Refugee Law In Hong Kong

1. International Refugee Law

Article 1A(2) of the 1951 Geneva Convention as amended by the 1967 Protocol defines a ‘refugee’ as any person who:

‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.'

Key concept: Non-Refoulement

Article 33(1) of the Convention states:

‘no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’

Inclusion in the 1951 Convention:

1. the claimant must be outside his/her country of origin
2. they must have a well-founded fear
3. of persecution
4. the persecution must be for one of the five grounds outlined in the definition
5. the state is unwilling, or unable to protect the person

Exclusion from the 1951 Convention:

The Convention does not apply to a person:
-who has the rights/obligations to nationality in another country (other than the country from which she is claiming asylum)-Article 1E
OR
-who is considered not to deserve protection because they have committed a serious non-political crime; a war crime or a crime against humanity; or a crime contrary to the purposes and principles of the United Nations-Article 1F
OR
-who is considered a danger to the security of the host country-Article 32(1) and 33(2)
Other international human rights principles which recognize the right to claim asylum and the principle of non-refoulement:

Universal Declaration on Human Rights: 'Everyone has the right to seek and enjoy asylum abroad from persecution.' - Article 14

The 1984 Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment: ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ - Article 3(1)

The 1966 International Convention on Civil and Political Rights prohibits torture, slavery, and arbitrary arrest or detention; protects the right to freedom of thought, conscience and religion.

Who is a Refugee? An analysis of the different elements of the Convention definition

Outside country of nationality or former habitual residence

- Protection of the Convention is extended to stateless persons, provided that they meet the other criteria in the definition

Well-founded fear

- Persecution can be seen in both subjective and objective terms (UNHCR Handbook on procedures and criteria for determining refugee status)
- State of mind relates to determination of subjective fear
- Objective element of the test can override the subjective

Persecution

- Necessary to have a continued well-founded fear for a Convention reason
- Threats to life or freedom will always amount to persecution (UNHCR Handbook)

Convention reason for fear of persecution

1. Race
2. Religion
3. Nationality
4. Political opinion or belief
5. Membership of a particular social group
Procedural Consideration

1. Burden of Proof

2. Standard of Proof

Common issues arising under the Convention

1. Non-state agents

2. Civil war and ‘singling out’

3. Past or future persecution

4. Persecution or prosecution

5. Conscientious objection to military service

6. Women asylum seekers

7. Internal flight alternative

2. Asylum Law and Procedures in the UK

The Convention as part of UK Law

- Section 1 of the Asylum and Immigration Appeals Act 1993 defines ‘an asylum claim’ as: ‘a claim made by a person …that it would be contrary to the United Kingdom’s obligations under the Convention for him to be removed from, or required to leave, the United Kingdom’.
- Section 2 of the Act states that the immigration rules must not be interpreted as allowing the immigration authorities to do anything that would be contrary to the Refugee Convention.
- The Immigration Rules (Statement of Changes in Immigration Rules 395) confirm that asylum applications will be determined in accordance with the UK’s obligations under the Convention and asylum will be granted where a person has
arrived in the UK, satisfies the definition of a refugee and their removal would be contrary to the Convention. In all other cases, asylum will be refused.

The asylum process

- The Home Office considers each person’s application for asylum in detail. If asylum is refused it will go onto consider whether the asylum seeker should be allowed to stay to be granted either Humanitarian or Discretionary leave.
- Basic procedures until 2002/2003

  - Temporary admission/Standard Acknowledgement Letter
  - A Statement of Evidence Form
  - Consult a legal representative/adviser for assistance
  - Home Office interview with representative
  - Review IV record and amend if needed/submit supplementary evidence
  - Home Office considers claim and either grants asylum or consider the grant of leave on another basis
  - If asylum refused detailed letter with reasons for refusal sent to representative which would focus issues for appeal
  - First appeal by Immigration Appellate Authority (independent from the Home Office)
  - Opportunity to appeal to Immigration Appeal Tribunal, High Court etc
  - Detention used in particular circumstances but not the norm

- Asylum seeker ‘entitlements’
  - Legal representation (legal aid provided to the representative provided sufficient merit in the case).
  - Subsistence support in the form of cash/food/housing
  - Entitled to apply for permission to work

- Procedural changes post 2002/2003

  - Rights of appeal drastically reduced
  - Detention increasingly practiced (results in representation difficulties)

- Changes to asylum seeker ‘entitlements’ post 2002/2003

  - An applicant no longer has the right to work
  - No subsistence support unless claim made within 3 days of claiming asylum
  - Lack of access to legal representation due to drastic cuts in legal aid funding
3. Measures adopted to discourage asylum seekers

- Visa regimes
- Carriers liability legislation
- Checks abroad
- Preventing asylum seekers as transit passengers
- Detention

4. Issues of concern regarding asylum seekers and refugees in Hong Kong

- Refugee Convention not extended to Hong Kong
- Failure to issue residence permits while a claim is considered by UNHCR
- Lack of support for basic needs
- No legal aid/lack of voluntary advisers
- Lack of education for children of asylum seekers

5. UNHCR

- As the HKSAR does not have its own refugee status determination system, UNHCR are responsible for determining asylum applications pursuant to the mandate given in its statute to provide international protection to refugees.
- While assisting asylum seekers to present their case to UNHCR I have been able to compare UNHCR refugee status determination procedures with that of the UK. Several issues have come to light which show that in some respects, the standards that UNHCR lays down for governments are not complied with in the practices of UNHCR itself.
- UNHCR process in refugee status determination in Hong Kong
  - Claim is made and asylum seeker interviewed (requests for advisers or legal representatives to be present at interview have been denied)
  - Status determination by UNHCR (requests by asylum seekers or their representatives to have access to files or transcripts/summaries of interview have been denied)
  - Status is granted or denied (if denied asylum seekers are not given detailed reasons for refusal in writing)
  - Appeal are normally made within the field office; no independent appeals mechanism
  - There is no ‘appeal hearing’; appeals are considered on the basis of written materials
  - If there is a further interview on appeal, requests for advisers or legal representatives to be present have been denied