

By email only: sc_hs101_16@legco.gov.hk

Clerk to Subcommittee on Children's Rights
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Written Submission

to

HKSAR Legislative Council's Subcommittee on Children's Rights

in advance of a meeting on 24 July 2017

regarding

Rights of Refugee Children

Submitted on 18 July 2017

1. About PathFinders and purpose of this submission

PathFinders' mission is to ensure that the most vulnerable children in Hong Kong, and their migrant mothers, are respected and protected. We believe that every child deserves a fair start in life;

PathFinders Limited is an approved charitable institution incorporated in Hong Kong. It receives no government funding;

PathFinders was founded in 2008 after rescuing two babies born in poverty to migrant women in Hong Kong. Since then, PathFinders has helped over 4,600 babies, children and women;

Around 360,000 foreign domestic workers (FDWs), the majority of whom are female, form an integral part of Hong Kong's families and communities. The fact that some of them become pregnant and give birth here is to be expected;

Too often, once the pregnancy becomes known, these women find themselves illegally fired from their jobs, evicted from their homes, and without support. They are denied access to healthcare. Many overstay their visas. In the women's home countries, having a mixed race child out of wedlock is heavily stigmatised and so they seek asylum for themselves and their children under Hong Kong's Unified Screening Mechanism (**USM**) to ensure a safer, brighter future;

An estimated 600 USM applicant children live in Hong Kong;

The USM's introduction has been a positive change. But it is only a small step towards a fair and treaty-compliant programme for processing refugee and asylum claims. Despite Hong Kong's otherwise well-developed support for new families, USM claimants and their children scarcely benefit. PathFinders' experience supporting USM claimants, and particularly child claimants, has been deeply troubling; and

This submission draws attention to the challenges that infant USM claimants and their families face, and makes recommendations to the government as to how they can bring about change for the better.

2. Problem: Infant children's' claims tied to the claims of parents

In PathFinders' experience, the USM claims of children are usually attached to and dependent upon the claim(s) of their parent(s). The fates of both child and parent are, in effect, bound together on a recognisance or bail certificate. This is problematic because the status and concerns of the child and parent are not typically aligned.

The child may face being sent to a country with which he/she has no connection and has never been to. There, the child might not speak the language and face discrimination for being of mixed race and/or born out of wedlock. In other cases, the parents are simply unfit for lifestyle and health reasons to be the primary carers of the child. In all these cases, the child's status hinges not on what is in their best interests, but on the fact that the merits of their USM claim is attached to, and considered as part of that of their parents, rather than as an individual claim;

PathFinders is currently involved in a case concerning a former Foreign Domestic Worker (**FDW**), her boyfriend and their young child. Because of the parents' abuse of drugs, the child was born with serious developmental defects. The child requires close care and a long-term plan for its future. The parents are both USM claimants. They are absent and incapable of caring for the child. However,

because the child's immigration status is determinative of what will happen to him/her, and his/her status is attached to his/her parents' claims, the child languishes in institutional care. No permanency plan has been made. The child faces remaining in care until one or other of the parents' claims is determined. Based on PathFinders' experience, the child will likely be deported to a country it does not know, with parents it does not know, to a place where the facilities and support he/she needs are likely unavailable. If the child's USM claim were separate from that of his/her parents and his/her best interests were a priority consideration, a better future for the child might be possible;

When applying for non-refoulement in Hong Kong, there is no prompt for parents to make separate USM claims for their children. The government provides no advice or support to parents as to the benefits of making a separate claim for their child. Instead, the government joins the child's claim to that of his/her parent(s);

Chapter 8 of the UNHCR's *'Refugee Children: Guidelines on Protection and Care'*¹ about the protection and care of refugee children specifically allows for children in the care of a parent or other adult to bring their own claim and sets out how the claim should be assessed and the provision of separate legal representation for the child;

The UN Convention on the Rights of the Child (CRC)², Article 22, provides that:

"...a child who is seeking refugee status or who is considered a refugee...shall, whether accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights..."

In PathFinders' experience, such 'appropriate protection' will also, unfortunately, also include protection from the child's parents; and

CRC Article 3 emphasises that the child's best interests should be a primary consideration in any decision taken as to its future:

"States Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing..."

Processing times for USM claims often span many years. These children then develop under the shadow and limitations of these claims.

3. Problem: The delay and cost of obtaining a birth certificate

USM claimant parents encounter extraordinary difficulty in obtaining a birth certificate for their child;

Usually, parents can make an appointment no more than ten days ahead via the birth registry online system. A birth certificate is typically issued on the day of the appointment. Parents are required to attend the birth registry only once.

¹ UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.refworld.org/docid/3ae6b3470.html> [accessed 15 July 2017]

² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 15 July 2017]

However, for USM claimant children, parents are required to attend twice and have to wait for files to be transferred between different sections of the Immigration Department. In PathFinders' experience, it typically takes up to fifty days before the certificate is issued. And this is despite the fact that UNHCR's guidelines (see note 1 above) on refugee children states that *"...every child shall be registered immediately after the birth.....through the same procedure applicable to nationals..."*

Obtaining a birth certificate is also complicated by the absence of information about translation services. Many applicant parents do not understand Chinese or English, and receive no language-appropriate guidance about how to obtain a birth certificate for their child. Translation services are only available at a cost - an expense USM claimants can ill-afford; and

Although the Immigration Department states that birth registration is free, parents must pay HK\$140 to obtain a copy of the birth certificate. The only free version of the birth registration (Form 3) makes no reference to the child's immigration status, and so is functionally useless for the purposes of registering for social, medical and education support and services.

4. Problem: The obstacles to education

USM claimant parents experience extreme difficulty securing and enjoying educational opportunities for their children. These problems begin from an early age and place the children at an immediate social and educational disadvantage. In a report on the Status of Ethnic Minorities in Hong Kong,³ Professor Puja Kapai highlighted the barriers to the enjoyment of equal rights to education in Hong Kong by ethnic minority children;

USM claimant children struggle to find kindergarten seats. Many schools are unwilling to accept claimants, either because they do not understand the child's entitlement to enrol or because the school does not want USM claimants and discriminates against them. Consequently, these children often enrol late or fail to find a place at all;

Even where kindergarten places are available, the high upfront cost discourages applications. Funding is available for USM claimant children through third parties, but it is difficult to obtain. When applying for a kindergarten place, parents must fund a mandatory deposit and initial fees before they can even apply for funding. This can be impossible for parents who, as USM claimants, are unable to work and have to survive on the limited assistance available through the International Social Services (ISS) scheme;

More generally, the government's policy on and approach to education services for non-Chinese-speaking students means that USM-claimant children often attend school in a racially and linguistically segregated environment. The schools they attend have very few Cantonese-speaking ethnic Chinese students;

The restricted availability of places in typical local schools also means that for USM-claimant children, at kindergarten and beyond, they must often travel long distances to school. This disadvantage is further compounded by the fact that unlike children of families eligible for the Comprehensive Social

³ The Status of Ethnic Minorities in Hong Kong, 1997 to 2014, commissioned by The Zubin Foundation and conducted by Puja Kapai, Director at the University of Hong Kong's Centre for Comparative and Public and Law. <http://www.law.hku.hk/ccpl/StatusofEthnicMinorities/J.Chapter3.pdf>

Security Assistance (**CSSA**) scheme who receive adequate school travel allowance, children receiving ISS do not receive a school travel allowance;

Equally students on USM claims also receive no funding support for school uniforms, meals, or books. They are often precluded from attending school trips, and their inability to secure a Hong Kong Identity Card (**HKID**) means that libraries and youth centres are inaccessible to them. By contrast, CSSA families can claim for such supplies and have full access to all facilities and services;

Further, USM claimant children are required to report regularly to the Immigration Department; as often as once a week in PathFinders' experience. The resulting absence from school to fulfil this reporting obligation interrupts the child's schooling. For most young children this is totally unnecessary as their parents in fact sign on their behalf;

Article 13 of the International Covenant on Economic, Social, and Cultural Rights (**ICESCR**)⁴ provides that:

"The States Parties to the present Covenant recognize the right of everyone to education," and that "...primary education shall be compulsory and available free to all."

Although PathFinders welcomed the HKSARG's 2014 decision to make schooling available to USM claimants, the government has more to do in order to meet its treaty obligations; and

Article 10 of the ICESCR provides that:

"special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

PathFinders believes that compliance with the Covenant also requires the HKSARG to help USM-claimant children to enjoy their education on equal terms with local students.

5. Problem: limited access to medical support

The registration of USM-claimant children for medical services is problematic, particularly for the babies PathFinders' helps;

Delay in issuing the birth certificate, as highlighted above, negatively impacts the child's ability to register for medical services. Without proof of the immigration status of the child (i.e., a birth certificate), public healthcare providers cannot be sure of the child's eligibility and registration is often denied;

General OutPatient Clinics (**GOPCs**) provide community-based primary care services to the general public. All appointments must be made through the Telephone Appointment System (**TAS**). However, TAS only supports registration if a HKID card or Hong Kong birth certificate number is provided. USM-claimant children who have neither, therefore cannot register and are unable to access the GOPC service;

⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 15 July 2017]

This becomes particularly significant where specialist treatment is required, Specialist OutPatient Clinics (**SOPCs**) require a medical referral letter issued by a general practitioner (**GP**). Attending a private GP clinic is not an affordable option for USM claimant children, GOPC is the only option. However, as demonstrated above, GOPCs are inaccessible;

PathFinders' clients also report extreme difficulty in obtaining funding to support children with special needs or to fund specialist medical care not available through the public system; and

ISS lacks the resources and time to process additional complex medical requests from USM claimants.

6. Problem: The separation of the family unit when one parent is a Hong Kong Permanent Resident

In a number of PathFinders' more heartbreaking cases, USM-claimant children who have one Hong Kong Permanent Resident (**HKPR**) parent and one USM claimant parent are too often separated from one of their parents. The government argues that the child can stay in Hong Kong with their HKPR parent (usually the father), or leave with the other when their USM claim fails. This puts parents in an invidious position and leaves children in an incomplete and fragmented family environment, detrimental to their development;

ICESCR Article 10 recognizes that the family is the "*natural and fundamental group unit of society,*" requiring "*the widest possible protection and assistance.*"

The 1951 Protocol Relating to the Status of Refugees (**PRSR**)⁵ adopted the principle of "*unity of the family.*" The protocol "*recommends Governments to take the necessary measures for the protection of the refugee's family especially with a view to... The protection of refugees who are minors...*"

7. Recommendations

On behalf of children and families with USM claims pending, PathFinders urges HKSARG to adopt the following recommendations:

Concerning USM-claimant children:

1. To consider children's USM claims in their own right, independent of and unattached to the claims of their parent(s);
2. To implement a specific guardianship system for foreign children who are not accompanied by their parents and/or where the parents are not protecting the child's rights and best interests;
3. To provide clear guidance/policy as to whether, in what circumstances and how the claims of children will and will not be assessed and prioritized;
4. To make the welfare of the child the paramount consideration when considering USM claims. Whether the needs of the child are served should be determined irrespective of immigration status;
5. To consider the age of applicants, the effects of stigma on their development, and to improve transparency and speed of process;

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 15 July 2017]

Concerning birth certificates for the children of USM claimants:

6. To accelerate the processing of birth certificate applications to make them consistent with those of non-USM claimants;
7. To end the requirement that USM claimant parents must attend the birth registry more than once to obtain birth certificates for their children;
8. To provide clear guidance about how to apply for a birth certificate in Hong Kong for that is accessible to non-Cantonese and non-English speaking parents;
9. To provide fee waivers for parents who cannot afford to pay the fees for copy birth certificates;

Concerning USM claimant children's access to education:

10. To take steps to improve access to education for USM-claimant children and in particular to fully fund kindergarten places for them and ensure admission is non-discriminatory;
11. To remove or reduce the requirement for USM claimant children to report to Immigration Department;
12. To expand the provision of travel allowances, school supplies, uniforms and other resources to USM-claimant children;
13. To ensure that all students can attend school in a non-segregated environment, in full compliance with the ICESCR;

Concerning access to medical care:

14. To remove the obstacles to access GOPC and SOPC services;
15. To simplify the provision of specialist medical care. Whether vital treatment or support is received should not depend upon the discretion of one person;

Concerning family separation risks:

16. To enable the unity of the family as enshrined in the ICESCR and PRSR;
17. To consider the best interests of HKPR children in determining their parent's right to remain in Hong Kong and to provide clear guidelines regarding circumstances under which the above is possible.

Thank you for taking the time to consider PathFinders' submission.



Kay McArdle
CEO, PathFinders