

# Hong Kong's Unified Screening Mechanism: form over substance

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Hong Kong is often cited as a positive example of a non-signatory territory that has established a government-led refugee status determination mechanism. However, in the absence of a broader public or executive-led commitment, this mechanism falls far below international standards.

In the 20th century, Hong Kong has been a safe harbour for refugees and migrants from mainland China and Vietnam. Although China acceded to both the Convention and its Protocol in 1982, the Refugee Convention has never been extended to Hong Kong, whose government maintains that it has no intention to ratify it. The official explanation is that Hong Kong's dense population, long coastlines, liberal visa regime and status as a regional transportation hub makes it vulnerable to the "ill-effects of illegal immigration".<sup>1</sup>

However, Hong Kong is party to other human rights treaties including the Convention against Torture (CAT) and the

International Covenant on Civil and Political Rights (ICCPR), both of which impose *non-refoulement* obligations. Since 2004, a series of judicial review decisions led to the government being compelled to establish *non-refoulement* screening, addressing commitments under the CAT and then ICCPR.

Initially, the government's screening ran parallel to a separate refugee status determination (RSD) process operated by UNHCR's Hong Kong sub-office. However, a further judicial review challenge culminated in the case of *C and Others v Director of Immigration and Another*,<sup>2</sup> in which the Court of Final Appeal ruled that, in exercising the power to remove a person from Hong

July 2021

www.fmreview.org/issue67

Kong, the Director of Immigration must independently determine whether that person meets the refugee definition as contained in the 1951 Refugee Convention.

Hong Kong's Courts have repeatedly urged that high standards of fairness must be observed in the exercise of immigration powers where "life and limb are at stake"<sup>73</sup> and where removal could lead to a risk of torture or violation of other absolute and non-derogable rights. The applicants in *C and Others v Director of Immigration and Another* (who had all been rejected by UNHCR after appeal) successfully argued that the Director was required to independently determine whether a claim is well-founded. By recognising this obligation, the Court of Final Appeal thus introduced into Hong Kong law a limited form of *non-refoulement* protection based on Article 33 of the Refugee Convention.

In compliance with the Court's ruling, the Unified Screening Mechanism (USM) was launched in March 2014, unifying the consideration of all *non-refoulement* obligations into one screening process. This was perhaps the first of its kind: a government-led refugee status determination system based on the Refugee Convention but operating in a non-signatory territory. Following this shift to increased state responsibility, UNHCR rolled back its operations in Hong Kong, limiting their role to that of assisting claimants who are successfully identified within the USM as being at risk of persecution with resettlement to a safe third country.

Given the considerable political challenges of persuading States to ratify the Refugee Convention, the development of Hong Kong's USM is often considered an example of an alternative means by which refugee protection might be effectively derived. Indeed, on paper, the USM gives every appearance of an effective system replete with an array of in-built procedural protections. Claimants are provided with free legal representation from a panel of duty lawyers and receive access to interpretation and translation assistance. They are provided with an opportunity to articulate their claims in writing before attending one or more interviews with

civil servant decision-makers, who are specifically designated to evaluate and determine such claims. Claimants are provided with written decisions that explain the reasoning behind them. In the case of negative decisions, claimants have a right to appeal to an appellate board composed of independent Adjudicators.

However, since it began operation in 2014, the recognition rate within the USM remains alarmingly low at below 1%, almost the lowest in the industrialised world. It is particularly telling that this rate reflects a significant and almost overnight precipitous drop upon transition from the previous UNHCR-led process. While the Hong Kong government maintains that this rate is a result of claimants abusing the system, modest scrutiny unearths a more likely cause.

Despite apparent procedural protections, in all operative aspects the USM is qualitatively deficient. Implemented with almost no civil society consultation, the system bestows upon decision-makers broad discretion and wide case-management powers that are not counterbalanced by effective or adequate mechanisms for transparency or accountability. The requirements of fairness, while widely accepted in principle, are significantly undercut by the very low standard of decision-making in both procedural and substantive matters.

### A flawed protection system

The central flaw of this so-called protection system is that the USM operates solely as an expression of a limited, negative legal obligation. The imposition of this *non-refoulement* obligation remains defined and constrained by the absence of public engagement or support, executive intention, or any other form of broader moral commitment or source of legitimacy. Both the development and the operation of the USM are marked by an absence of any driving humanitarian impulse, which has contributed significantly to a backlash and to an environment in which negative perceptions and hostile attitudes at all levels of society towards asylum seekers go unchecked.



Benjamin Kostrzewa BOK Photo

A refugee looks out over the harbour in Hong Kong.

The Hong Kong government's open hostility to people seeking protection is evident from its frequent insistence that refugees are "illegal immigrants", "overstayers" or "foreigners who have smuggled themselves into Hong Kong", who must be removed from Hong Kong as soon as practicable.<sup>4</sup> This language, which permeates all official communications, has fuelled a broader xenophobic narrative that portrays people in need of international protection as abusers of the system, "fake refugees"<sup>5</sup> and criminals.

Decision-makers within the USM are clearly not immune from these prevailing cultural attitudes. For, although substantive decisions to grant or deny protection appear to be based on legal analysis, there are numerous instances where the Courts have found that accuracy and procedural fairness have (inevitably) been undermined when decision-makers carry hostile attitudes, bias or flawed assumptions into that process.

What we observe in the USM is that in this way, despite giving the appearance of ensuring fairness, each individual mechanism for procedural protection within the system falls short in practice. For example, as the complexity of legal proceedings increases,

the likelihood and ease of obtaining legal representation swiftly decreases; although legal representation is initially obligatory it becomes discretionary from the appellate stage onwards. Where an independent appeal process is provided by right, its hearings are held in private, with decisions unpublished; and relevant lawyers (after minimal training) are given unsupervised discretion as to whether to continue to provide representation (and so the result is that 92–95% of appellants are unrepresented). Similarly, although there is a right to apply for Legal Aid to seek legal representation for judicial review of negative decisions, over 90% of such applications are refused. And while only a few succeed in their asylum claims, those who do succeed are not then granted legal status; their removal orders remain in place for an indefinite period until they are resettled to a safe third country or leave Hong Kong for other reasons.

Despite these clear structural failings, the government continues to evade improvement. This is despite repeated concerns raised by civil society and the Courts, and repeated recommendations of relevant Treaty Bodies. Rather than addressing such shortfalls, in April 2021, the government passed the Immigration (Amendment) Ordinance

July 2021

[www.fmreview.org/Issue67](http://www.fmreview.org/Issue67)

2021 seeking to introduce amendments to the USM that are widely considered to be regressive.<sup>6</sup> The amendments include allowing the government to increase the use of immigration detention, restricting the submission of new evidence on appeal, shortening the timeframe for notice of hearings, and mandating the language of asylum proceedings. The stated purpose of the Bill is ostensibly to expedite the screening process but civil society has repeatedly articulated concerns not only that these proposals risk eroding procedural fairness and human rights safeguards even further but also that there is no real evidence-based policy requirement or need for increased expediency in a system where the main delays are actually delays in government and Courts' decision-making.

In the absence of political will, holistic reform to the USM is unlikely in the foreseeable future. To address the high rate of refusal and lack of durable solutions, some civil society organisations are assisting refugees in Hong Kong to pursue complementary pathways (such as private community sponsorship programmes) to migrate to safe third countries. In collaboration with civil society coalition Refugee Concern Network, Justice Centre Hong Kong engages in constructive dialogue with policymakers, while collecting and publishing relevant data, advocating for reform through print and social media, and training and working with legal practitioners to identify and litigate strategic cases.

If anything, the Immigration (Amendment) Ordinance 2021 embodies the precariousness of Hong Kong's *non-refoulement* protection regime: a system where court-imposed legal responsibilities continue to flounder unsupported by any apparent moral commitment, and without the Refugee Convention's normative foundations. This is therefore a cautionary tale for those advocating for a shift to government-led RSD systems in other jurisdictions, and one that emphasises the need for political buy-in and a whole-of-society approach.

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1. See Human Rights Committee, *Fourth period report submitted by Hong Kong, China under article 40 of the Covenant*, CCPR/C/CHN-HKG/4 <https://digitallibrary.un.org/record/3856300?ln=en>

2. *C and Others v Director of Immigration and Another* (2013) [www.hkii.hk/eng/hk/cases/hkcfca/2013/22.html](http://www.hkii.hk/eng/hk/cases/hkcfca/2013/22.html)

3. *Secretary of Security v Sakthivel Prabakar* (2004) [www.hkii.hk/eng/hk/cases/hkcfca/2004/43.html](http://www.hkii.hk/eng/hk/cases/hkcfca/2004/43.html)

4. This is the government's official policy line. See for example [www.immd.gov.hk/eng/press/press-releases/20201217.html](http://www.immd.gov.hk/eng/press/press-releases/20201217.html)

5. This is a term used with increasing frequency by certain media outlets and politicians to refer to people whom they perceive to be applying for *non-refoulement* protection in Hong Kong for social welfare benefits or to engage in unlawful employment.

6. See [bit.ly/HKFP-20210428-immigration-law](https://bit.ly/HKFP-20210428-immigration-law)