



Written Submission

LegCo Panel on Constitutional Affairs, Meeting 17 Feb. 2014

In response to item IV. Third report by the Hong Kong Special Administrative Region under the International Covenant on Economic, Social and Cultural Rights

Introduction

The Hong Kong Refugee Advice Centre regrets that the Hong Kong government's Third Report under the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹ in paragraphs 2.46-2.49 on "protection for asylum-seekers and refugees", does not provide details on the actual levels of humanitarian assistance provided to protection claimants,² or the structural barriers they face—directly as a result of government policies—in exercising the rights to work and an adequate standard of living, particularly the rights to food and housing. In light of these information gaps in the State Report, HKRAC filed a submission in April 2013 with supplementary information to the pre-sessional working group of the UN Committee on Economic, Social and Cultural Rights (CESCR).³ We remind the Hong Kong government that in its list of issues, the CESCR has asked HKSAR to "clarify whether refugees have access to the labour market and to tertiary or vocational training" and to "also clarify the housing situation of asylum seekers and refugees".⁴ The questions in the list of issues must not go unanswered and the Hong Kong government should provide a response before its forthcoming review in May 2014.

Moreover, in 2005 Concluding Observations, the CESCR recommended that HKSAR "reconsider its position regarding the extension of the Convention relating to the Status of Refugees and its Protocol to its territorial jurisdiction, and that it strengthen its cooperation with the UN Refugee Agency (UNHCR)," in particular "in the formulation of a clear and coherent asylum policy based on the principle of non-discrimination." The CESCR regretted the position of HKSAR that "it does not foresee any necessity to have the Convention and the Protocol extended to its territorial jurisdiction".⁵ Indeed, the fact that the Convention and its Protocol have not been extended to the territory and HKSAR's lack of domestic refugee law have repeatedly been criticised by several treaty bodies—and these are some of the most frequent and unanimous recommendations made to the Hong Kong government in UN treaty body reviews. Regardless of whether the government seeks extension, it still has obligations to respect, protect and fulfill protection claimants' basic social and economic rights.

¹ HKSAR, Third Report of the Hong Kong Special Administrative Region of the People's Republic of China under the International Covenant on Economic, Social and Cultural Rights, UN Doc.: E/C.12/CHN-HKG/3

² Protection claimant refers collectively to asylum seekers, refugees, torture and cruel, inhuman or degrading treatment or punishment (CIDTP) claimants—also known as "non-refoulement claimants" under the forthcoming Unified Screening Mechanism.

³ HKRAC, Submission to the Committee on Economic, Social and Cultural Rights (CESCR) complementing the Third Report of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China, April 2013, available at:

http://www2.ohchr.org/english/bodies/cescr/docs/ngos/HKRAC_ChinaHongKongPSWG51.pdf

⁴ CESCR, List of issues in connection with the consideration of the second periodic report of the People's Republic of China (E/C.12/CHN/2) including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2), adopted by the pre-sessional working group at its fifty-first session, 21-24 May 2013, UN Doc.: E/C.12/WG/CHN/Q/2, at para. 44 and 55

⁵ CESCR, Concluding Observations for the People's Republic of China (including Hong Kong and Macao), UN Doc.: E/C.12/1/Add.107, 13 May 2005, at para. 80 and 92

Protection claimants are legally treated as “over-stayers” despite having to remain in Hong Kong for years before their claims are determined, which is a significant barrier to them being able to enjoy their socioeconomic rights

The Immigration Ordinance does not provide for any differential treatment for protection claimants compared to other persons seeking entry to Hong Kong. The government affirms that it allows protection claimants without the right of abode to remain in HKSAR on humanitarian grounds at the “discretion” of the Director of Immigration. Those who enter into Hong Kong legally and file an asylum claim with the UNHCR or a torture claim with the Hong Kong government are treated as “over-stayers” by HKSAR once their visas expire. At this point they may either voluntarily surrender to the Immigration Department or risk arrest for overstay. In either case, once they come to the attention of the Immigration Department, they may be subject to detention before the Director of Immigration, at his discretion, retains their passports and issues “recognizance papers”.⁶

The Third Report by HKSAR notes that “being a refugee or asylum-seeker per se would neither disadvantage nor give immunity to a person in Hong Kong.”⁷ However, HKRAC finds that protection claimants’ lack of legal status (leaving them without any valid Hong Kong Identification Card), and the absence of a comprehensive asylum policy that entrenches protection claimants’ rights are the primary determinants bearing a negative impact on claimants’ unequal enjoyment of economic, social and cultural rights in the territory. Without legal status, they are unable to work and earn a livelihood, they cannot open a bank account, they cannot front costs for necessities that do not fall under the humanitarian assistance package, and they face a difficult time accessing education and healthcare, among other significant hurdles.

All too often, the Hong Kong government rationalises its low humanitarian assistance based on tenuous arguments about reducing “magnet effects”, through the lens of border control rather than taking human rights standards and principles into primary consideration in determining its policies. The HKSAR Social Welfare Department (SWD) has openly stated that, “[our] aim is to provide support which is considered sufficient to prevent a person from becoming destitute while at the same time not creating a magnet effect which can have serious implications on the sustainability of our current support system.” The Hong Kong government often describes the humanitarian assistance as a temporary measure, premised on the assumption that recipients are in Hong Kong for a short amount of time. However, many protection claimants are often stuck in legal limbo for several years before their claim can be determined and, if meritorious, before a durable solution can be found. In fact, a recent survey conducted by the Refugee Concern Network with protection claimants found that two-thirds had been in Hong Kong for three years or more, and about one-half for five years or

⁶ Frontline workers are not always familiar with recognizance documents, which cause significant confusion when they have to access services—such as healthcare assistance.

⁷ HKSAR, Third Report of the Hong Kong Special Administrative Region of the People’s Republic of China under the International Covenant on Economic, Social and Cultural Rights, at para 2.49

more. In fact, in a written submission the Panel on Welfare Services, the International Social Service—an international non-governmental organisation contracted by the SWD to administer the humanitarian assistance package—noted:⁸

“The current assistance project is designed exactly as a tide over grant with barely adequate provisions for adaptation to Hong Kong. What has been missed is that this tide over lasted for years and people have been in suspended limbo over their stay in Hong Kong. Looking back, if anyone had stated that the length of time for each client to stay in Hong Kong would at least be a year or more, then the entire project design, policies and provisions should have been different.”

The Hong Kong government should consider amending its immigration legislation to give recognition to protection claimants and offer them legal status while they are awaiting the outcome of their claim and grant them a Hong Kong Identification Card. In order to reduce the time that claimants are waiting for a decision on their claim, it is crucial that the proposed “Unified Screening Mechanism” to process non-refoulement claims be introduced expeditiously; be met with adequate human and financial resources and meet the high standards of fairness that have been set out in the courts.⁹

The current humanitarian assistance scheme leaves recipients destitute, does not comply with international human rights standards and principles and must be revised in the next tender process this year.

Article 11 of the ICESCR recognizes “the right of everyone to an adequate standard of living for oneself and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” As an interim measure, HKRAC welcomes the recent decision to make targeted “enhancements” to the current humanitarian assistance scheme—in effect as of 1 February 2014. These include: a one-off increase in the benchmark rental allowance, assistance with housing deposits, a move to a cash allowance for transport instead of reimbursements, and an increase in the amount of assistance for utilities and food.¹⁰ However, the HKSAR government does not adopt a rights-based approach in its assistance scheme. More comprehensive reforms must be

⁸ International Social Service Hong Kong, Ways to improve the situation of refugees, torture claimants and asylum seekers in Hong Kong, LC Paper No. CB(2)1646/12-13(01), available at: <http://www.legco.gov.hk/yr12-13/english/panels/ws/papers/ws0722cb2-1646-1-e.pdf>

⁹ HKSAR, Administration’s Paper on the Screening of Non-Refoulement Claims, presented at a Meeting of the Panel on Security of the Legislative Council on 2 July 2013, LegCoPaper No. CB(2)1465/12-13(01)

¹⁰ HKSAR, Humanitarian Assistance for Non-refoulement Claimants in Hong Kong, Legislative Council Panel on Welfare Service, LC Paper No. CB(2)626/13-14(06) , 13 January 2014, available at: <http://www.legco.gov.hk/yr13-14/english/panels/ws/papers/ws0113cb2-626-6-e.pdf>

made, in line with international human rights standards, before the next service contract begins after August 2014.

In regards to housing, the “enhanced” existing rent allowance grid will now be benchmarked at \$1,500, up from \$1,200 per month. However, in a city that has ranked number 1 for world’s unaffordable housing for the fourth consecutive year,¹¹ this amount—with no other form of supplementary income—does not ensure that protection claimants can access housing that meets the aspects of adequate housing elaborated by the CESCR, including: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.¹² Moreover, it is not specified whether the allowance for children (previously \$600) will also be increased, which is already drastically inferior to what households with children under the CSSA receive.¹³ The housing amount is not regularly adjusted to inflation, and these “enhancements” are a one-off increase, although the government states that it will “consider building in a regular review mechanism based on objective criteria in the next services contract”.¹⁴ This stands in stark contrast to other types of welfare assistance which periodically increase through an established adjustment mechanism according to the movement of the Social Security Assistance Index of Prices.¹⁵

The Administration has agreed to increase the average budget for food per claimant from \$1,060 to \$1,200 a month, equating to \$40 dollars a day for food. The fact that food is delivered exclusively as in-kind assistance creates significant problems for quality control, user choice, accountability in operations, and it incurs unnecessary overhead costs, in addition to being extremely undignified and inconvenient for service users. HKRAC, several NGOs and even the UN Refugee Agency (UNHCR) have frequently advocated for the food assistance to be changed to a voucher or even more preferably a cash transfer system, arguments that are also backed by many international expert studies which show the superiority of such systems over in-kind assistance.¹⁶

¹¹ Liu, Yvonne, “For the fourth consecutive year, the city is ranked world’s No 1 for unaffordable housing” South China Morning Post, 22 January 2014, available at: <http://www.scmp.com/property/hong-kong-china/article/1410730/hong-kong-ranks-worlds-no-1-most-unaffordable-housing>

¹² CESCR, General comment 4: the right to adequate housing, (Art. 11 (1) of the Covenant), UN Doc: 12/13/1991, para. 8, available at: <http://www.unhcr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e>

¹³ Society for Community Organization, Submission to LegCo on Humanitarian Assistance for Non-refoulement Claimants in Hong Kong, LC Paper No.CB(2)678/13-14(03), 9 January 2014, available at: <http://www.legco.gov.hk/yr13-14/english/panels/ws/papers/ws0113cb2-678-3-e.pdf>

¹⁴ HKSAR, Legislative Council Panel on Welfare Service, Humanitarian Assistance for Non-refoulement Claimants in Hong Kong, LC Paper No.CB(2)626/13-14(06), January 2014, available at: <http://www.legco.gov.hk/yr13-14/english/panels/ws/papers/ws0113cb2-626-6-e.pdf>

¹⁵ HKSAR, Welfare allowances to be adjusted upwards in February, Press Release, 27 January 2014, available at: <http://www.info.gov.hk/gia/general/201401/27/P201401270245.htm>

¹⁶ For example, Overseas Development Institute, Project on Cash Transfers and Their Role in Social Protection (2006-2009), available at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/612.pdf>; Samson, Michael, ‘Social Transfers and Pro-Poor Growth’, in

The government should reconsider its position that “it has no intention to change the present arrangement of providing assistance-in-kind to asylum seekers as offering assistance-in-cash would likely create a magnet effect”.¹⁷ According to the SWD’s 2011 Service Specifications, the humanitarian assistance is designed to prevent the service user from being ‘seriously hungry.’ However, international human rights standards related to the right to food discuss elements that include: availability of food in a quantity and quality, sufficient to satisfy the dietary needs, quality so that it is free from adverse substances sets requirements for food safety, cultural or consumer acceptability and economic and physical accessibility.¹⁸ We note that the right to food also entails a person, family or community’s right to feed themselves, which would be most successfully achieved by ensuring the right to work is realised.

Protection claimants should not be barred from working and should have the choice to be self-sufficient to care for themselves and their families.

As noted by the Committee in its General Comment 18, “the right to work is essential for realising other human rights and is an inseparable and inherent part of human dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.”¹⁹

Legally treated as visitors/over-stayers, protection claimants (even ones whose claims are meritorious, such as successful torture claimants or recognised refugees awaiting resettlement) are not granted the right to work—paid or unpaid.²⁰ Although the Director of Immigration has discretion to give permission to work if claimants can show exceptional circumstances, this permission is temporary and rarely granted in practice. In fact, the Director’s “blanket policy” of barring claimants from working has recently been the subject of a judicial review in the Court of Final Appeal.²¹ Several other countries—

Promoting Pro-Poor Growth: Social Protection, OECD, 2009; Cunha, Jesse M., ‘Testing Paternalism: Cash vs. In-kind Transfers in Rural Mexico’, Stanford University, 30 March 2010; Reinhardt, Uwe E., ‘Provide Cash, or Benefits In Kind?’ *New York Times*, 21 January 2011

¹⁷ HKSAR, Panel on Welfare Services, Updated background brief prepared by the Legislative Council Secretariat for the meeting on 13 January 2014, Situation of mandated refugees, asylum seekers and torture claimants in Hong Kong, LC Paper No. CB(2)626/13-14(07), 7 January 2014, available at: <http://www.legco.gov.hk/yr13-14/english/panels/ws/papers/ws0113cb2-626-7-e.pdf>

¹⁸ OHCHR, International Standards on the Right to Food, available at: <http://www.ohchr.org/EN/Issues/Food/Pages/Standards.aspx>

¹⁹ CESCR, General Comment No. 18: Article 6 (Right to Work) of the International Covenant on Economic, Social and Cultural Rights, UN Doc.: E/C.12/GC/18, 6 February 2006

²⁰ Sections 38AA (1)(a) and (b) Immigration Ordinance Cap.115 create an offence for anyone who has entered Hong Kong illegally and remains without proper authority, or has been made the subject of a removal or deportation order, to take up any employment or establish any business here, even though they have released from detention with the approval of the Director of Immigration. HKSAR

Government, Legal Aid Department Annual Report 2010, Chapter 3: Cases of Public Interest or Concern

²¹ *GA &Ors. v. Director of Immigration*, on appeal from *MA &Ors. v. Director of Immigration*, CACV 44-48/2011, Hong Kong: Court of Appeal, 27 November 2012.

with much larger refugee populations than Hong Kong—allow asylum seekers and refugees to work after a certain amount of time has passed from when they file a claim. For example, in the United States it is 150 days, in the United Kingdom it is 12 months, and in South Korea it is 6 months.²²

Because protection claimants are not granted the right to work, but at the same time do not receive assistance levels that are suitable to enjoy an adequate standard of living, this population group is forced into situations of poverty, deprivation, social exclusion and dependence on charity. However, most claimants are of working age and would prefer to work to be able to sustain their own living and be able to offer a positive contribution to society. Current policies actually force them into poverty and the very situation of dependence for which they are often ruthlessly criticised in the media and by the public, thus reinforcing negative stereotypes, which would best be dispelled by allowing refugees to work and interact in society.

Forced inactivity has a human and financial cost. The inability to occupy their time meaningfully and productively has a negative impact on protection claimants' mental health and contributes to feelings of social isolation, depression and hopelessness. When protection claimants are denied self-reliance opportunities and are prevented from undertaking training or skills development, their potential for future employment and successful integration is severely diminished. Protection claimants' lives should not be wasted waiting for the status of the claim. They should not have to see their skills deteriorate over time or experience long-term unemployment, which create hiring stigmas in their future country of resettlement.

Current policies may also cause some claimants to have to work illegally in the informal economy or turn to negative coping mechanisms for their survival, a situation that offers them no legal protection and puts them at a series of risks—including potentially affecting the success of their claim. They may be subject to abuse and exploitative, unsafe and unhealthy working conditions propagated by unscrupulous employers who take advantage of their vulnerable position. We urge authorities and the Hong Kong government not to confuse the reasons why protection claimants arrive in Hong Kong with their basic needs once they are here. During this time, it is imperative that they have adequate means not only to survive, but lead a dignified life. We therefore urge the Hong Kong government to comply with its obligations under the ICESCR and at least allow recognized refugees, torture claimants and future successful non-refoulement claimants to be granted the right to work. In the USM system, we further encourage the Hong Kong government to consider also allowing claimants for whom a decision has not been granted within one year after filing a claim to be granted the right to work, as is the standard policy in many other jurisdictions.

²² See Refugee Concern Network, *Improving the Living Conditions of Protection Claimants in Hong Kong*, October 2013, pg. 12, available at: <http://www.hkrac.org/wp-content/uploads/2013/10/Refugee-Concern-Network-Briefing-to-Social-Welfare-Department-October-2013.pdf>

About HKRAC

The Hong Kong Refugee Advice Centre is a non-profit, human rights organisation that advocates for refugees in Hong Kong. HKRAC is the only NGO dedicated to the provision of high-quality free legal services to refugees applying for international protection from the United Nations High Commissioner for Refugees (UNHCR) in Hong Kong. HKRAC works to ensure that the asylum application process is fair, that the decision is accurate and that basic human rights are upheld. Since its establishment in 2007, HKRAC has provided life-changing legal services to over 2,000 refugee men, women and children.