convention Against Torture. Besides the procedural problems of each mechanism, the current set-up is ineffective as claimants may make claims under both mechanisms, thus prolonging the time that a claimant may stay in Hong Kong. For genuine cases, this is highly frustrating. The current system also makes it easy for illegal immigrants without genuine cases to abuse the system and stay longer in Hong Kong, going against the government’s official policy of combating abuse of the CAT system. It is recommended that the two systems be combined into one single mechanism so that one single independent body makes screenings of cases. This body must process claims with a high standard of fairness, which includes legal representation.

In March 2006 the UN Human Rights Committee asked the HKSAR to establish an appropriate mechanism to assess the risks faced by individuals expressing fear of being victims of grave human rights violations in the locations to which they may be returned. The Human rights Committee is thus concerned about the absence of adequate legal protection and has asked the government to set up its own mechanism. However, the government has turned a blind eye to the recommendations of the Human Rights Committee and in fact it has stated that it has a firm policy of not granting asylum.

19 Concluding observations of the Committee against Torture, Hong Kong Special Administrative Region (CAT/C/HKG/CO/4), para. 7.

20 Ibid, para. 7(b).

21 The case was heard in the High Court of the HKSAR (HCAL 51, 105, 106, 107, 125, 126 of 2007).

Regarding the screening mechanism under the Convention Against Torture, it has been subject to a judicial review. The judgment of the court case²² (5 December 2008) revealed the following flaws in the CAT claim procedure:

1. Lawyers are not permitted to be present during the completion of a questionnaire or the conduct of the screening interviews.
2. There is no legal representation during the screening process.
3. The person making the determination of the claim is different from the one conducting the interview. This is problematic when issues of credibility are at stake.
4. There is insufficient training and guidance of the examining officer, the decision maker and the decision maker in relation to a petition to the Chief Executive the persons.
5. There is no oral hearing at the petition (appeal) stage. This goes against the principles of a high standard of fairness.
6. No reasons are given for the refusal of a petition, which makes it difficult for a person or a potential deportee to consider the possibility of judicial review.

The government has therefore decided to review the screening procedure and plans to restart the screening of cases this year, make changes to the system and also aims legislate on the screening. With the review of the system the government should seriously consider screening asylum cases as well. A single system set up by the government could also avoid the procedural problems in the UNHCR-HK and would be more cost effective.

4.2.1 UNHCR-HK violates procedural standards

The UNHCR-HK does not provide adequate protection to asylum seekers and in fact UNHCR-HK only accepted around 10% of the asylum seekers as refugees. This figure is highly disturbing and many asylum seekers are rejected without having access to a fair refugee status determination mechanism.

The need for the government to urgently set up its own mechanism is shown in the results of our survey of 100 asylum seekers called “Survey of the UNHCR HK’s Refugee Status Determination Mechanism” (July 2006). It reveals severe problems of the UNHCR’s system and that the UNHCR-HK does not observe the *Procedural Standards for Refugee Status Determination under the UNHCR’s Mandate* published

22 The High Court cases No. 51, 105, 106, 107, 125, 126 of 2007

September 2005.

Main findings of the survey

a. Asylum seekers are denied right to legal representation by the UNHCR

According to UNHCR guidelines, a legal representative may accompany applicants during the interviews. However, in the survey in 91% of the cases, UNHCR-HK never informed the asylum seekers of their right. UNHCR-HK has, however, changed the procedure and now allows asylum seekers to bring legal representatives. However, as legal representation is only provided by a very limited number of pro-bono lawyers, only a very limited number of asylum seekers actually have legal representatives.

b. UNHCR-HK only conducts very short interviews before rejecting cases

The UNHCR guidelines instruct interviewers to provide adequate time for asylum seekers to present their cases. However, the UNHCR-HK rejects cases even though the applicants did not get enough time to present their case. In fact 61% of the asylum seekers say that they were not allowed to make a full account of what happened to them in their country.

c. Interpreters are not always provided, and the quality of interpretation is highly questionable

The survey shows that many asylum seekers were highly unsatisfied with the interpretation services provided. 41% of respondents felt that the interpreter only summed up what they said. The inadequate quality of interpretation denies asylum seekers the opportunity to clearly explain their claims and to make a well-presented claim.

d. No detailed documentation of case is given to the applicant

According to the UNHCR guidelines, the interviewer should read back important major points of interview transcripts. However, 88% were not asked to agree on the major points of the interview and 98% were not given a copy of interview transcripts. Thus, the applicant has no access to check whether the UNHCR-HK makes a faithful recording of his statement.

e. No detailed written reasons for refusal are given

According to UNHCR guidelines rejection letters should enable the rejected applicant to understand the details of the reasons why he has been rejected, so that he is able to

make an appeal focusing on relevant facts and issues. However, in 81% of cases the respondent did not receive a detailed written reply about the reasons for refusal of his case. The practice of the UNHCR-HK is to simply give a verbal explanation. However, it is highly difficult to make an informed appeal based on a verbal explanation from the UNHCR-HK. The results show that 64% say it was difficult to make an appeal because they could not remember all the reasons for the rejection.

f. Uncomfortable questioning by UNHCR-HK officers

According to UNHCR guidelines, the interview should be conducted in a non-confrontational manner. However, the attitude of the interviewers reveals a hostile environment in which 72% of the applicants say that they felt uncomfortable during the interviews. The hostile environment makes asylum seekers uncomfortable making their claims and many feel as if they are being interrogated.

g. UNHCR-HK does not have a regular complaint mechanism

According to the guidelines UNHCR should have a procedure to receive and respond to complaints. However, it seems that no systematic mechanism is in place to deal with such complaints. 37% had made a complaint, but of these 69% did not get any reply from the UNHCR-HK about the complaint. The lack of any complaints mechanism makes it difficult for asylum seekers to have their cases reassessed if any procedural unfairness has taken place.

h. UNHCR-HK is slow in processing claims

According to the guidelines initial decisions made by the UNHCR should be issued within one month following the interviews. However, many have to wait for a long time before getting the results from the UNHCR-HK. 43% had to wait for 7 months or more before they getting the first rejection and as many as 22% had to wait between 13 and 24 months after the appeal before receiving a second rejection.

E. Article 5(e) Economic, social and cultural rights

The government discriminates against ethnic minorities, new immigrants from Mainland China and asylum seekers/CAT claimants in its housing and welfare policies.

5. 7-year residence hurdle for welfare applications

5.1 Poverty among new immigrants

The problem of poverty is serious among new arrivals from the Mainland China. About 54,000 new immigrants come to Hong Kong for family reunion every year. Racial discrimination and social exclusion from the local people are common obstacles for employment. Government figures showed that in 2006, near two-thirds of new arrivals had a monthly employment earning below \$8,000, while only 3.4% earned \$20,000 or over. Even worse, employed new arrivals generally had lower incomes than those of the local people as a whole (see Table 1). This inevitably leads more new immigrants to become low-income families.²³

Table 1. Monthly employment earnings of employed persons from Mainland China having resided in Hong Kong for less than 7 years in year 2006.

Monthly employment earnings (HK\$)	Employed persons from the mainland China having resided in Hong Kong for less than 7 years (New immigrants)		Employed persons from the mainland China having resided in Hong Kong over 7 years (Non-new immigrants)	
	No. of persons ('000)	%	No. of persons ('000)	%
<2,000	1,551	3.4%	30,576	2.1%
2,000 – 3,999	6,212	13.7%	255,940	7.2%
4,000 – 5,999	15,246	33.7%	170,195	11.4%
6,000 – 7,999	11,974	26.4%	205,536	13.8%
8,000 – 9,999	4,213	9.3%	171,815	11.5%
10,000 – 14,999	3,128	6.9%	267,218	17.9%
15,000 – 19,999	1,429	3.2%	137,586	9.2%
20,000 – 29,999	831	1.8%	129,436	8.7%
≥30,000	723	1.6%	122,451	8.2%
Total	45,307	100.0 %	1,490,753	100.0 %

23 Census and Statistics Department, HKSAR Government (2007)

5.2 No social security for new immigrants

Comprehensive Social Security Assistance (CSSA) is the only safety net to help Hong Kong residents who encounter financial difficulty. Currently, about 12% of CSSA cases are new immigrants of less than seven years residence. Most of them are single-parent families or families with chronic illness patients. They applied for CSSA, as they could not find other helping resources. Without assistance from the CSSA system, new immigrants with financial difficulties cannot survive in Hong Kong. However, the Government adopted a stricter welfare policy for the new immigrants in order to screen out the poor new immigrants in its new population policy in 2003. The criteria of application for Comprehensive Social Security Assistance (CSSA) have changed from one-year of residence to seven years residence. It took effect on 1st January 2004. Although children are waived, their parents cannot receive CSSA. Most of them are mothers. The policy hinders the mother from taking care of the children, as she does not have resources to help the children and also must share the children's CSSA.

According to official statistics (Table 2), there were 1,665 applications in 2004/05 and 3,856 applications in 2005/06, where the applicants resided in Hong Kong for less than 7 years. As can be seen from Table 2, there has been a steady increase in the number of applications for social welfare. About 20% of the applicants could successfully receive welfare from the Government while the other applicants were considered self-withdrawn cases. But it was found that many applicants complained that they were informally rejected by the Social Welfare Department and were considered self-withdrawal cases. Due to the discriminatory policy, the new immigrants from Mainland China are inevitably living in poverty without any assistance from the Government.

Table 2. CSSA application results of people who resided in Hong Kong for less than 7 years in the year of 2004/05, 2005/06 and 2006-08

No. of cases \ Year	2004/05	2005/06	2006-08
Self withdrawal	1,299 (78.0%)	2,892 (75.0%)	6,890(65.4%)
Granted by discretion	230 (13.8%)	843 (21.9%)	3,429(32.5%)
Rejection	18 (1.1%)	26 (0.7%)	85(0.8%)
Pending assessment	118 (7.1%)	95 (2.5%)	135 (1.3%)
Total No. of application	1,665 (100%)	3,856 (100%)	10,539(100%)

6. Welfare assistance for asylum seekers far below standard

The current government policy regarding asylum seekers and CAT claimants is only to offer assistance in kind, on a case-by-case basis. The aim is only to prevent a person from becoming destitute rather than to provide an adequate standard of living. Cases are assessed individually and the government provides assistance according to the personal situations of asylum seekers, including the availability of resources from NGOs. Asylum seekers without immigration papers do not receive any assistance from either the government or UNHCR-HK. Recognized refugees do not receive assistance from the government, but are referred to the UNHCR-HK for help.

As of 31 January 2009, the number of asylum seekers/CAT claimant receiving assistance for accommodation was 2,616 and for food 2,477.

Currently, the government does not provide any cash allowance to asylum seekers or torture claimants. Welfare is provided as assistance-in-kind, meaning that asylum seekers have to collect food at specified shops every 10 days, while house rent subsidies are paid directly to the landlords. Transportation and medical waivers are provided on a case-by-case basis subject to documentary proof. However, the current system neither meets the basic needs of asylum seekers nor is it cost effective.

6.1 Low level of assistance

First of all, the level of assistance provided to asylum seekers is much lower than that provided to people receiving welfare. Asylum seekers are only allowed to pick up food at two shops in Hong Kong once every 10 days, where they choose from a list of food, which will then be packed for them. Adults only get food worth approximately HK\$ 900/month and children only get HK\$ 450/month. As seen in the table below, the food assistance provided to adults only amounts to 55% of the standard rate of the social security received by Hong Kong permanent residents. As for children, it is even worse. Children only get food worth 23% of the standard rate of the CSSA. As the government views the CSSA level as the basic level of assistance, it is disturbing to see that the level given to asylum seekers is much lower.

As for rental allowance, the amount to asylum seekers is only \$1000 per person, while that for CSSA recipients is HK\$1,265. Also, it has been standard that children within families do not receive any rental allowance. Thus an asylum seeker family of 5 would only get \$2,000 for housing, while CSSA recipients would get HK\$3,550, which is 78% more than that for asylum seekers. The government has provided extra

house rent for children on a case-by-case basis.

6.2 Inhumane and disrespectful distribution of food

Secondly, the type of assistance is very different. Although the current level for CSSA is low, at least CSSA recipients receive cash, and can choose to buy what they want and also whenever they want. However, asylum seekers are only allowed to pick up food every 10 days, collecting a big bulk of food, which they must carry home. As the food is only distributed every 10 days it is not fresh when eaten and sometimes asylum seekers even have to throw out the food as the food has expired. Also, each time they collect the food, around 60 people are also waiting outside the shop, so it often takes more than 2-3 hours to collect the food. In one of the districts, the food is currently distributed in a dirty back alley of the shop.

Table 3. Comparison between Hong Kong residents receiving social security and asylum seekers.

Type of assistance	Hong Kong residents	Asylum seeker/torture claimants	Difference between residents and asylum seekers
Rent subsidy	\$ 1,265 cash for singleton.	\$1,000 for adults. Children do not normally receive rental assistance.	Asylum seekers only get 79% of that given to HK people
Food etc.	Standard cash rates for singletons: Adults: \$ 1,630 cash Children: \$1,955 cash	- Food worth \$900 for adults - Food worth \$450 for children - No cash given	Adult asylum seekers: 55% of that given to HK residents Child asylum seekers: 23% of that given to HK residents.
Utilities	Part of standard rate	Case-by-case	
Transportation	Included in the standard rate above	Case-by-case and only for specific purposes.	HK residents get cash as part of standard rate. Asylum seekers only get for specific purposes through ISS.

The current assistance provided by the government infringes on the right of all to have an adequate standard of living, including adequate food, clothing and housing. Also regarding children, the International Convention on the Rights of the Child states that State Parties should recognize the right of every child to a standard of living adequate for the child's physical and mental development. It is very clear that the current assistance provided does not meet these basic needs and that the government's treatment of asylum seekers is disrespectful and does not meet international standards. It is recommended that the government provide cash assistance to asylum seekers at the same level of the rates provided to CSSA recipients.

F. Recommendations

- 1) Include the status of being a new immigrant from Mainland China in the Race Discrimination Ordinance as a ground of discrimination.
- 2) Include all government functions and powers in the Race Discrimination Ordinance.
- 3) Include immigration status under the purview of the Race Discrimination Ordinance.
- 4) The government should set up independent monitoring to prevent and detect racial discrimination by law enforcement personnel.
- 5) The Hong Kong government should immediately ratify the Convention Relating to the Status of Refugees and formulate a coherent and comprehensive asylum policy to deal with aspects of immigration and the refugee status determination. It should further ensure that adequate housing and food is provided to asylum seekers and refugees.
- 6) The government should set up a fair screening procedure to assess claims under the Convention Relating to the Status of Refugees and the Convention Against Torture.
- 7) The government should abolish the 7-year rule for applications of social welfare and stop discriminating against new immigrants from Mainland China.

G. Introduction to the Hong Kong Human Rights Commission

The Hong Kong Human Rights Commission is a coalition of ten non-governmental organizations including religious, women, community and students groups. It was founded in March 1988.

Though coming from different backgrounds, all groups believe that every man and woman has inherent rights and dignity. Based on the belief of universal brotherhood and sisterhood, Human Rights Commission considers mutual respect, equality and freedom as the foundations on which a just, peaceful and humane society is to be built.

All these years, Human Rights Commission has endeavored in the protection of human rights for the community. We came to realize that not only does Hong Kong lack a democratic system, through legislation, the local government also inherited from the colonial regime enormous power so as to maintain social control. Thus, members of the Commission wish to gather resources and consolidate civil power to activate public concern and urge the government to improve the human rights situation.

Besides campaigning for the enactment of the Bill of Rights Ordinance and subsequent amendments of laws, the Human Rights Commission has also promoted human rights education through exhibitions, conducting workshops and giving talks to schools and community centers. Public awareness and participation are vital to the development of human rights. Only through the establishment of a culture that respects human rights will its protection be substantial. Though there are initial achievements after these few years' work, it is still inadequate.

Members of the Hong Kong Human Rights Commission

Christians for Hong Kong Society
Hong Kong Christian Industrial Committee
Hong Kong Christian Students Movement
Hong Kong Federation of Catholic Students
Hong Kong Federation of Civil Service Union
Hong Kong Social Workers General Union
Hong Kong Woman Christian Council
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