

**Information Paper provided by the delegation of the
Legislative Council of the Hong Kong Special
Administrative Region of the People's Republic of China**

**Protection of the Rights of Migrant Workers in
the Hong Kong Special Administrative Region**

1. Background

1.1 On behalf of the Indonesian House of Representatives, the Speaker of the House has invited the Legislative Council ("LegCo") of the Hong Kong Special Administrative Region ("HKSAR") to participate in the Ad Hoc Committee Meeting on the Protection of the Rights of Migrant Workers in Asia to be held at Solo in the Republic of Indonesia on 28 September 2011.

1.2 For the purpose of the Ad Hoc Committee Meeting, this paper provides information on the protection of the rights of migrant workers in HKSAR. The paper covers the types of migrant workers in HKSAR; the protection of the rights of migrant workers under international conventions, local legislation and administrative measures; the services and supports provided to migrant workers; and the recent development relating to the scope of the rights of migrant workers in HKSAR.

2. Types of migrant workers in HKSAR

2.1 *Article 12* of the *Basic Law* stipulates that HKSAR shall be a local administrative region of the People's Republic of China ("PRC"), which shall enjoy a high degree of autonomy and come directly under the PRC Government. In *Article 154*, the Government of HKSAR ("the HKSAR Government") may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions. According to Section 11(2) of the *Immigration Ordinance*, the permission for a person to land or remain in HKSAR is subject to the examination by and, where considered necessary, conditions of stay as imposed by the Director of Immigration of the HKSAR Government.

2.2 While HKSAR does not have a legislative definition of migrant workers, according to *Article 11* of the International Labour Organisation's *Migration for Employment Convention (Revised)*¹, a migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

2.3 According to the categorization by the Immigration Department of the HKSAR Government, there are six major types of migrant workers in HKSAR² (please refer to Appendix):

- (a) professionals and investors – persons who possess special skills, knowledge or experience of value to and not readily available in HKSAR can obtain employment visas to work in HKSAR under the General Employment Policy. In 2009-2010, there were 22 280 professionals from nearly 100 countries/territories admitted into HKSAR for employment in various sectors, either on long-term or short-term basis;
- (b) Mainland³ talents and professionals – the Admission Scheme for Mainland Talents and Professionals, implemented in July 2003, allows qualified Mainland applicants to work in HKSAR in order to meet local manpower needs. The Scheme has no sectoral restrictions, catering for the entry of talents and professionals in the arts, culture, sports and culinary sectors. As at 31 March 2010, 34 967 talents and professionals were admitted under this Scheme;

¹ The *Migration for Employment Convention (Revised)* specifies that migrants in regular status should receive treatment no less favourable than those of nationals in certain matters pertaining to employment.

² Annual Report of the Immigration Department of the HKSAR Government, 2010.

³ According to *Article 1* of the *Basic Law*, HKSAR is an inalienable part of PRC. In this paper, in order to distinguish the HKSAR system from the PRC system, "Mainland China" is used to describe PRC when it is not intended to include HKSAR, the Macao Special Administrative Region and Taiwan.

- (c) overseas Chinese professionals – introduced in September 1990, Mainland residents who have been residing overseas for at least one year immediately before submitting the application from overseas would be allowed to come to HKSAR for employment⁴. There were 3 023 overseas Chinese professionals admitted to work in HKSAR between November 2000 and March 2010;
- (d) non-local graduates – the Immigration Arrangements for Non-local Graduates ("IANG") was introduced in May 2008. Foreign persons who have obtained a degree or higher qualification in a full-time and locally-accredited programme in HKSAR can apply to stay and work in HKSAR. Those who apply within six months after their graduation are not required to secure an offer of employment upon application, while those apply after six months of their graduation need to meet such requirement. Successful applicants under IANG who are able to meet the normal immigration requirements may be granted 12 months' stay on time limitation without other conditions of stay. As at 31 March 2010, 6 522 non-local graduates were approved to work in HKSAR under this arrangement;
- (e) imported workers – under the Supplementary Labour Scheme introduced in 1996, persons from overseas are employed to fill vacancies which could not be filled by local workers. Imported workers are normally allowed to stay for an initial period of 12 months and the maximum contract period is two years. As at 31 March 2010, there were 16 418 workers admitted under this Scheme; and
- (f) foreign domestic helpers ("FDHs") – persons from overseas are allowed to work as domestic helpers in HKSAR on a two-year contract basis to relieve domestic families of household chores since the 1970s. As at 31 March 2010, there were 273 609 FDHs in HKSAR, with 49% coming from Indonesia, 48% from the Philippines, and the remaining from Thailand and other regions.

⁴ Until 1 November 2000, the overseas residential requirement immediately before submitting the application from overseas for employment in HKSAR was two years.

2.4 Most migrant workers in HKSAR are FDHs. In 1970s, the Philippine Government implemented the *1974 Labour Code* which began the Philippines' export of labour⁵. The Philippine Government promoted and encouraged labour export as a measure to ease its serious unemployment situation at home. Meanwhile, Hong Kong achieved near full employment due to economic boom in the manufacturing and servicing sectors. As a result, the Hong Kong Government attempted to mobilize the local female labour force to ease the labour shortage problem, which led to a growing need for domestic assistance and particularly the hiring of FDHs from the Philippines. The number of FDHs has been on the rise since they were first allowed to work⁶ in the territory. In the early 1970s, there were only about 2 000 FDHs in Hong Kong. The number increased to 21 000 in 1982 and 70 300 in 1990. The increase continued during the 1990s and the total reached 200 000 in 2000.⁷ In 2010, FDHs accounted for 3.9% of the total population⁸ in HKSAR.

2.5 Until the 1990s, most FDHs came from the Philippines. After the Asian economic crisis in 1998, both Indonesia and Thailand allowed labour to work as domestic helpers in other places including HKSAR. Over the years, the Immigration Department has reported a drastic increase in the number of migrant workers entering HKSAR from Indonesia and Thailand. In 2010, the percentage of FDHs coming from Indonesia for the first time exceeded that from the Philippines⁹.

⁵ *Article 17 of the Labour Code of the Philippines* states that an Overseas Employment Development Board is created to undertake, in cooperation with relevant entities and agencies, a systematic programme for overseas employment of Filipino workers in excess of domestic needs and to protect their rights to fair and equitable employment practices.

⁶ According to the Labour Department of the HKSAR Government, the policy of allowing FDHs to work in HKSAR is in line with the principle that non-local persons are admitted for employment only if the jobs concerned are not readily taken up by the local work force.

⁷ Baseline Research on Racial and Gender Discrimination towards Filipino, Indonesian and Thai Domestic Helpers, Asian Migrant Centre, p.15.

⁸ According to the Census and Statistics Department of the HKSAR Government, the population in HKSAR was 7 067 800 as at 31 March 2010.

⁹ Annual Reports of the Immigration Department of the HKSAR Government, 2008-2010.

3. Relevant international conventions and local legislation

International conventions

3.1 There are three international conventions specifically addressing the rights of migrant workers, namely the United Nation's *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*¹⁰; and the International Labour Organisation's *Migration for Employment Convention (Revised)* and *Migrant Workers (Supplementary Provisions) Convention*¹¹. Among the three conventions, only the *Migration for Employment Convention (Revised)* applies to HKSAR.

3.2 According to *Article 39* of the *Basic Law*, the provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the international labour conventions¹² as applied to HKSAR shall remain in force and shall be implemented through the laws of HKSAR after its reunification with the Mainland China. Furthermore, the United Nation's *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination against Women* are also applicable to HKSAR.

¹⁰ The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* aims to foster respect for migrants' human rights, and guarantee equality of treatment and the same working conditions for migrants and nationals.

¹¹ The *Migrant Workers (Supplementary Provisions) Convention* addresses the needs of those migrant workers in irregular status. It focuses on labour migration under abusive conditions and equality of opportunity and treatment.

¹² According to the Department of Justice of the HKSAR Government, there are 41 international labour conventions applicable to HKSAR. The conventions cover various aspects of labour rights and protections, including unemployment, maternity protection, equality of treatment, workmen's compensation and working environment.

Local legislation

3.3 In HKSAR, all migrant workers enjoy the same statutory rights and protection as local workers under the labour legislation. The two major pieces of labour legislation in HKSAR, namely the *Employment Ordinance*¹³ and the *Employees' Compensation Ordinance*¹⁴, apply equally to local and migrant workers. Under these Ordinances, migrant workers have the right to unionise, organize, demonstrate and undertake religious and cultural activities. In particular, they enjoy various types of protection including:

- (a) maternity protection – female FDHs are eligible for 10 weeks' paid maternity leave if they have been employed under a continuous contract¹⁵ immediately before the commencement of the scheduled maternity leave. The daily rate of maternity leave pay is equal to four-fifths of the average daily wages of the FDH. Further, once a female FDH has given notice of her pregnancy and her intention to take maternity leave, the employer is prohibited from dismissing her by reason of her pregnancy¹⁶;
- (b) rest days – employers should provide FDHs at least one rest day in every period of seven days, and the rest day is a continuous period of not less than 24 hours and is in addition to the statutory holidays to which the FDHs are entitled;
- (c) statutory holidays – FDHs are entitled to 12 statutory holidays in a year irrespective of their length of services;
- (d) paid annual leave – FDHs are entitled to paid annual leave after serving every period of 12 months with the same employer. The length of paid annual leave will increase progressively from seven days (for one to two years) to a maximum of 14 days (for nine years and above) according to the length of service;

¹³ Chapter 57 of the Laws of HKSAR.

¹⁴ Chapter 282 of the Laws of HKSAR.

¹⁵ An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week, is regarded as being employed under a continuous contract.

¹⁶ Section 15 of the *Employment Ordinance* (Chapter 57 of the Laws of HKSAR).

- (e) long service payment – employers should pay long service payment to FDHs upon their dismissal if they have worked continuously for not less than five years. If the FDH has had not less than 24 months of service with the same employer immediately prior to the termination by reason of redundancy, he/she is entitled to severance payment; and
- (f) employees' compensation – the *Employees' Compensation Ordinance* in general applies to employees who are employed under a contract of service or apprenticeship. Employers must take out insurance with authorized insurers to secure their liability to pay compensation under the Ordinance and the common law in respect of injuries sustained by their employees as a result of an accident arising out of or in the course of employment. Any employer who does not have a valid insurance commits an offence and is liable to a maximum fine of HK\$100,000 and imprisonment for two years.

Administrative measures

3.4 For FDHs, the HKSAR Government has taken administrative measures, which are not applicable to local workers, to safeguard the rights of FDHs. They are protected by a Standard Employment Contract which is mandatory for hiring FDHs, regardless of nationality or gender in the sense that unless the Standard Employment Contract is signed between the employer and FDH, the relevant authority will not issue the requisite visa to the FDH.

3.5 Any HKSAR resident who satisfies the criteria as specified in the Guidebook for the Employment of Domestic Helpers from Abroad¹⁷, including financially capable of employing a FDH and completion of the Standard Employment Contract, may employ a FDH. The employer should submit the application forms for employing a domestic helper from abroad and for an entry visa together with the completed contract and other required documents. All contracts must be notarized by the corresponding consulate before the Immigration Department of the HKSAR Government approves the FDH employment visa unless the FDH's country of origin does not require such notarization.

¹⁷ Accessible at the website of the Immigration Department of the HKSAR Government at [http://www.immd.gov.hk/ehtml/ID\(E\)969.htm](http://www.immd.gov.hk/ehtml/ID(E)969.htm).

3.6 Under the Standard Employment Contract, a FDH is employed as a full-time, live-in domestic helper at the employer's residence for a period of two years. The helper should only perform domestic duties¹⁸ as listed in the Schedule of Accommodation and Domestic Duties attached to the contract, and should not take up and be required by the employer to take up any other services (including part-time work) for any other person or at other premises.

3.7 The Standard Employment Contract also sets out the basic employment terms, under which the employer must provide the FDH:

- (a) a mandatory wage level not lower than the prevailing Minimum Allowable Wage ("MAW")¹⁹. With effect from 2 June 2011, MAW for FDHs is HK\$3,740 per month²⁰. Underpaying is a criminal offence, and offenders are subject to a maximum penalty of HK\$350,000 and imprisonment for three years;
- (b) provision of free accommodation with reasonable privacy;
- (c) free food or food allowance;
- (d) free medical treatment; and
- (e) free passages from the FDH's place of origin to HKSAR and return to his/her place of origin on termination or expiry of the contract.

¹⁸ The major domestic duties listed in the Schedule of Accommodation and Domestic Duties are household chores, cooking, looking after aged persons in the household, baby-sitting and child-minding.

¹⁹ The determination of salaries for FDHs is based on MAW instead of Statutory Minimum Wage ("SMW") as all live-in domestic helpers, both local and foreign, are exempted from SMW. Given SMW is set on an hourly basis, it is practically impossible to apply on live-in domestic workers as they are residing, working and living in the employers' home, rendering the calculation and recording of their working hour unfeasible.

²⁰ MAW is determined with reference to a basket of economic indicators including the prevailing general economic condition and the employment situation in HKSAR. MAW is subject to regular reviews. Since the early 1970s, there have been 25 adjustments on MAW, of which, all but two were upward adjustments and five of them had an increment of 20% or more.

3.8 The HKSAR Government also regulates the commission that a migrant worker may pay the HKSAR employment agency that places him/her. The *Employment Agency Regulations*²¹ stipulate that the maximum commission for an employment agency should not exceed 10% of the first month's wages of the migrant worker who has been placed in employment by the agency. Overcharging a job seeker is a criminal offence and the maximum penalty is a fine of HK\$50,000.

4. Supports for migrant workers in HKSAR

4.1 In order to raise awareness of both employers and migrant workers on labour rights, the HKSAR Government has taken the initiative to organize exhibitions and promotion activities for migrant workers. The Labour Department has also published a guidebook for FDHs in several languages to explain to them their rights and relevant services provided by the Government.

4.2 In HKSAR, there are established redress channels for migrant workers to voice their grievances and seek assistance. Migrant workers are encouraged to report to the relevant authorities, such as the Labour Department, the Immigration Department and the Police if they are being abused or their rights are infringed. In the event that free conciliation services provided by the Labour Department are not successful, migrant workers can approach the Labour Tribunal or the Minor Employment Claims Adjudication Board for further assistance. In addition, migrant workers are eligible to apply for assistance under the Legal Aid Scheme provided by the Government when they become involved in legal proceedings.

4.3 There are also various non-government organizations and migrant support groups in HKSAR which provide services and supports to migrant workers. The two largest FDH groups from the Philippines and Indonesia have established their respective trade unions in HKSAR. Other organizations such as the Asian Migrant Centre and the Asian Migrants Coordinating Body also provide information, organize programmes and conduct researches on migrant workers.

²¹ *Regulation 10 of Employment Agency Regulations* (Subsidiary Legislation A of Chapter 57 of the Laws of HKSAR).

5. Recent dispute relating to the scope of the rights of migrant workers in HKSAR

5.1 A Filipino FDH who has lived in HKSAR since 1986, applied to become a permanent resident on the basis that she has been ordinarily residing in HKSAR for a period not less than seven years. Her application was refused by the Immigration Department on the ground that her stay in HKSAR was not reckoned as ordinary residence under the *Immigration Ordinance*²². She then applied for judicial review and one of her arguments is that the relevant provision in the *Immigration Ordinance* might be inconsistent with *Article 24(4)* of the *Basic Law*, which states that persons not of Chinese nationality who have entered HKSAR with valid travel documents, have ordinarily resided in HKSAR for a continuous period of not less than seven years and have taken HKSAR as their place of permanent residence before or after the establishment of the HKSAR could be permanent residents of HKSAR.

5.2 The case was heard at the Court of First Instance of the HKSAR High Court and the judge reserved judgement on the case after a two-and-a-half day hearing. A decision is expected by the end of September 2011. Two similar cases are pending before the High Court. Since the cases are pending legal proceedings, it is not appropriate for LegCo and its Members to comment or express any views on the matters in issue.

²² Schedule 1 to Chapter 115 of the Laws of HKSAR.

Appendix

Table – Number of visas/entry permits issued under major schemes by the Immigration Department of the HKSAR Government (2008-2010)

	2008-2009	2009-2010
Employment Visas for foreigners under the General Employment Policy ⁽¹⁾	22 815	22 280
Admission Scheme for Mainland Talents and Professionals	6 552	6 718
Overseas Chinese Professionals	404	498
Immigration Arrangements for Non-local Graduates	3 124	3 398
Supplementary Labour Scheme	1 317	1 078
Foreign Domestic Helpers	86 962	88 931

Note: (1) Excluding training and group visa applications.

Source: Annual Report of the Immigration Department of HKSAR Government 2010

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