

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

On the replies of the Hong Kong Special Administrative Region of China to the Committee

November 2018

Justice Centre Hong Kong (Justice Centre) makes the following submissions to the United Nations Committee on the Elimination of Racial Discrimination (the Committee) on the replies of the Hong Kong Special Administrative Region of China (Hong Kong) to the Committee's list of themes. The list of themes was issued as part of the consideration of Hong Kong's third report under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) in the Fourteenth to Seventeenth Reports of China under the Convention.

Background

At the 96th session of the Committee, the Committee requested the following from the Hong Kong Government in its list of themes:

*"Statistics, disaggregated by ethnicity, on stateless persons in ...Hong Kong, China Information on availability of residency cards for children of refugees. Measures taken by Hong Kong, China, to address the situation of stateless children of asylum seekers."*¹

The Hong Kong Government replied in paragraph 85 of its response to the list of themes:²

"The [Immigration Department] has not made any determination as to the statelessness of persons and has no relevant statistics or information. The United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol have never been applicable to Hong Kong. Non-refoulement claimants will not be regarded as "asylum seekers" or "refugees" in Hong Kong. Only persons who are liable to be removed to his home country/a country where he enjoys a right to enter (known as "Risk State" in the context of [Unified Screening Mechanism (USM)]) would be eligible to make a non-

¹ Committee on the Elimination of Racial Discrimination. (13 June 2018). *List of themes in relation to the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China, and Macao, China)*. CERD/C/CHN/Q/14-17, paragraph 34. Retrieved from https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHN%2fQ%2f14-17&Lang=en.

² The Hong Kong Government's replies to the list of themes are not available on the Committee's website or other sites online. A hard copy was obtained by civil society.

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*refoulement claim under USM. Therefore, none of the claimants, children or otherwise, are stateless persons.*³

The Hong Kong Government's response did not fully or correctly explain the situation of statelessness in Hong Kong. The following sections clarify the situation.

The definition of statelessness

According to the 1954 Convention relating to the Status of Stateless Persons, the term "stateless person" refers to a person "who is not considered as a national by any State under the operation of its law."⁴ Determination of stateless status depends on the domestic nationality laws of each jurisdiction, for example, if citizenship and/or nationality is passed down through parentage (*jus sanguinis*) or through being born within a territory (*jus soli*). There may be overlap between people who are unregistered and undocumented, and stateless; however, they are distinct categories of legal persons.⁵ Even if a person does not have identity documentation and is thus undocumented, depending on the relevant nationality laws, they may automatically be a national of their parents' country/countries of origin, or their territory of birth. For example, an unregistered child born in Hong Kong may or may not be stateless at birth, depending on the nationality laws of the countries of the child's parents; however, they may be at the risk of becoming stateless, depending on their individual circumstances.

There exists a clear nexus between forced migration and statelessness. Persons who are forced to flee may find themselves (and particularly, their children) stateless as result of the severance of ties with their countries of nationality; and discriminatory policies that effectively deny or strip persons or groups of nationality are in

³ The Unified Screening Mechanism is the mechanism by which the Hong Kong Government determines claims for non-refoulement protection.

⁴ United Nations High Commissioner for Refugees. (1954). *Convention relating to the Status of Stateless Persons*. Retrieved from: <http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html>.

⁵ "Unregistered" and "undocumented" are not defined in international law. According to the Programme of Action adopted at the International Conference on Population and Development in Cairo in 1994, undocumented or irregular migrants are persons who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity. See United Nations Population Fund. (2014). *Programme of Action adopted at the International Conference on Population and Development (20th Anniversary Edition)*. Retrieved from https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf. Unregistered persons can refer to persons who are not registered with the State or other bodies, such as the United Nations High Commissioner for Refugees, depending on the context.

turn persecutory acts that force persons to flee. It is therefore highly likely that there is a stateless population in Hong Kong within the cohort of persons seeking non-refoulement protection.

However, the issue of statelessness should not be solely considered in the context of forced migration. The right to nationality is entrenched in the international human rights framework, including in the context of the rights of children, non-discrimination and the right of equality before the law.

The obligations of the Hong Kong Government

The right to nationality is a fundamental principle of international human rights law. The definition of statelessness as contained in the 1954 Convention relating to the Status of Stateless Persons has acquired the status of customary international law, so has the prohibition against the arbitrary deprivation of nationality. The 1954 Convention relating to the Status of Stateless Persons has been extended to Hong Kong. It establishes minimum standards of treatment for stateless people in respect to their human rights, which must in any event be no less favourable than that accorded to aliens, unless the convention contains more favourable provisions (Article 7). Article 32 of the convention further mandates the contracting state, as far as possible, to facilitate the naturalization of stateless persons.

The 2009 United Nations Secretary General report to the Human Rights Council affirmed that the prohibition of arbitrary deprivation of nationality and the obligation to avoid statelessness had become principles of customary international law.⁶ Resolution 32/5 adopted by the Human Rights Council in 2016 affirmed that “the arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, including disability, is a violation of human rights and fundamental freedoms.”⁷

Article 24(3) of the International Covenant on Civil and Political Rights, which has been ratified in Hong Kong, provides that every child has a right to nationality.

The right to nationality is particularly significant for migrant children, who may be stateless or at risk of statelessness due to the location of their birth and/or status of their parents. The best interests of the child should be the primary consideration of any decisions affecting children. This principle is enshrined in the

⁶ Human Rights Council. (14 December 2009). *Report of the Secretary General: Human rights and arbitrary deprivation of nationality*. United Nations General Assembly. Retrieved from <http://www.refworld.org/pdfid/4b83a9cb2.pdf>.

⁷ Human Rights Council. (15 July 2016). Resolution 32/5. *Resolution adopted by the Human Rights Council on 30 June 2016*. A/HRC/RES/32/5. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/27/PDF/G1615427.pdf>.

Convention on the Rights of the Child (CRC), which has been ratified in Hong Kong, and is widely accepted as a principle of customary international law. The CRC provides under Article 7(1) that any child "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents". Article 7(2) of the CRC further stipulates that states must ensure the implementation of the rights under Art. 7(1) in accordance with their domestic law, "in particular where the child would otherwise be stateless."

All persons have the right to equality before the law in the enjoyment of the right to nationality. Article 22 of the Hong Kong Bill of Rights Ordinance provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."⁸ Further, based on Article 5(d)(iii) of the Convention, which has been ratified in Hong Kong, Hong Kong undertakes to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law in the enjoyment of the right to nationality. Article 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women, which has also been ratified in Hong Kong, additionally provides: "States parties shall grant women equal rights with men to acquire, change or retain their nationality."

Problems with the existing system: Identification

Justice Centre is concerned that there is no screening mechanism for statelessness in Hong Kong. This is shown by the Hong Kong Government's above-mentioned reply to the Committee that it does not have "any relevant statistics or information" regarding stateless persons.⁹

With regard to the USM, the Government stated: "Only persons who are liable to be removed to his home country/a country where he enjoys a right to enter (known as "Risk State" in the context of USM) would be eligible to make a non-refoulement claim under USM. Therefore, none of the claimants, children or otherwise, are stateless persons." However, there is no legal provision to the effect that a stateless person is not eligible to make a claim for non-refoulement protection. Also, a person can have the right to enter a State without being its national.

A person who has fled a former country of residence due to persecution, torture or other violation of human rights may also be stateless. Indeed, the deprivation of nationality itself may constitute a persecutory act within the definition of the 1951 Convention relating to the Status of Refugees. In severing ties with or

⁸ Article 22 of the Hong Kong Bill of Rights Ordinance domestically incorporates and reads the same as Article 26 of the International Covenant on Civil and Political Rights. The text of the ordinance can be retrieved from <https://www.elegislation.gov.hk/hk/cap383>.

⁹ Paragraph 85 of the replies.

prolonged absence from their country of nationality, persons seeking non-refoulement protection (and their children born in Hong Kong) may also be stateless. The lack of a mechanism or capability to determine whether a non-refoulement protection claimant is stateless does not equate a lack of stateless persons among non-refoulement protection claimants.

Justice Centre is aware of non-refoulement protection claimants who are/may be stateless. In the cases of apparently stateless persons which Justice Centre has assisted on, both the Immigration Department and the Torture Claims Appeal Board have failed to consider the right to nationality and the statelessness of the claimant in the context of persecution, although the factual and legal submissions clearly warrant such consideration.

Ignoring those who are or may be stateless is not in the practical interest of states because, in many cases, these individuals cannot leave voluntarily or be removed.

Problems with the existing system: Lack of access to rights

In Hong Kong, there are barriers for stateless persons to access the right to a nationality/residency.

There are provisions in the Nationality Law of the People's Republic of China pertaining to stateless persons. Article 6 states that "[a]ny person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality."¹⁰ This provision cannot be effectively implemented, however, because it ties the eligibility of a stateless person to Chinese nationality on the determination of their parents as stateless. Given there is no known mechanism to determine whether the parents of a child is stateless in Hong Kong, the provision cannot be triggered to grant nationality to a stateless child.

In terms of the right to naturalization, Article 7 of the Chinese Nationality Law provides that: "Foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who meet one of the following conditions may be naturalised upon approval of their applications:

- they are near relatives of Chinese nationals;
- they have settled in China; or
- they have other legitimate reasons."¹¹

¹⁰ GovHK. (2010.) Nationality Law of the People's Republic of China. Retrieved from <https://www.gov.hk/en/residents/immigration/chinese/law.htm> on 8 November 2018.

¹¹ *Ibid.*

It is concerning that the Hong Kong Government considers all non-refoulement claimants, including those whose claims are substantiated, and their children, to be illegal immigrants.¹² This may mean they are not eligible for naturalization as Chinese nationals under Article 7 of the Chinese Nationality Law.

Recommendations

Establishing an identification mechanism for stateless persons

Justice Centre urges that the Hong Kong Government establish an identification mechanism for stateless persons. The mechanism should operate in tandem with, but not be limited to, the USM process. Where a person who may be stateless is claiming non-refoulement protection, the evaluation of a non-refoulement claim should be conducted before the statelessness screening to ensure that the State where a claimant may face persecution or torture is not notified of their presence in Hong Kong, where such notification may put the claimant at risk.

Ensuring access to rights

In addition to an identification mechanism for stateless persons, Justice Centre urges that the Hong Kong Government ensure that stateless persons, especially children, are able to access their fundamental human rights. This includes the right of stateless persons to reside in Hong Kong, given that legal settlement in the territory is the first step to naturalisation as a Chinese national.

Responsibility of the United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees (UNHCR) is mandated to assist stateless persons who are refugees according to Article 1(2) of the Convention relating to the Status of Refugees and Article 6(a)(ii) of the UNHCR Statute.¹³

However, the remit of UNHCR also extends beyond stateless refugees. Point 15 of Resolution 50/152 of the United Nations General Assembly Resolution mandates UNHCR to “promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness” and “to provide relevant technical and advisory services pertaining to the preparation and

¹² Director of Immigration, Hong Kong. (24 August 2015). *Panel on Security: Follow-up to meeting on 7 July 2015*. LC Paper No. CB(2)2048/14-15(01), available at: Retrieved from <https://www.legco.gov.hk/yr14-15/english/panels/se/papers/se20150707cb2-2048->

¹³ United Nations High Commissioner for Refugees. *Statute of the United Nations High Commissioner for Refugees*. Retrieved from <http://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html> on 8 November 2018.

implementation of nationality legislation to interested States.”¹⁴ Resolution 61/137 further encourages UNHCR to continue its work in the area of identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons.¹⁵ Justice Centre urges UNHCR to assist the Hong Kong Government with the development of an identification mechanism for stateless persons, based on its mandate.

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About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong’s most vulnerable migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

For more information please visit: www.justicecentre.org.hk

¹⁴ United Nations General Assembly. (9 February 1996). Resolution 50/152. *Resolution adopted by the General Assembly [on the report of the Third Committee (A/50/632)]*. A/RES/50/152. Retrieved from <http://www.un.org/documents/ga/res/50/ares50-152.htm>.

¹⁵ United Nations General Assembly. (25 January 2007). Resolution 61/137. *Resolution adopted by the General Assembly on 19 December 2006 [on the report of the Third Committee (A/61/436)]*. A/RES/61/137. Retrieved from http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_137.pdf.