

Individual Civil Society Report submitted to the
Committee against Torture
in response to the 5th Periodic Report, China (Hong Kong)

for consideration in the preparation of the list of issues
at the 54th Session (20 April - 15 May 2015) of CAT

Justice Centre Hong Kong (formerly Hong Kong Refugee Advice Centre or HKRAC) is an NGO defending the rights of Hong Kong's most vulnerable forced migrants – including refugees, other people seeking protection and survivors of modern slavery. Justice Centre Hong Kong ("Justice Centre") files this report before the Committee against Torture's (CAT) 54th session.

This shadow report responds to para. 3.1 - 3.11 and para. 16.34 of the Hong Kong Special Administrative Region's (HKSAR) State report. Justice Centre regrets that much of the information in the State report to CAT is outdated and no longer relevant, and uses this opportunity to provide updates and supplementary information to that contained in the State report to help inform the drafting of its list of issues to HKSAR.

The concerns outlined in this report stem around the limited protection offered to asylum-seekers, refugees and other people seeking protection in Hong Kong. The review comes at an important time, as the HKSAR Government rolled out a new system to process non-refoulement claims in March of last year – the Unified Screening Mechanism (USM). The report also mentions Justice Centre's concerns about the HKSAR Government's efforts to combat human trafficking and its lack of recognition of the problem and root causes.

Noting CAT's Concluding Observations to the State party from 2008, which contain several recommendations to the HKSAR Government in relation to asylum protection, Justice Centre urges CAT to give due scrutiny to these two aspects of the State report and inquire the HKSAR Government for more information in its list of issues.

1. There have been significant legal developments since the HKSAR State party report was submitted to CAT

The HKSAR Government's 5th periodic report discusses the Immigration Department's (ImmD) "enhanced screening mechanism for torture claims" (para. 3.3 - 3.8) as well as its firm position not to extend the Convention relating to the Status of Refugees and its 1967 Protocol ("Refugee Convention") and United Nations High Commissioner for Refugees (UNHCR) Sub-office in Hong Kong's consequent role in refugee status determination in the HKSAR territory (para. 3.9 - 3.11).

However, there have been two legal challenges and many policy developments in the past couple of years that have dramatically changed the landscape for protection in Hong Kong. These changes from late 2012 until now are not reflected in the State report. Following the landmark Court of Final Appeal (CFA) decisions in the cases of *Ubamaka*¹ and *C*² in December 2012 and March 2013³ respectively, the HKSAR Government unveiled a "Unified Screening Mechanism" (USM) on 3 March 2014 to assess, "in one go", claims on the grounds of:⁴

¹ *C and Ors v Director of Immigration and another*, FACV 18-20/2011

² *Ubamaka Edward Wilson v Secretary for Security and another*, FACV 15/2011

³ In *Ubamaka* the CFA determined that in addition to torture, the Hong Kong Government also has an obligation not to return a person from the HKSAR territory if the person is at risk of being subjected to cruel, inhuman or degrading treatment or punishment, in order to be in compliance with the Hong Kong Bill of Rights, implementing its obligations under the International Covenant on Civil and Political Rights (ICCPR). In the case of *C*, the CFA ruled that when the Director of Immigration decides whether to remove a person from the HKSAR territory and considers whether a person is at risk of persecution, he cannot simply outsource the decision to the UNHCR-HK but must instead conduct an independent assessment of that person's claim, satisfying "high standards of fairness". For more information on these developments and background, please see: Justice Centre Hong Kong, "Meeting the Bare Minimum: Hong Kong's New Screening Process for Protection. A Stocktake of the First Months of Implementation of the Unified Screening Mechanism for Non-refoulement Claims", May 2014.

www.justicecentre.org.hk/framework/uploads/2014/03/USM-Briefing-Meeting-the-Bare-Minimum-HK-New-Screening-Process-for-Protection.pdf as well as Daly, Mark, "Refugee and Non-refoulement Law in Hong Kong: the Introduction of the Unified Screening Mechanism", *Hong Kong Lawyer*, www.hk-lawyer.org/en/article.asp?articleid=2417

⁴ HKSAR Government, "Commencement of unified screening mechanism for claims for non-refoulement protection", 7 February 2014, at: www.info.gov.hk/gia/general/201402/07/P201402070307.htm

- Torture as defined under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT claims);
- Torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights Ordinance (HKBORO Article 3 claims); and/or
- Persecution with reference to the principle under Article 33 of the 1951 Convention relating to the Status of Refugees (persecution claims).

These are collectively called "non-refoulement claims" by the ImmD. Like previous changes that gradually led to enhancements to the torture screening system, the HKSAR Administration did not implement the USM at its own initiative; it was forced to do so by the CFA rulings. Nonetheless, the introduction of the USM is a **welcome development** and its impact is certainly significant.

For example, prior to the USM being implemented, persecution claims were only adjudicated by UNHCR HK Sub-office through its refugee status determination process, and these decisions were not subject to judicial review. Under the USM, however, decisions regarding persecution claims will be made by the ImmD and will now be subject to judicial review by the Hong Kong Courts, thus improving avenues for accountability. Consequently, UNHCR began to phase out of conducting refugee status determination in HKSAR.⁵

The USM is an administrative mechanism that tacks onto the previous statutory screening mechanism for CAT claims. Whereas determination of CAT claims is underpinned by Part VIIC of the Immigration Ordinance (Cap. 115), determination of BORO Art. 3 claims and persecution claims is not, and are administrative schemes. The rationale for not introducing comprehensive non-refoulement legislation despite suggestions for years to do so, according to the HKSAR

Government's rationale, was to first develop "experience" in assessing persecution and CIDTP claims first.⁶

Nevertheless, less than a year after the USM was initiated, the HKSAR Government, in a letter from the Security Bureau, introduced "proposals" to "enhance" the USM, which it shared with limited parties from the legal profession for consultation.⁷ There is concern that these proposed reforms to "streamline measures" (including introducing "screening bundles", abridging the non-refoulement claim form, tightening the scheduling of screening interviews and "standardizing legal fees", among others) could restrict non-refoulement protection claimants' access to justice and procedural fairness.⁸

Justice Centre requested urgent action to discuss the USM through a consultation process before and after its implementation, which have not been successful,⁹ and the legal profession has also lamented that their views had never been sought on the operational details of the USM before it came into effect.¹⁰

⁶ Response by the Secretary for Security, Mr. Lai Tung-kuok, at the Panel on Security of the Hong Kong Legislative Council, Agenda Item: "Screening of Non-refoulement Claims", 2 July 2013.

⁷ The Hong Kong Bar Association's submission in response, outlining its position and concerns, is available online. See: Hong Kong Bar Association, "Security Bureau's Proposals to Enhance the Unified Screening Mechanism Submission of the Hong Kong Bar Association", 26 January 2015, at: www.hkba.org/whatsnew/submission-position-papers/index.html

⁸ See: Hong Kong Bar Association, "Security Bureau's Proposals to Enhance the Unified Screening Mechanism", [hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20\(2\)%20-%20\(webpage\).pdf](http://hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20(2)%20-%20(webpage).pdf); Justice Centre Hong Kong, Submission to the Security Bureau on the "Proposals to Enhance the Unified Screening Mechanism", 13 February 2015, www.justicecentre.org.hk/framework/uploads/2014/03/Submission-to-SB-re-USM-13-Feb-2015.pdf; Law Society of Hong Kong, "Proposals to enhance the unified screening mechanism", 16 February 2015 www.hklawsoc.org.hk/pub_e/news/submissions/20150216.pdf

⁹ See: Hong Kong Refugee Advice Centre, Letter to the Panel on Security, Follow-up information on the Administration's announcement to adopt a "Unified Screening Mechanism" (USM) to assess claims for non-refoulement protection, 12 November 2013, LC Paper No. CB(2)317/13-14(01), www.legco.gov.hk/yr13-14/english/panels/se/papers/secb2-317-1-e.pdf; and Letter to the Panel on Security re: Urgent action requested to discuss Unified Screening Mechanism to process "non-refoulement" claims, in operation since 3 March 2014, LC Paper No. CB(2)1063/13-14(01), 13 March 2014, www.legco.gov.hk/yr13-14/english/panels/se/papers/se0318cb2-1063-1-e.pdf

¹⁰ Hong Kong Bar Association, "Unified Screening Mechanism for Non-refoulement Claims", at para. 3 www.hkba.org/whatsnew/misc/img-214175157.pdf

⁵ According to the UNHCR-HK website, "Upon the commencement of the USM the UNHCR ceased refugee status determination procedures in Hong Kong and transitioned to an advisory role in regards to refugee and asylum policy, marking a major development in the agency's goals under its mandate." See: www.unhcr.org/hk/unhcr/en/about_us/HK_Sub_Office.html

Lastly, the HKSAR Government has made it very clear that people recognised under persecution grounds will not be given refugee status and that, "The commencement of the USM does not affect the HKSAR Government's position that the Refugee Convention and its 1967 Protocol have never been applied to Hong Kong and our firm policy of not determining the refugee status of or granting asylum to anyone."¹¹

SUGGESTED QUESTIONS

- Given that several treaty bodies have recommended that the State party (HKSAR) seek extension of the 1951 Refugee Convention, including CAT in its previous concluding observations, can the HKSAR Government please explain in more detail its stated rationale that "doing so will subject [its] immigration regime to abuses and thus undermine public interest...?"
- Can the State party please provide further information as to the HKSAR Security Bureau's recent "proposals" to enhance the Unified Screening Mechanism", as well as measures it has taken to consult with the legal profession, the UNHCR, civil society and other concerned stakeholders in the lead-up and follow-up to the USM implementation?

2. Statistics show worrying trends about the operation of the USM and the transparency of this new system

It must first be noted that the HKSAR Government **does not** publish statistics on the applications made under the USM and decisions by the ImmD, as is common practice in most jurisdictions, as well as by the UNHCR.¹² Justice

¹¹ HKSAR Government, Press Release: "Commencement of unified screening mechanism for claims for non-refoulement protection", 7 February 2014, www.info.gov.hk/gia/general/201402/07/P201402070307.htm

¹² For example, the European Union regularly collates statistics on asylum from its member states which can be found in the Eurostat Database, see: ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics; the Immigration and Refugee Board also has public statistics, see: www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/RefClaDemStat.aspx; the United States, see: www.justice.gov/eoir/efoia/FY2010-FY2014-Asylum-Statistics-by-Nationality.pdf; and the UNHCR also publishes mid-year and annual statistical tables, see: www.unhcr.org/pages/49c3646c4d6.html

Centre has only been able to obtain information on processing and acceptance rates in the USM by periodically filing individual Access to Information requests to the ImmD invoking Hong Kong's Access to Information Code.

While Justice Centre requested that ImmD develop regularly updated and publically accessible statistical data on protection claims, the ImmD responded that there is no information for such a provision by their office. Justice Centre continues to urge the HKSAR Government to develop publically accessible information systems on the USM, which is fundamental for monitoring and evaluation at this crucial time when the system is still quite new.

In the interim, responses to the Access to Information requests (the latest of which was provided in January 2015), as well as questions filed by individual members of the Legislative Council, have provided some figures to get a basic understanding of how the system is working. In the previous torture screening mechanism, from 2010 to 28 February 2014, the figures show the following:¹³

	2010	2011	2012	2013	2014*	TOTAL
<i>Substantiated Claims (1st Instance)</i>	0	0	0	10	9	19
<i>Substantiated Claims (on Appeal)</i>	No information available by each year					3
<i>Total Number of Appeals lodged</i>	109	459	767	919	59	2313
<i>Refused Claims (not substantiated)</i>	214	932	1575	1803	212	4736
<i>Otherwise Closed Claims / taken NFA</i>	1186	802	1154	778	89	5195

* From 1 Jan to 28 Feb 2014 only (last day before USM commenced)

As is evidenced from the numbers, the number of recognitions at first instance and on appeal vis-à-vis the number of refused claims is a small fraction - leading to a success rate of far less than even 1%. Since the introduction of the USM, there have been five recognitions (as of 15 February 2015),¹⁴ bringing the total number of

¹³ HKSAR Immigration Department, Response to Justice Centre Hong Kong Access to Information Request, ref. L/M(1) in ImmD RALOS/1-55/3/C, 28 May 2014, www.justicecentre.org.hk/framework/uploads/2014/11/First-access-to-information-request-response.pdf

¹⁴ Man, Joyce, "Refugees in Hong Kong see little improvement from new screening system", South China Morning Post, 16 February 2015, www.scmp.com/news/hong-kong/article/1714243/refugees-hong-kong-see-little-improvement-new-screening-system

recognitions - since 1992 when the Convention against Torture was first applicable to Hong Kong - to less than 30, compared with the more than 9,580 outstanding non-refoulement claims as of 30 November 2014.¹⁵

The low acceptance rates (often dubbed an "effective zero recognition rate") in the USM (and its predecessor) are much lower than other well-developed jurisdictions.¹⁶

Advocates and human rights lawyers have thus questioned the impartiality and expertise of adjudicators, and expressed concerns that the threshold for substantiating claims may be excessively restrictive.¹⁷

Suggestions have been made to improve training to Immigration Officers and for there to be better understanding and access to country of origin information, for example.

It is noteworthy that claimants must file their claim to the recently renamed "Enforcement and Removal Assessment Branch" of the ImmD, which is the section responsible for

¹⁵ HKSAR Immigration Department, Response to Justice Centre Hong Kong Access to Information Request, ref. L/M(2) in ImmD RALOS/1-55/3/C, 7 January 2015

¹⁶ Although the UNHCR did not publish statistics on acceptance rates in Hong Kong, when its sub-office conducted RSD, the number oscillated around 10% in Justice Centre's experience. UNHCR's global recognition rate in 2011 was 83%. To give an example of acceptance rates in other countries, the average EU acceptance rate for protection was about 19% in 2013, although with high variations among the member states. US asylum acceptance rates in 2011 were 66%, 45% in Canada, 33% in the UK and 28% in Germany. See: Eurostat, "Final decisions on (non-EU) asylum applications, 2013 (number, rounded figures)", [ec.europa.eu/eurostat/statistics-explained/index.php/File:Final_decisions_on_\(non-EU\)_asylum_applications_2013_\(number,_rounded_figures\)_YB15_II.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Final_decisions_on_(non-EU)_asylum_applications_2013_(number,_rounded_figures)_YB15_II.png); Kagan, Michael, "UNHCR leads major asylum systems with 83 percent recognition rate in 2011", 17 December 2012, rsdwatch.wordpress.com/2012/12/17/unhcr-leads-major-rsd-systems-with-83-percent-recognition-rate-in-2011/

¹⁷ See, for example: Banu, Zarina, "Hong Kong's Refugee Shame", Al-Jazeera, 15 April 2014, www.aljazeera.com/indepth/opinion/2014/04/hong-kong-refugee-shame-20144210546584825.html; Chen, Te-Ping, "Hong Kong Changing the Way It Handles Refugees", Wall Street Journal, 16 July 2013, www.wsj.com/articles/SB10001424127887324694904578601171702287356; Choi, Christy, "Torture victims seeking asylum in Hong Kong for nine years to settle in Canada", South China Morning Post, 6 July 2014, www.scmp.com/news/hong-kong/article/1547630/african-torture-victims-stymied-hong-kong-accepted-canada-refugees; Man, Joyce, "Hong Kong's Zero Recognition Rate: A Mystery in Numbers", Netzwerk Flüchtlingsforschung, 23 March 2015, fluechtlingsforschung.net/hong-kongs-zero-recognition-rate-a-mystery-in-numbers/; Ngo, Jennifer, "Refugee screening system still slow and opaque, critics say", South China Morning Post, 9 November 2014, www.scmp.com/news/hong-kong/article/1635373/refugee-screening-system-still-slow-and-opaque-critics-say

the USM.¹⁸ There have been concerns that this encourages an institutional culture of assessing claimants for the primary purpose of determining whether someone can be removed from the territory, rather than from the perspective of protecting victims of human rights abuses who will suffer serious harm if they are returned to their country of origin.

Other areas where there is little transparency is the way in which claims are prioritised and how the HKSAR Government is processing claims, whether by date of arrival, nationality or other criteria. In its Access to Information request, Justice Centre requested clarity on how the HKSAR Government is prioritizing claims, to which ImmD responded that, "subject to the operational needs, priority will generally be given according to claimants' arrival dates, save and except for those of the following nature, e.g. (i) cases of claimants who are under detention of the ImmD Ordinance Cap. 115; (ii) cases of claimants who are involved in criminal proceedings or who may constitute a threat to the general public (iii) cases of claimants requiring special needs (iv) cases of claimants requesting priority handling (v) claims that have been lodged earlier on, and (vi) any other cases with justifiable circumstances." However, ImmD did not disclose statistics as to number of prioritised claims.

Furthermore, Justice Centre Hong Kong has repeatedly requested that the HKSAR ImmD provide a full breakdown, disaggregated by nationality, of claims received, claims withdrawn, claims that have been processed, appeals and acceptance rates. So far, the HKSAR Government has only ever disaggregated for up to a dozen nationalities, although Hong Kong is host to protection claimants from many more countries of origin than this, with Justice Centre Hong Kong having received people from more than 40 nationalities through its doors in 2014.

Lastly, while written decisions are provided to individual protection claimants under the USM at both the first instance and the appeal stage, none of these decisions are publicly available in a redacted format. The Law Society and Bar Association of Hong Kong have noted that this might not be fair to appellants when the Director

¹⁸ HKSAR Immigration Department, Organisational Chart of Enforcement and Removal Assessment Branch, www.immd.gov.hk/eng/about-us/organisation/organisation-chart/enforcement.html

of Immigration, as the respondent in all appeal cases, would necessarily have access to all prior appellate decisions.¹⁹

By contrast, in many other jurisdictions, tribunal decisions are published in a redacted format in order to promote transparency and fairness while maintaining the anonymity of the claimants.²⁰ For example, in Australia, the Refugee Review Tribunal [RTT] is "required to publish decisions that are considered to be of 'particular interest'. Publishing decisions provides transparency and accountability, and allows interested persons to see how cases and issues are dealt with by the tribunals. ... RTT decisions are required to be edited so as to not identify the applicant or family members."²¹

SUGGESTED QUESTIONS

- Can the State party please provide further information as to HKSAR ImmD's mechanisms for periodic monitoring and evaluation of the USM?
- Does ImmD have plans to make regularly updated, disaggregated statistics on screening trends publicly available? Does the Torture Claims Appeal Board have plans to publish redacted decisions?

3. The USM only meets the "bare minimum," with many shortcomings that remain unaddressed by HKSAR

The HKSAR Government did not choose to implement this system; it was forced to do so by the CFA as a result of its

¹⁹ Joint Letter by the Law Society and Bar Association of Hong Kong to the Secretary of Security, 2 May 2014, at para. 21, [www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20of%20Non-refoulement%20Claims%20-%20Joint%20letter%20dd%20%20May%202014%20to%20Security%20Bureau%20..\(webpage\).pdf](http://www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20of%20Non-refoulement%20Claims%20-%20Joint%20letter%20dd%20%20May%202014%20to%20Security%20Bureau%20..(webpage).pdf)

²⁰ For example, see Immigration and Refugee Board of Canada, "Decisions", www.irb-cisr.gc.ca/Eng/BoaCom/decisions/pages/index.aspx; New Zealand Ministry of Justice, "Decisions", www.justice.govt.nz/tribunals/immigration-protection-tribunal/decisions; United Kingdom Courts and Tribunals Judiciary "Tribunal Decisions", www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/tribunal-decisions/

²¹ Government of Australia, Website of the Migration Review Tribunal-Refugee Review Tribunal: www.mrt-rrt.gov.au/Decisions.aspx

rulings made in 2012 and 2013. The unwillingness that underpins the USM's existence plays out in the system's design, meeting the "bare minimum". Despite being a unique opportunity to address many challenges that plagued the previous torture screening mechanism, the USM is largely a continuation of it, with a few add-ons. There are major gaps that make navigating this new system - particularly for the most vulnerable and traumatised - very difficult.

Justice Centre noted that when the USM first commenced, very little information was available from the HKSAR Government as to changes in the system, with no information online for claimants, no number to call, or written pamphlets at ImmD offices. There was next-to-no guidance on how to file a written signification, and considerable confusion as to whether the signification had to be filed in English, Chinese or if it could be filed in the claimants' native language.²² It is for this reason that Justice Centre began to run information sessions on the USM to help claimants understand these changes, how to enter into the new system, what to expect of the process and how to file appeals and judicial reviews, as well as their rights while staying in Hong Kong. Since then, the ImmD has put information about non-refoulement claims on its webpage. However, letters of correspondence from ImmD are still often sent to claimants in English. Interpreters are available at the briefing and throughout the process (although there is significant shortage for some languages, such as Somali, Amharic or Tigrinya, among others) which can be a cause of processing delay).

Justice Centre has also seen many claimants who are rejected at first instance that report that they were not aware that they had a right to seek a second opinion, which raises concerns that perhaps not all duty lawyers and court liaison officers (CLOs) spend enough time to ensure claimants understand what the USM decision on their claim fully entails, particularly in relation to rejections.

A major gap in the statutory torture system that has now been entrenched in the USM is that a person seeking non-refoulement protection must first overstay their visa and

²² Chiu, Joanna, "Refugee-screening system slammed as a confusing 'shambles'", South China Morning Post, 21 May 2014, www.scmp.com/news/hong-kong/article/1516770/refugee-screening-system-slammed-confusing-shambles?page=all

be liable to removal from HKSAR before they are eligible to file a USM claim or they must have no valid travel documents.²³ The time it takes for a visa to expire varies greatly among different nationalities the ImmD's visa rules for each country of origin, but can take anywhere from 7 to 90 days. Previously, under the UNHCR-HK's refugee status determination, overstaying was not a requirement for being able to file a refugee claim.

The impact is that a protection claimant is **only** able to receive humanitarian assistance if they have an open claim; however, they are unable to file a claim until their visa expires. As a result of this requirement, they must wait up to several months before they can receive support and are forced to subsist on whatever they came to Hong Kong with, which for people who have fled for their lives and safety, may be very little. Justice Centre, and NGOs who we work closely with, have noticed an increase in destitution and homelessness among new arrivals in particular.

Also of great concern for Justice Centre is the ability for the most vulnerable of protection claimants - including minors, survivors of torture, trauma or sexual and gender-based violence, illiterate people, single-parent families, those with medical conditions, among others - to navigate a complex legal system like the USM.

The USM process requires protection claimants to provide accurate, logical and legally relevant information about their claim. However, the most vulnerable protection claimants are often simply unable to do so without adequate legal and mental health support. For example, many vulnerable protection claimants have experienced severe trauma, and are suffering from Post-Traumatic Stress Disorder (PTSD) or clinical depression.

Claimants can find it particularly difficult to recount their stories in a legally relevant, chronological and coherent

²³ "A person who is outside the country of his nationality and in Hong Kong may claim for non-refoulement protection only if - (a) the person is subject or liable to removal from Hong Kong and, apart from a Risk State, he does not have a right of abode or right to land in, or right to return to, any other State in which he would be entitled to non-refoulement protection; or (b) the person whose surrender is requested in surrender proceedings. [cf. s.37W (1) & (2)]", from HKSAR Government, "The Practice and Procedural Guide of the Administrative Non-refoulement Claims Petition Scheme", First Edition, 21 February 2014, at para. 7.1, [www.sb.gov.hk/eng/links/tcab/Frist%20Edition%20of%20the%20PG%20\(21%20February%202014\)Final.pdf](http://www.sb.gov.hk/eng/links/tcab/Frist%20Edition%20of%20the%20PG%20(21%20February%202014)Final.pdf)

way. Trauma memories are stored differently to normal memories in our brains. When a protection claimant is recounting traumatic experiences, their narration can appear to be inconsistent and not chronological. They may also suffer from lapses in memory and may not be even able to provide basic information as a result of the trauma they experienced. Some protection claimants can suffer from cognitive difficulties which prevent them from articulating themselves. Some women who are survivors of SGBV can often hide pertinent information about their experience of sexual violence out of shame and/or self-blame. Often, vulnerable protection claimants who have experienced repeated and systematic persecution find it difficult to trust figures of authority, including lawyers and in particular, ImmD officers, and as a result withhold relevant information out of fear. In fact, in our experience, many vulnerable protection claimants require psychosocial support before they are able to provide an account of their experiences.

ImmD's "Notice to Persons Making a Non-refoulement Claim" and the non-refoulement claim form itself make passing reference to claimants with 'special needs' and the possibility for them to request prioritisation.²⁴ In the "Determination of Non-refoulement Claims" note to officers of the Torture Claim Assessment Section of ImmD, it is stated that "case officers should be aware of clients with "special needs" and that these cases should be handled with "due care."²⁵ It is unclear to what extent ImmD relies on protection claimants to self-identify that they have special needs in the claim form. The full criteria used as a basis for determining whether people have "special needs" and grounds for prioritisation, and how ImmD officers are trained to handle claimants with "due care" all need further clarification.

When the UNHCR Sub-office conducted RSD, it had a social worker who acted as a focal point for this group and liaised with NGOs and other service providers who identified vulnerable people to contact. The UNHCR also employed accelerated RSD processing procedures to which applicants can be referred when there are

²⁴ HKSAR Immigration Department, Non-refoulement Claim Form, www.immd.gov.hk/pdf/forms/id978e.pdf

²⁵ Claimants with special needs include, in para. 97 of the note: a) victims of sexual violence b) unaccompanied minors c) those suffering from mental illness or trauma d) female clients with special needs (e.g. some female claimants may not wish to be interviewed by a male officer on religious grounds).

compelling protection reasons to process the claim on a priority basis. The accelerated procedures incorporate reduced waiting periods at each stage of the RSD procedures and shortened timelines for the issuance of decisions.

Lastly, there are concerns regarding the legal assistance provided under the Duty Lawyer Scheme. Entering into the system itself often requires legal expertise although claimants at this initial stage are not afforded with a DLS lawyer. To summarise the process, people wishing to file a USM claim must provide a "written signification" to the ImmD giving a general indication of the person's reasons for claiming non-refoulement protection in Hong Kong. If the signification fails to give sufficient indication, the claim will be considered to not have been made. A person who has submitted a written signification will receive a written reply from the ImmD as to whether their written signification is satisfactory or not.

If sufficient, ImmD will make arrangements to process their claim. If insufficient, the person will have 14 days to provide further details. Once their claim begins to be processed, they will be called in for a briefing session and will then have access to publicly-funded legal aid through the Duty Lawyer Service (DLS). Many claimants do not know how much and what to note down in their "written signification" without legal representation and require assistance in being able to write and file it (particularly those with limited reading and writing skills) in order to enter into the USM process. However, they are afforded a DLS lawyer only after they file the signification.

Furthermore, due to significant backlogs as a result of caseloads and limited interpretation for some languages, there may be a long waiting period from the time they file the written signification to the time the ImmD begins the claim process.

Moreover, the prolonged delay can in itself bear a negative impact on claimants who are already vulnerable or who may have psychological concerns. Adult protection claimants have no legal right to take up work, whether paid or unpaid or to receive adult education while in Hong Kong. They often feel they have nothing to do apart from waiting, which can result in feelings of helplessness, depression and anxiety.

SUGGESTED QUESTIONS

- Can the State party please provide information on how many claimants have been identified as having "special needs" by the HKSAR ImmD authorities and the "due care" that is provided to such cases to ensure their needs are met? Can the State party provide more information on the ImmD's prioritisation criteria?
- Can the State party explain what training, if any, is given to authorities and to the DLS to ensure that they are trained to identify and assist vulnerable protection claimants with special needs, particularly given such protection claimants may not be able to "self-identify" as having special needs?
- Can the HKSAR ImmD explain the rationale behind requiring a person to overstay their visa and be liable to removal from HKSAR before they are eligible to file a USM claim or that they must have no valid travel documents before they can make a non-refoulement claim?

4. Lack of durable solutions, low success rates, lengthy processing times and low enjoyment of socio-economic rights could amount to "constructive refoulement"

"Constructive refoulement" is often used to describe a situation where a refugee is forced to return "voluntarily" back to their country of origin, even despite facing a risk of persecution, because the conditions in the asylum-seeking country are insupportable.²⁶ Justice Centre would like to highlight two concerns in particular - the limited humanitarian assistance provided to protection claimants and the lack of durable solutions for recognised claimants under the USM.

The State party report, in para. 3.11 makes brief mention of the humanitarian assistance provided to protection claimants. It should first be pointed out that since

²⁶ Mathew, Penelope, *Reworking the Relationship between Asylum and Employment*, Routledge Press: New York, 2012, at. pp 97-98.

February 2013 the UNHCR no longer provides humanitarian support to refugees as it once did due to budget constraints.²⁷ In regards to the humanitarian assistance provided to claimants through the Social Welfare Department (the tender of which is sub-contracted currently to the International Social Service Branch in Hong Kong), the assistance is so low and piecemeal that it thrusts refugees into severe poverty and social exclusion.²⁸ The focus on solely providing in-kind assistance and forcing claimants to live on a cashless basis for several years has also been considered degrading and simply impossible to get by on, particularly on a long-term basis, as many claimants wait for years, in some cases indefinitely, for a decision on their claim and a long-term solution if successful. The massive criticism that the humanitarian assistance has received should be subject to rigorous scrutiny by CAT.²⁹

²⁷ Carney, John, "UNHCR axes all aid for HK refugees in budget cuts", South China Morning Post, 27 February 2013, www.scmp.com/news/hong-kong/article/1159313/unhcr-axes-all-aid-hk-refugees-budget-cuts

²⁸ It is difficult to quantify the assistance, since it is mostly in-kind, and there is little transparency about the package, however, some estimates put the in-kind assistance at 37% below the poverty line, previous to 1 February 2014 enhancements, and 20% after the enhancements. This is based on the combined amount for rent and food for a single person against the newly established poverty line of HKD 3,600 for a single person. See: Vision First, "Crashing through the Poverty Line", 10 January 2014. For more information on challenges with the assistance package, see Refugee Concern Network, "Improving the Living Conditions of Protection Claimants in Hong Kong: Recommendations from the field", October 2013 and Ramsden, M; Marsh, L. Refugees in Hong Kong: Developing the Legal Framework for Socio-Economic Rights Protection. Human Rights Law Review, 2014, 14. Oxford University Press. 2014

²⁹ For news coverage, see for example: Brown, Sophie, "The Waiting Game: Refugees live in limbo in Hong Kong", CNN International, 30 September 2014;

Branigan, Tania, "Hong Kong's dirty secret: thousands of asylum seekers left waiting in squalor", The Guardian, 6 March 2014; Knowles, Hazel, "Haven of Hopelessness", China Daily Asia, 28 March 2014, "Asylum Seekers in Hong Kong Face Slum-Like Conditions", Wall Street Journal, 16 July 2013; Lai, Samuel

and Tjhung, Mark, "Hong Kong's Refugee Shame", Timeout Hong Kong, 19 June 2013; Chan, Wilfred, "Hong Kong's 'Shameful' Treatment of Refugees Exposed", CNN, 18 July 2013. Lee, Danny, "U.N. concern at plight of Hong Kong asylum seekers living in squalor", South China Morning Post, 8 September 2013.

For treaty body recommendations, see: This recommendation has been explicitly raised in the most recent reviews of the CESCR, CEDAW, CAT, CERD, HRC, and the CRC. See: CESCR, "Concluding observations: People's Republic of China (including Hong Kong and Macao)", UN Doc.: E/C.12/1/Add.107, 13 May 2005, at para. 82 and 92; CEDAW, "Concluding comments: China", UN Doc.: CEDAW/C/CHN/CO/6, 25 August 2006, at para. 43-44; CAT, "Concluding observations: Hong Kong Special Administrative Region", UN Doc.: CAT/C/HKG/CO/4, 19 January 2009, at para. 7; CERD, "Concluding observations: China (including Hong Kong and Macau Special Administrative

In fact, immigration concerns largely dictate HKSAR Government policies aimed at providing assistance to protection claimants in Hong Kong, often at the cost of disregarding the HKSAR's international human rights obligations. The HKSAR Government's rationale for its low humanitarian assistance is clearly grounded in ensuring a deterrent effect, as it has put on the record that the aim of the assistance is "to provide support which is considered sufficient to prevent them from becoming destitute, while at the same time not creating a magnet effect which could have serious implications on the sustainability of our current support systems and on our immigration control."³⁰ While the HKSAR Government asserts that the objective of the humanitarian assistance is to prevent "destitution", by providing no legal access to work with a humanitarian assistance package that offers no income (only in-kind) and that is set so low, it is thrusting recipients increasingly into destitution and marginalisation in society the longer that they must stay in Hong Kong.³¹

Perhaps the most glaring omission in the HKSAR Government's papers on the USM is the lack of discussion on what durable solutions (voluntary repatriation, resettlement to a third country or local integration) will be

Regions)", UN Doc.: CERD/C/CHN/CO/10-13, 15 September 2009, at para. 29; HRC, "Concluding Observations: Hong Kong, China", UN Doc.: CCPR/C/CHN-HKG/CO/3, 29 April 2013, at para. 9; CRC, "Concluding observations: China, including Hong Kong, China and Macao, China", UN Doc.: CRC/C/CHN/CO/3-4, 29 October 2013, para. 84; CESCR, "Concluding observations on the 2nd periodic report of China, including Hong Kong, China, & Macao, China", UN Doc.: E/C.12/CHN/CO/2, 13 June 2014, para. 42.

³⁰ HKSAR Government, Paper to the LegCo Panel on Welfare Services "Humanitarian Assistance for Torture Claimants, Asylum Seekers and Mandated Refugees in Hong Kong", LC Paper No. CB(2)1630/12-13(01), 22 July 2013, at para 4, available at: www.legco.gov.hk/yr12-13/english/panels/ws/papers/ws0722cb2-1630-1-e.pdf

³¹ The European Court of Human Rights (ECtHR) has held that the failure to address the needs of destitute individuals can amount to 'degrading treatment'. Indeed, in *MSS v Belgium and Greece*, the ECtHR held that where an asylum seeker was homeless and in 'extreme poverty', the state is under a duty to take proactive steps to avoid violating the prohibition on CIDTP.⁹⁴ The ECtHR and English courts have both recognised that the denial of social welfare could give rise to CIDTP. This would be the case where an individual applicant faces an imminent prospect of suffering materially caused by the denial of adequate shelter, food or the most basic necessities of life.⁹⁶ This is also reflected in Hong Kong, where the Court of First Instance in *MA v Director of Immigration* recognised that refusing permission to work to mandated refugees and screened-in torture claimants could amount to CIDTP.⁹⁷, from Marsh, Luke and Ramsden, Michael, "Refugees in Hong Kong: Developing the Legal Framework for Socio-Economic Rights Protection", *Human Rights Law Review* Volume 14, Issue 2, 2014 at pg. 281.

hrhr.oxfordjournals.org/content/14/2/267.full

available to people whose claim is deemed substantiated in the USM. Under the existing torture screening system, recognised claimants are granted non-refoulement protection not to be sent back to their country. However, no additional rights are conferred in Hong Kong, such as residency rights, greater socio-economic protection or any legal right to work, have access to vocational training or overadult education opportunities.

The HKSAR Government has stated that substantiated claims on persecution grounds will be referred to the UNHCR-HK,³² which will seek to find a durable solution for that person as they fall within the agency's mandate, but the procedure for referral process, as well as details about how long this arrangement will be possible, is unknown. It is also unclear how potentially substantiated claims under the USM that were previously rejected by the UNHCR would be decided by UNHCR. For the other two claims, CIDTP and torture, there are no available durable solutions.

While the CFA ruled in February 2014 in the case of *GA v. Director of Immigration* that successful claimants have no constitutional or other legal right to work *per se*, the Court did not disturb the lower court's ruling that in certain circumstances the denial of work can constitute inhuman, or degrading treatment.³³ The lower court, endorsing the position of the South African Constitutional Court, held that "the right to productive work is a fundamental human right inherently connected to the right to human dignity and the right to life, even where that is not required in order to survive".³⁴ The court held that where a successful claimant has been stranded in HK for a long time and where the denial of work is detrimental to his mental health, this may constitute inhuman or degrading treatment, hence permission to work may be granted.³⁵

³² See discussion at the LegCo Panel on Security, Agenda Item II. Screening of Non-refoulement Claims, 2 July 2013

³³ *GA & Ors v. Director of Immigration* FACV 7, 8, 9 & 10/2013, paras. 43-54; CFA also acknowledged that denial of work does not involve "cruel" treatment, para. 45.

³⁴ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21, at para 27, quoted in *MA & Ors v. Director of Immigration* HCAL 10, 73, 75, 81, 83/2010, at para 103. See also the UK case of *Tekle v Secretary of State for the Home Department* [2008] EWHC 3064, where the UK High Court held that work should not be regarded solely as a means to prevent destitution- see para 50 (iv).

³⁵ *MA & Ors v. Director of Immigration* HCAL 10, 73, 75, 81, 83/2010, para. 122-127

In essence, the situation of successful claimants remains unchanged; they are not able to locally integrate, are forced to depend on the same humanitarian assistance and are stuck in "legal limbo" as they are not even able to obtain any legal status that distinguishes them from overstayers. However exceptionally they might be able to obtain a work permit as explained above. Still, Access to Information requests reveal that only a handful of such permissions have ever been granted (7 as of August 2014 out of 31 applications), raising concerns that the criteria by the Director of Immigration are too stringent, such as, for example, the requirement that claimants first have a job offer from an employer before they can apply for permission.³⁶

Justice Centre is gravely concerned that the low recognition rates, the length of time that it takes for many claimants to receive a decision on their claim due to significant backlogs in the processing system, coupled with living in situations of poverty for lengthy periods of time and the lack of durable solutions available to them puts claimants in a hopeless and ultimately unbearable situation. The Access to Information responses from ImmD show very high withdrawal rates and Justice Centre knows of several claimants who have gone back to their countries of origin against advice due to the conditions in Hong Kong.

SUGGESTED QUESTIONS

- Can the State party please provide information on the criteria used to ensure that the humanitarian assistance provided to protection claimants does not subject them to cruel, inhuman or degrading treatment or punishment?
- Can the State party provide further information as to what durable solutions will be made available to substantiated claimants, as well as its arrangements with the UNHCR in this regard? What provisions will be in place for claimants substantiated on torture and CIDTP (but not persecution) under the USM who are

³⁶ HKSAR Government, "Press Release: Written reply by the Secretary for Security, Mr. Lai Tung-kwok, in the Legislative Council, to LCq9: Torture Claims, filed by the Hon. Dennis Kwok, 21 January 2015, www.info.gov.hk/gia/general/201501/21/P201501210634.htm

unable to return to their country of origin and do not fall under the mandate of the UNHCR for resettlement?

5. The HKSAR Government is not taking sufficient steps to combat human trafficking in all its forms

It is regrettable that the State party report makes mere passing reference to human trafficking in para. 16.34 and provides little statistics and evidence of the impact of its existing policies. In fact, in the past couple of years, Hong Kong has been in the media spotlight due to several high-profile cases of abuse and exploitation among several foreign domestic workers (notably that of Erwiana Sulistyarningsih), one of the population groups most highly vulnerable to human trafficking and forced labour.³⁷

Justice Centre notes that the HKSAR is not bound to the UN Trafficking or "Palermo Protocol" and that the territory was downgraded to Tier 2 in the US State Department's annual Trafficking in Person's Report, where it has languished ever since.³⁸ One of the most important reasons why the HKSAR territory has lingered at Tier 2 status in the US State Department's Trafficking in Persons Report is due to the HKSAR Government's lack of progress in getting appropriate legislation and practical measures in place to comprehensively address human trafficking. As in the State party report, the HKSAR Government's approach has merely been to deny that the HKSAR territory is a source, destination or a transit point for human trafficking.

Currently, Hong Kong has no comprehensive anti-human trafficking law, a national plan of action or even a concerted strategy; rather, legislation is scattered across different ordinances, leading to significant legislative gaps and critical difficulties with enforcement. Section 129 of the Crimes Ordinance (Cap. 200) - the only legislation that addresses human trafficking explicitly - stipulates that "a person who takes part in bringing another person

into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of the offence of trafficking in persons to or from Hong Kong." There are also relevant provisions under other ordinances, but no one piece of legislation is robust enough to address human trafficking in all its forms, which creates significant issues in relation to enforcement, victim identification, and access to justice.³⁹

SUGGESTED QUESTIONS

- Does the State party have intention of extending the UN Trafficking Protocol to the HKSAR Territory (ratified by the People's Republic of China in 2010) and incorporate its provisions into legislation and practice?
- Can the State party please provide an update and statistics on the impact of the interventions mentioned in the State report, as well as figures on how many cases of human trafficking victims it has identified over the years and the follow-up support given to these victims?
- Can the State party please provide more information as to steps it has taken to identify the root causes of trafficking, particularly among certain vulnerable sectors to exploitation, such as foreign domestic workers or sex workers, among others?

³⁷ See: Amnesty International, "Exploited for Profit, Failed by Governments: Indonesian Migrant Domestic Workers Trafficked to Hong Kong", 2013, www.amnesty.org/en/documents/ASA17/029/2013/en/

³⁸ Tier 2 countries "do not fully comply with the minimum standards of the U.S. Trafficking Victims Protection Act but are making significant efforts to do so." See: US State Department, Trafficking in Persons Report 2014, www.state.gov/j/tip/rls/tiprpt/

³⁹ For more information on these legislative gaps and the impact on the protection, prosecution and prevention angles of Hong Kong's human trafficking efforts, see: Justice Centre Hong Kong and Liberty Asia, "How Many More Years a Slave? Trafficking for Forced Labour in Hong Kong", March 2014, www.justicecentre.org.hk/framework/uploads/2014/03/JCHK_Report_final_spreads.pdf

ABOUT US

Justice Centre Hong Kong is a not-for-profit, human rights organisation working fearlessly to protect the rights of Hong Kong's most vulnerable forced migrants - refugees, other people seeking protection and survivors of modern slavery.

Launched in 2014, Justice Centre Hong Kong was formerly Hong Kong Refugee Advice Centre, which over seven years helped over 2,000 refugee men, women and children on the road to a new life.

Justice Centre Hong Kong advocates with and for refugees, other people seeking protection and survivors of modern slavery, bringing their voices into the public debate. It campaigns for adequate legislation and policies, conducts research and works with schools, universities and the media to fight root causes and change systems and minds.

At the charity's welcoming and comfortable centre, people seeking protection in Hong Kong receive free and independent legal information and assistance. The most vulnerable protection claimants can also receive one-to-one specialised support.

To learn more, visit: www.justicecentre.org.hk