

SUBMISSIONS TO THE SUBCOMMITTEE ON CHILDREN'S RIGHTS OF THE LEGISLATIVE COUNCIL

Rights of Refugee Children

Introduction

Hong Kong is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which provides that the Hong Kong Government shall not return ("refouler") a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Although Hong Kong is not a signatory to the Convention Relating to the Status of Refugees ('the Refugee Convention'), the prohibition of refoulement of refugees is also recognised by UNHCR as a rule of customary international law that binds all States, including those that have not yet become a party to the Refugee Convention.¹ Moreover, Hong Kong is a signatory to the Convention on the Rights of the Child ('the CRC'). The Government must therefore ensure that its policy relating to children seeking non-refoulement protection fulfils the standards set out in the CRC, particularly Article 3(1), which provides that the best interests of the child shall be a primary consideration in all actions concerning children.

The Immigration Department determines all claims for non-refoulement protection under the Unified Screening Mechanism (USM). Other than risks of torture, non-refoulement claims can also be made on grounds of persecution with reference to the Refugee Convention or violation of an absolute and non-derogable right under the Hong Kong Bill of Rights Ordinance, Cap. 383. Where a claim is made on the grounds of persecution with reference to the Refugee Convention and is substantiated, the claimant is generally considered as a refugee and UNHCR facilitates his or her resettlement to a third country. For claims made on other grounds, substantiation only leads to non-refoulement protection without residency or the right of abode in Hong Kong.

Inadequate protection of the rights and protection needs of children in the USM

There is minimal protection of the rights and needs of asylum-seeking and refugee children under the USM. The substantiation rate of all non-refoulement claims, including those made by adults and children, is 0.68%, while that of developed countries is 30% on average.² The United Nations Committee against Torture has commented in its

¹ UNHCR, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", 26 January 2007, available at: <http://www.unhcr.org/4d9486929.pdf>

² For example, in Australia the substantiation rate is approximately 40% (Department of Immigration and Border Control, Asylum statistics—Australia: Quarterly Tables—June quarter 2014, available at: <http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-statistics-aus-jun-qtr-2014.pdf>, accessed

Concluding Observations on Hong Kong in February 2016 that the threshold for granting protection may be distinctly high. This is concerning because too high a threshold for granting protection imposed by the Government may mean children are being returned to countries where they face severe persecution, torture or even death threats. This would give rise to concerns with regards to Article 6 of the CRC, which provides that States shall ensure to the maximum extent possible the survival and development of the child.

However, in the Government's current 'comprehensive review' of the USM, almost no mention has been made of the protection of the rights of asylum seekers and refugees or the concerns of the Committee against Torture. The 'comprehensive review' is focused on pre-arrival control, removal and detention. Honouring CAT and other international human rights mechanisms is a fundamental component of the rule of law and vital to Hong Kong's international reputation.

There is currently a complete absence of publicly-funded rehabilitation services for child victims of torture, which includes legal, medical, psychological and welfare services. The right to rehabilitate is recognised in both CAT and the CRC and is fundamental to the recovery of children to allow healthy and safe development into adulthood. The right to rehabilitation is fundamental to CAT and the Committee specifically in respect of children has said, "States parties shall establish a system to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment. Accordingly, States parties should include in their reports to the Committee data disaggregated by age, gender, nationality, and other key factors regarding redress measures afforded to victims of torture or ill-treatment, to meet their obligation as recalled in General Comment 2 to provide continual evaluation of their efforts to provide redress to victims."³

Moreover, we are not aware of any policy of considering USM claims in a child-sensitive manner. From our experience of providing legal support to asylum seekers, an accompanied child in Hong Kong will almost always be considered as merely a dependent upon their parent/s. Indeed, we have seen no instances in which the specific rights and protection needs of asylum-seeking children have been recognised as existing in their own right. There does not appear to be any policy, guidance available nor training given to Immigration Officers, to ensure a child-centred approach is adopted within the USM. This absence is of key concern – we are not aware of any procedural safeguard in place to ensure sensitivity towards the factors and challenges specific to children's claims, such as: increased and various forms of vulnerability; varying levels of maturity and corresponding dependency upon adults; child-specific

on 12 May, 2017). In the UK the substantiation rate is approximately 38% (Home Office, the United Kingdom Government, National Statistics: Asylum 25 August 2016, available at: <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum>, accessed on 12 May, 2017).

³ Committee against Torture, General Comment No. 2 "Implementation of Article 2 by States Parties" (CAT/C/GC/2), 2008, para 45, available at: <http://www.refworld.org/docid/47ac78ce2.html>

forms and manifestations of persecution, for example the trafficking of children for prostitution and the risks of female genital mutilation.

Proposal for detention camps

Some lawmakers have called for setting up detention camps for non-refoulement claimants⁴ and the Government is considering whether legislative amendments are needed to introduce closed camps for non-refoulement claimants.⁵ Such proposals are often made with no detail, such as the scale and locations of such detention camps and whether children will be placed in the camps. The current detention policy of the Immigration Department is that the Director of Immigration considers all relevant circumstances when deciding whether to detain a person. The fact that a claimant is aged under 18 is a factor against detention but is only one of the many factors considered. This policy does not seem to meet the standards set in Article 37(b) of the CRC, which provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily and the detention of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Moreover, we are not aware of any policy to ensure that the best interests of the child are a primary consideration in detention decisions, which breaches Article 3(1) of the CRC. The United Nations Committee on the Rights of the Child has repeatedly stated that immigration detention is never in the best interests of the child.⁶

Moreover, asylum-seeking and refugee children have often been traumatised by torture or persecution experiences. It has been found by research that detention is not a place where unaccompanied children are able to recover from past trauma.⁷ A 19-year-old asylum seeker in Hong Kong has recently said in a media interview that he will jump into the Victoria Harbour and kill himself if he is to be put in a detention camp.⁸ Detaining unaccompanied children may therefore violate Article 39 of the CRC, which provides that States shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed

⁴ Legislative Council Official Record of Proceedings, 30 November 2016, available at: <http://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20161130-translate-e.pdf>

⁵ Security Bureau, "An update on the comprehensive review of the strategy of handling non-refoulement claims", LC Paper No. CB(2)1533/16-17(03), June 2017, page 15, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>

⁶ OHCHR, "Children and families should never be in immigration detention – UN experts", 14 December 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026>

⁷ Australian Human Rights Commission, "The Forgotten Children: National Inquiry into Children in Immigration Detention", 2014, page 34, available at:

https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

⁸ 梁銘恩, "政黨倡住禁閉營 也門難民：寧跳維港死", Apple Daily, 11 June 2017, available at: <http://hk.apple.nextmedia.com/news/art/20170611/20052129>

conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁹ Furthermore, prolonged detention may cause serious mental harm to children and amount to cruel, inhumane and degrading treatment, violating Article 37(a) of the CRC.¹⁰

Detention is often introduced to deter irregular migrants, but there is no empirical evidence to suggest that it has such a deterrent effect. This has been concluded by the International Detention Coalition in a 2015 report – finding that detention was “ineffective at reducing irregular migration to desired levels.”¹¹ Moreover, significant public money has been spent in overseas jurisdictions on the liability arising from unlawful detention. For example, the United Kingdom spent £13.8 million (HK\$131 million) on compensation payments for unlawful detention from 2012 to 2015.¹²

Inadequate legal protection against discrimination

Under the Race Discrimination Ordinance, Cap. 602 (‘the RDO’), immigration status or residency is not included in the definition of ‘race’. This has often been cited as a reason by the Equal Opportunities Commission (‘the EOC’) for not being able to address harassment or discrimination faced by asylum-seeking and refugee children, in areas such as access to healthcare services, where the children are harassed or discriminated against on the grounds of immigration status or residency. The EOC has recommended that the Government conduct a public consultation and then introduce protection from discrimination on grounds of nationality and citizenship under the RDO in its report on the Discrimination Law Review to the Government in March 2016.¹³

Recommendations

We call upon the Security Bureau to ensure that protection of the rights of asylum-seeking and refugee children as stipulated in the CRC form a core part of its comprehensive review of its non-refoulement policy. The Bureau should

⁹ Australian Human Rights Commission, “The Forgotten Children”, p.34.

¹⁰ See for example Human Rights and Equal Opportunity Commission of Australia, “A Last Resort? National Inquiry into Children in Immigration Detention”, April 2004, page 431, available at: https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf

¹¹ International Detention Coalition, “Reframing immigration detention in response to irregular migration Does Detention Deter?”, April 2015 No. 1, available at: http://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter-April-2015-A4_web.pdf

¹² UK Minister for Immigration Robert Goodwill, Holding answer received on 13 October 2016, available at: <https://www.theyworkforyou.com/wrans/?id=2016-10-10.47658.h&s=immigration+detention#g47658.q0>

¹³ Equal Opportunities Commission, *Discrimination Law Review: Submissions to the Government (Executive Summary)*, March 2016, page 15, available at: <http://www.eoc.org.hk/eoc/upload/DLR/2016324141502000459.pdf>

ensure that the best interests of the child are a primary consideration in all actions concerning asylum-seeking and refugee children in accordance with Article 3(1) of the CRC. In particular, we urge the Security Bureau to accept the recommendations of the Committee against Torture in its 2016 Concluding Observations and ensure the threshold for giving non-refoulement protection is appropriate so that children in need of protection are not returned to countries where they will face persecution or torture.

We urge the Security Bureau not to introduce detention camps for asylum seekers and refugees, especially not for children. The Bureau should ensure that any detention of children is in conformity of the law and only used as a means of last resort for the shortest appropriate period of time¹⁴.

We ask the Hong Government to follow the technical guidance given by both the Committee on the Rights of the Child and the Committee against Torture specifically addressing the rights and responsibilities of asylum-seeking children and children who are victims of torture within the Convention on the Rights of the Child and the Convention against Torture. In particular acknowledging in existing and future policy that the definition of 'victim' in the Convention would cover children born in Hong Kong whose parents were victims of torture.¹⁵

We also invite the Constitutional and Mainland Affairs Bureau to request the extension of the Refugee Convention to Hong Kong and to propose amendments to the RDO to introduce protection from discrimination on grounds of nationality and citizenship.

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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 forced 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 See Law Council of Australia, "Asylum Seeker Policy", page 7, available at: <https://www.lawcouncil.asn.au/docs/b8ae4569-ae36-e711-93fb-005056be13b5/Policy-Statement-Asylum-Seeker-Policy.pdf>

¹⁵ Committee against Torture, General Comment No. 2 "Implementation of Article 2 by States Parties" (CAT/C/GC/2), 2008, para 45, available at: <http://www.refworld.org/docid/47ac78ce2.html> & Committee on the Rights of the Child, General Comment No. 6 "Treatment of Unaccompanied and Separated Children Outside their Country of Origin" (CRC/GC/6), 2005, available at: <http://www.refworld.org/docid/42dd174b4.html>.