

18 July 2013

Paper for Special Meeting of the LegCo Panel on Welfare Services on 22 July 2013

“Ways to improve situation of refugees, torture claimants and asylum seekers in Hong Kong”

Main Recommendation: *The Hong Kong Government should commission a comprehensive comparative study of the basic medical, social and economic benefits/entitlements provided to refugees, torture claimants and asylum seekers in other countries.*

- The proposed study will inform legislators of the international standards in this area. It will provide information on the different kinds of benefits received, the levels of such benefits and, importantly, the different modes of delivery of such benefits. Different approaches to allowing claimants and screened-in claimants to work can also be canvassed.
- The study will also need to compare the benefits/entitlements of asylum seekers relative to those of citizens and residents of the jurisdiction.
- Many countries have well developed systems of providing basic benefits/entitlements to asylum seekers. There have been recent developments. Here is a sample of what the study could explore in greater detail:
 - **Canada:** “Various categories of individuals under refugee law enjoy a number of social and economic rights, such as work and study in Canada, income assistance, and basic medical coverage. In a very practical way, the provision of these rights serves as a precondition for ensuring the well-being and inclusion of refugee claimants and refugees in society.”¹
 - **Germany:** The Asylum Seekers’ Benefit Act provides asylum seekers with basic provision of food, accommodation, heating, clothing, healthcare and toiletries, household consumer goods and consumables, pocket money for personal daily needs, benefits in the event of illness, pregnancy and birth, and additional benefits in

¹ Martin Jones and Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) 81.

special circumstances.² Basic provisions are provided in the form of non-cash benefits.

- **Malaysia:** Like Hong Kong, Malaysia has no treaty obligations under the UN Refugee Convention or Protocol. In a recent major policy shift, it will now provide training and jobs for refugees. A government official stated that “giving them employment would deter them from criminal activities”.³
- **New Zealand:** Asylum-seekers who are not detained are usually granted a permit to allow them to remain in New Zealand while their claim is assessed. “In many cases, especially for family groups, a work permit will be issued to allow the claimant(s) to either work or access welfare provisions. In 2008/09, 363 work permits were issued to asylum seekers. If asylum-seekers are granted refugee status, they are usually provided with a work permit (if they do not already have one). They may then lodge a residence application, which will give them the same access to the labour market as other permanent residents have.”⁴

What is the Justification for Conducting this Study?

- Our courts have held that it is unconstitutional to detain asylum seekers indefinitely. The norm is for asylum seekers to live in the community pending the determination of their non-refoulement claim. If their claim is substantiated, they continue to live in the community until they can be resettled in a third state or it is no longer a danger to return them to their place of origin.
- Living in the community without an adequate standard of living or the right to work may result in a violation of the rights of asylum seekers, a rise in the incidence of avoidable crimes, and social instability.
- The rights engaged by this issue include the following:

² See Germany’s Federal Office for Migration and Refugees website, dated 3 May 2011, accessible at <http://www.bamf.de/EN/Migration/AsylFluechtlinge/Asylverfahren/Asylbewerberleistungen/asylbewerberleistungen-node.html>.

³ Qishin Tariq, “Plan to let refugees get jobs”, *The Star Online*, 12 July 2013, accessible at <http://www.thestar.com.my/News/Nation/2013/07/12/Plan-to-let-refugees-get-jobs.aspx>.

⁴ Ministry of Business, Innovation & Employment, “Flows of refugees and asylum seekers” in *International Migration Outlook – New Zealand 2008/09*, accessible at http://www.dol.govt.nz/publications/research/sopemi/sopemi_03.asp.

- **Right to privacy** (Bill of Rights, Art. 14): Counsel for the HK government “accepted that the refusal of permission to work for a long time could be an invasion of private life. He did not take issue with the proposition that the ability to work affected the ability to function as a social being and thus affected private life.” See *MA v Director of Immigration*, CACV44/2011, 27 Nov 2012, para 63.
 - **Protection against cruel, inhuman or degrading treatment** (Bill of Rights, Art. 3): “It seems to me that it is certainly arguable that an inability to function economically may well give rise to cruel, inhuman or degrading treatment.” Per Fok JA in *MA v Director of Immigration*, CACV44/2011, 27 Nov 2012, para 76.
 - **Right to work and freedom of choice of occupation** (Basic Law, Arts. 39 and 33).
 - Legislators need to know if the Government’s current policies and practices fall below international standards and obligations. The study would be able to highlight where there are shortcomings and present ideas drawn from overseas experience on how best to fill the gaps.
 - Legislators need to know if Hong Kong is likely to be criticized again by United Nations human rights treaty bodies for its failure to live up to acceptable human rights standards for asylum seekers. In the coming year, the UN Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women will be reviewing Hong Kong.
 - Legislators need to know if the current practices are likely to be successfully challenged in the courts. The Government has generally failed to have their policies related to asylum seekers upheld in litigation in the Court of Final Appeal. So much time and expense has been wasted in trying to defend untenable policies. The victims of all this litigation have been the asylum seekers themselves who have either been returned to their place of origin without having had a fair determination of their claim or been trapped in Hong Kong without the opportunity to work living on only minimal levels of subsistence.
 - The answer to the situation of asylum seekers in Hong Kong is not further litigation but better policy-making informed by research. Legislators should work to promote better and proactive policy-making in this area.
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We should not have to wait for the courts to tell us what is right and best for our society.

- Legislators should pay particular attention to the issue of the right to work. There is currently a case in the courts concerning the entitlement of screened-in asylum seekers to work (see *MA v Director of Immigration*). The government won in the Court of Appeal in November last year but primarily on a ground that has now been undermined by the Court of Final Appeal in *Ubamaka v Secretary for Security*, FACV15/2011, 21 Dec 2012. There is now a reasonable prospect that the case will succeed in the Court of Final Appeal when it is heard in January 2014. Thus there is a need now to study the issue properly to prepare for the implications of this case. Regard should be had to [The Michigan Guidelines on the Right to Work](#) which explains the connection between the right to work and other human rights as well as the potential negative social and economic consequences when the right to work is denied:

“It is also in the interest of countries of refuge that refugees are allowed to work. The ability to engage in decent work empowers refugees, enabling self-reliance and contribution to the economy and society. Yet, the right to work is often denied to refugees and others seeking protection, compounding the persecution, fear, and displacement they have already suffered. State policy or conduct that denies the right to work may result in destitution and the violation of the prohibition on inhuman or degrading treatment. The obligation of *non-refoulement* may also be violated as those unable to work may be compelled to return to a place of persecution.” (p. 295)

- Other issues loom and may attract judicial scrutiny if policy cannot address them earlier: medical care, shelter and accommodation, basic subsistence funding, travel subsidy, access to legal assistance, access to education, etc. In this regard, reference should be made to the other parts of the Refugee Convention and particularly the right to equality and non-discrimination. Increasingly other developed jurisdictions in East Asia, such as South Korea, Japan and Malaysia (whether or not signatory) have made reference to the Refugee Convention and understood its practical significance.
- The increasing social discord among HK residents and refugee and torture claimants is often the result of perceptions that they are not entitled to even the most basic rights. This attitude needs to be corrected.

A study that ascertains relevant international obligations and best practices can serve an educational value for the public and help address negative social attitudes, stereotyping, discrimination and lack of access to services.

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