

NOTE ON THE SITUATION OF ASYLUM SEEKERS, REFUGEES AND
CONVENTION AGAINST TORTURE (“CAT”) CLAIMANTS IN THE HONG KONG
SAR prepared for the Panel on Security Meeting 3rd February 2009

Please see the attached note prepared for the meeting on 18th July 2006.

I will be available to provide an update on my previous note dated 16th July 2006 and in particular the test cases of *FB and others v DOI/Secretary for Security*, HCAL 51/ 2007 judgment 5th December 2008, (on the unfairness of the CAT process) and the Court of Appeal case of *A and others v DOI*, CACV 314/2008, judgment July 2008, on the detention of CAT claimants.

Mark Daly
Barnes & Daly

NOTE ON THE SITUATION OF ASYLUM SEEKERS, REFUGEES AND CONVENTION AGAINST TORTURE (“CAT”) CLAIMANTS IN THE HONG KONG SAR prepared for Joint Meeting of the Legislative Council Panels on Welfare Services and Security 18 July 2006

Increasing International Criticism

Various United Nations (UN) Committees have been critical of the way the HKSAR has treated asylum seekers, refugees and CAT claimants.

Concluding Observations of the UN Human Rights Committee Hong Kong Special Administrative Region (HKSAR) 21 April 2006:

“10. 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.”

Concluding Observations of the UN Human Rights Committee (Hong Kong): China. 12/11/99:

“14. 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 Committee on the Rights of the Child: Concluding Observations-24 November 2005

“31. The Committee is concerned about the persistence of discrimination against refugee, asylum-seeking and undocumented migrant children in the Hong Kong SAR, and the lack of legislation specifically prohibiting discrimination on the basis of race or sexual orientation...”

81. With regard to the Hong Kong SAR, the Committee notes that refugee children and undocumented migrant children are not guaranteed access to education.

82. *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:*

(c) Amend 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.”

Concluding Observations of the UN Committee on Economic, Social and Cultural Rights (“ICESCR”) 13 May 2005:

“Para 80. 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 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.”

In May 2000 the UN Committee Against Torture also “*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*”

Hong Kong SAR Law Relating to Asylum Seekers, Refugees and CAT Claimants: The Problems¹

1. HKSAR has no legislation or coherent policy governing the treatment of asylum seekers, refugees, or CAT claimants.² The problems and criticisms are mounting to the detriment of all concerned, creating great hardship to persons in need of protection, and damaging the reputation of the HKSAR. The current “system” in the HKSAR does not comply with legal obligations, results in delays, inconsistencies and abuses. The Refugee Convention has not been extended to the HKSAR despite UK and PRC (and over 140+ countries) acceding to both instruments and the Convention being extended to Macau.

¹ This brief note only provides a general outline of a number of the fundamental problems with respect to the treatment of asylum seekers, refugees and CAT claimants in the HKSAR.

² Asylum seekers/refugees and CAT claimants are to be distinguished from “economic migrants” (see Refugee Handbook paragraphs 62-64).

Refugee Status Determination (“RSD”) by the UNHCR Does Not Meet the Most Basic Standards of Procedural Fairness

2. HKSAR presently attempts to “sub contract” its RSD obligations³ to the United Nations High Commissioner for Refugees (“UNHCR”) (as it unlawfully tried to do with its obligations under CAT [see the *Prabakar* Court of Final Appeal FACV 16/2003 judgment 2004])—a body that cannot be compelled to appear in HKSAR courts.

3. UNHCR refugee status determination (“RSD”) lacks a number of guarantees ensuring procedural fairness such as: transparency; written reasons for refusal; independent appeal; provision for legal assistance; judicial review. The UNHCR in Hong Kong does not even comply with its own published procedural standards including legal representation for unaccompanied minors. Given the serious consequences from a negative decision relating to persecution the present situation is wholly unacceptable—particularly for a jurisdiction that considers itself to be bound by the rule of law. There have been numerous criticisms of the fairness of the UNHCR process, both academic and survey studies, and the UNHCR itself has been pushing for the HKSAR to have the Convention extended and legislate its own procedures. Because of the UNHCR’s lack of domestic legal personality (and lack of resources resulting in lengthy delays) it cannot be a surrogate for the HKSAR properly assuming its legal obligations under customary international law. There are also problems relating to access to the UNHCR and the serious problems with fairness have been highlighted by some “airport” cases⁴ where the HKSAR effectively forced the UNHCR to make “snap” decisions in unreasonably short periods of time (a few days). Because of this unsatisfactory situation applicants remain at risk and the HKSAR continues to risk running afoul of the principle of *non-refoulement* at customary international law.⁵

-Q. Wouldn’t it be more efficient and fairer for the HKSAR to set up its own legislation and related policies to prevent hardship, delays and abuses?

-Q. Given that the application numbers are small and it is difficult for an asylum seeker to get to the HKSAR what are the obstacles to extension of the Refugee Convention and legislation?

³ The HKSAR denies it has any obligations at all (which is arguably wrong in law) yet maintains that “claims for refugee status lodged in Hong Kong are dealt with by the United Nations High Commissioner for Refugees (“UNHCR”).”

⁴ Note the “Airport” cases—in particular *Aliyar v Director of Immigration*. HCAL 64 of 2003

⁵ See Sir Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement” 20 June 2001, pp 61-87. The Universal Declaration of Human Rights recognizes that everyone has the right to seek and to enjoy in other countries asylum from persecution.

Convention Against Torture (“CAT”) Procedures Do Not Meet Minimum Standards of Fairness and Have Not Been Scrutinized by Legco

4. Under CAT, and post *Prabakar*, the HKSAR has implemented “discretionary” “non statutory” screening procedures for CAT claimants only (It is important to note that the legal test under CAT differs from that under the Refugee Convention). Despite the seriousness of the consequences of the decision there is no provision for legal representation—no legal aid, no Duty Lawyer Service (“DLS”)—despite the Court of Final Appeal in *Prabakar* stating that such CAT screening should adhere to high standards of fairness. Other problems include the fact that the process takes a very long time, often years, which is neither fair to the individual or efficient from the standpoint of administration. It also seems that information gathered by the DOI during CAT interviews can be used to prosecute the applicant for “immigration” offences. Paragraph 2 of the “Notice to Person Making a Claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment says:

“The information provided in the interview will only be used for the purposes of assessing a claim under Article 3 of the Convention. It will not be used for any other purpose save that, if any part of it be relevant to further immigration decisions concerning the claimant, it may be taken into account.”

-Q. How many torture claims have been found to be successful? Failed? Appealed?

-Q. What are the appeal procedures? Will there be an oral hearing for example?

-Q. Given that legal representation was provided for during screening under the Vietnamese refugee legislation how does the HKSAR justify there being no provision for legal representation under CAT screening?

-Q. Please explain how a CAT claimant is to fairly appeal to the Chief Executive within 2 weeks from a refusal, particularly without legal representation?

-Q. If the HKSAR is interviewing CAT applicants at length in any event then why not slightly expand the inquiry process and assess the refugee claim out of the same inquiry?

-Q. What training has been provided to those assessing whether or not an applicant will return to face torture?

Comprehensive Support (Including Education for Children and the UN Convention on the Rights of the Child)

5. The HKSAR considers that it has no obligation to assist CAT claimants (or asylum seekers/refugees) with comprehensive support, such as accommodation, food, medical assistance or education for children and has left applicants in a state of destitution, to starve or beg for assistance from NGO’s. At the same time, and despite the lengthy

screening processes the HKSAR does not allow applicants to work to support themselves. Recent court cases⁶ (including the “bag of rice” case where the applicant was given a bag of rice by the Social Welfare Department without means or a place to cook it)--where the applicants’ argue that the HKSAR has breached its legal obligations including: the ICCPR and the Bill of Rights Ordinance; the ICESCR; the Convention on the Rights of the Child (“CRC”); and the common law--have resulted in some changes being made but details have yet to be worked out and serious problems remain. These include: continuing problems of administering an “in kind” assistance program (which has resulted in the inefficiencies of SWD staff shopping for applicants and escorting applicants to medical appointments—waiting hours—instead of providing minimal cash allowance); questions about what assistance is being provided to those not involved in litigation?; what are the details of the DSW arrangement with NGO providers? (we understand that DSW has provided a “brief” including budget to the NGO providers (International Social Service “ISS” was contracted only in April 2006 despite government knowledge of the problem for a long time) but the brief/tender (effectively the government proposal) has not been made public); DSW are telling applicants that they must have valid visas and to approach their embassy (contrary to refugee law—an asylum seeker does not approach the alleged persecutor/torturer!); medical waivers are ad hoc; the rental allowance is unrealistically low (\$1000 per adult with no provision for children) etc.

- Q. Please provide full details of the proposal to provide comprehensive support?
- Q. Please provide a full update on the program to date including: numbers of applicants? Numbers being provided accommodation? Details of numbers of shelters? Assessment procedures?
- Q. How was the rental allowance of \$1000/adult (with no provision for children) arrived at (which the Court has commented may be illusory given Hong Kong’s rental market)?
- Q. Given the complexity of decision-making in refugee/CAT cases and the length of time applicants must wait, why isn’t schooling of children automatic and why does the EMB need the DOI permission in any event?
- Q. Why are children not eligible for student financial assistance?
- Q. Why deny the right to work when working applicants would be able to support themselves and take the burden off taxpayers?
- Q. How many cases has DSW not referred to ISS and what are the reasons for non-referral?

⁶ D v Director of Social Welfare, HCAL 163/2005, N & family v DSW, HCAL 25/2006 and G & family v DSW, HCAL 31/2006.

Detention⁷

6. Detention of asylum seekers/refugees/CAT claimants is a matter of serious concern. Present powers under the *Immigration Ordinance* should only be used for immigration purposes and be subject to strict time limits. The inconsistent and unclear policy has been highlighted recently by the arrest and release of asylum seekers at the HKSAR/ISS shelter and the continuing detention of asylum seekers/CAT claimants (hunger strikers) at the Castle Peak Bay Immigration Centre (“CIC”). Ironically, on 29 June 2006, the same day the destitution cases against the DSW were being heard in the High Court, the HKSAR/ISS shelter (which was on offer for the applicants in the litigation to accept as accommodation) was raided by the police because they were suspected “overstayers”. They were in fact asylum seekers, and despite holding certificates from the UNHCR, were arrested and detained, although in this case only held briefly. This highlights the absurdity of a policy in which the HKSAR allows UNHCR to carry out RSD but ignores and/or reserves the right to prosecute/detain asylum seekers holding UNHCR papers. While these persons were released after having to report to the DOI the following day and only after the intervention of NGOs and lawyers, many asylum seekers/CAT claimants remain detained in CIC. The justification for the detention is unclear and although a number of detainees have applied for legal aid they are frustrated by the delay in that process, despite unlawful detentions being priority matters for the Courts. They also suffer from the lack of an administrative detention review procedure.⁸

-Q. The policy under the heading, “Detention or Release on Recognizance” provides no detail as to how the “discretion” is exercised. What factors are considered and what is the legal basis for the detention of asylum seekers/CAT claimants in the first place?

-Q. Please provide details of the numbers of asylum seekers/CAT claimants presently detained?

-Q. Are asylum seekers/CAT claimants being detained because they are considered security threats? Please provide numbers of detainees considered to be security threats and why they are considered to be security threats?

-Q. Reconcile the policy of requiring a guarantor to support an asylum seeker (which it has been argued in Court is the obligation of the HKSAR anyway) before considering release from detention and the fact that generally some comprehensive support is now supposed to be provided and there is no mention of having a guarantor?

⁷ The 1999 UNHCR Guidelines on detention of asylum seekers reaffirmed the general principle that asylum seekers should not be detained. In Canada, “the standard of procedural guarantees for immigration detainees is relatively high. There are rights to automatic and then periodic review (after 48 hours or without delay thereafter, then 7 days, then every 30 days) by a member of the Immigration Division of the Immigration and Refugee Board. The detainee has the right to counsel and legal aid. Detention is only used very selectively. (UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006) In Canada, there were over 20,000 asylum applications and legal aid is generally provided.

⁸ Even under the *Dogs and Cats Ordinance* a person aggrieved by a decision specifying the place or period of detention of a dog or cat can appeal to an Administrative Appeals Board.

Prosecution Policy

7. The problems relating to prosecutions of asylum seekers/refugees/CAT claimants has been touched on above. Persons fleeing persecution and torture often do not have valid travel documents and international refugee law has provided that in general such persons should not be prosecuted for immigration offences. HKSAR still prosecutes, even for offences such as “overstaying” when it is quite clear that the person concerned is here exercising the fundamental right to claim asylum or the right not to be removed or deported to face torture. Even asylum seekers/CAT claimants with valid visas are refused extensions upon request and are therefore made liable to prosecution for overstaying. In any event the practice of prosecuting asylum seekers in the HKSAR seems to be contrary to the principle embodied in Article 31 of the Refugee Convention:

“1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

This treatment can be contrasted with those arriving recently from the Solomon Islands in need of protection who were provided temporary visas, cash allowances, accommodation and psychological counselling.

Recommendations

8. The HKSAR needs to: (1) take immediate concrete actions to put in place **fair and efficient** and comprehensive legislation and a **coherent policy** to deal with the serious concerns set out above and in the other submissions to this Joint Panel and (2) extend the Refugee Convention to the HKSAR without delay.

16 July 2006
Mark Daly