



**Australian Government**  
**Refugee Review Tribunal**

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# Country Advice

## Hong Kong

China – Hong Kong – HKG36399 –  
Country of Nationality – British Overseas  
Territory of Hong Kong  
26 March 2010

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- 1. Please provide information on whether Hong Kong Special Administrative Region (HKSAR) is a “country” for the purposes of considering nationality. Please provide a brief discussion on this to distinguish the situation that applied to the British Overseas Territory of Hong Kong and that which applies to HKSAR. In particular, please provide information on whether HKSAR can be considered a country of nationality now that it is a “special administrative region” of the PRC.**

A judgment in a 1997 Federal Court case of *Koe v Minister for Immigration and Ethnic Affairs and Others* indicates that at the relevant date when it was still under British control, Hong Kong had a distinct area with identifiable borders, its own immigration laws, and a permanent identifiable community. The case arose from an appeal by an ethnic Chinese man born in Indonesia against a decision by the RRT that he was not a refugee. The applicant had left Indonesia for China in 1959. In 1973, he left China for Hong Kong, where, in 1980, he obtained a permanent identity card and a certificate of identity. The Tribunal found that the applicant’s “place” of former habitual residence was Hong Kong. In support of his review application, it was claimed by the applicant that the Tribunal was in error “because the RRT ascribed to Hong Kong the status of a country for the purposes of the Convention whereas Hong Kong has never been an independent political entity which could be properly described as a country. At the time of the decision Hong Kong was a British Crown Colony and was therefore a colonial possession of the British Crown.” The judge in the case held that it was appropriate to treat Hong Kong “as a ‘country’ in accordance with the meaning and purpose of that expression as used in Art 1A of the [Refugees] Convention.” As part of his judgment, Tamberlin J. held that:

It is clear that Hong Kong was not a *state* or *nation*. At the relevant time Hong Kong did not have an independent capacity to enter into legal relations. It was under the control, direct or indirect, of the United Kingdom.

Nevertheless, Hong Kong at the relevant date had a distinct area with identifiable borders. It had its own immigration laws, and was inhabited by a permanent identifiable community, and therefore in my opinion it was appropriate to treat it as a “country” in accordance with the meaning and purpose of that expression as used in Art 1A of the Convention. In 1965 Hong Kong enjoyed a degree of autonomy in relation to its administration. This lends further support to the submission that it is a “country”. In addition, as a matter of everyday usage of language, it is not inappropriate to refer to a person as coming from, belonging to, or returning to Hong Kong. The Territory was not simply a place or area but possessed the foregoing additional elements which make it appropriate to be treated as a country for Convention purposes<sup>1</sup>.

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<sup>1</sup> *Koe v Minister for Immigration and Ethnic Affairs and Others* (1997) 78 FCR 289, at 294 & 299, Legal Online website <http://subscriber.lawbookco.com.au/ThomsonNXT4/pdf/pdf.aspx/LAWREP-078-FCR-0289.pdf?ref=LAWREP-078-FCR-0289.pdf> – Accessed 26 March 2010 – Attachment 1.

The case is referred to in Chapter 2 on country of reference in the MRT-RRT Legal Services Section's guide to refugee law in Australia.<sup>2</sup>

In relation to the present situation in the Hong Kong Special Administrative Region (SAR) of the People's Republic of China, the US Department of State's report on human rights practices in China, including Hong Kong, for 2009 indicates that the Hong Kong SAR has "a high degree of autonomy except in matters of defense and foreign affairs." Under a "one country, two systems" framework, the Hong Kong SAR administers "its own immigration and entry policies". It is stated in the report that:

Hong Kong, with a population of approximately seven million, is a Special Administrative Region (SAR) of the People's Republic of China (PRC). The 1984 Sino-British Joint Declaration on the Question of Hong Kong and the SAR's charter, the Basic Law of the SAR (the Basic Law), specify that Hong Kong will enjoy a high degree of autonomy except in matters of defense and foreign affairs. The Fourth Term Legislative Council (LegCo) was elected from a combination of geographic and functional constituencies in September 2008 elections that were generally free and fair. Civilian authorities generally maintained effective control of the security forces.

...The law provides residents freedom of movement, freedom of emigration, and freedom to enter and leave the territory, and the government generally respected these rights in practice, with some prominent exceptions. Under the "one country, two systems" framework, the SAR continued to administer its own immigration and entry policies and made determinations regarding claims under the Convention Against Torture (CAT) independently.

The Hong Kong Special Administrative Region "is not a party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol and has no temporary protection policy." China, however, "is a party to the 1951 Convention relating to the Status of Refugees and its 1967 protocol," although "the law does not provide for the granting of refugee or asylum status."<sup>3</sup>

A document last updated on 17 March 2008 on The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website provides information on the Basic Law, including the relationship between the central Chinese authority and the HKSAR. According to the document:

The Sino-British Joint Declaration on the Question of Hong Kong (The Joint Declaration) was signed between the Chinese and British Governments on 19 December 1984. The Joint Declaration sets out, among other things, the basic policies of the People's Republic of China (PRC) regarding Hong Kong. Under the principle of "One Country, Two Systems", the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region (HKSAR) and Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years. The Joint Declaration provides that these basic policies shall be stipulated in a Basic Law of the HKSAR.

The Basic Law of the Hong Kong Special Administrative Region (The Basic Law) was adopted on 4 April 1990 by the Seventh National People's Congress (NPC) of the PRC. It came into effect on 1 July 1997.

...The Basic Law is the constitutional document for the HKSAR. It enshrines within a legal document the important concepts of "One Country, Two Systems", "a high degree of autonomy" and "Hong Kong People ruling Hong Kong". It also prescribes the various systems to be practised in the HKSAR.

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<sup>2</sup> MRT-RRT Legal Services 2010, *A Guide to Refugee Law in Australia*, Chapter 2 – Attachment 2.

<sup>3</sup> US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – China (includes Tibet, Hong Kong, and Macau)*, March, Section 2(d) of China section, Introduction & Section 2(d) of Hong Kong section – Attachment 3.

Major provisions of the Basic Law “which set out the basic policies of the PRC regarding the HKSAR” include the following:

The HKSAR has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication. (BL Article 2)

The executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong. (BL Article 3)

The socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for 50 years. (BL Article 5)

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the legislature of the HKSAR. (BL Article 8)

With regard to the relationship between the central Chinese authority and the HKSAR, it is stated in the document that:

The Central People’s Government (CPG) shall be responsible for the defence and the foreign affairs relating to the HKSAR. (BL Articles 13-14)

The CPG authorizes the HKSAR to conduct relevant external affairs on its own. (BL Article 13)

The HKSARG shall be responsible for the maintenance of public order in the Region. (BL Article 14)

National laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. Laws listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR. The laws listed in Annex III shall be applied locally by way of promulgation or legislation by the HKSAR. (BL Article 18)

No department of the CPG and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the HKSAR administers on its own in accordance with the Basic Law. (BL Article 22)

The document indicates that “[t]he Chief Executive of the HKSAR shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the HKSAR with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years. (BL Article 44)” The powers and functions of the Legislative Council of the HKSAR include the power to “enact, amend or repeal laws”, to “examine and approve budgets introduced by the government”, to “approve taxation and public expenditure”, to “raise questions on the work of the government”, to “debate any issue concerning public interests” and to “endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court. (BL Article 73)” The Court of Final Appeal of the HKSAR has “[t]he power of final adjudication of the HKSAR”.

The HKSAR also “remains a free port, a separate customs territory and an international financial centre. Its markets for foreign exchange, gold, securities and futures shall continue. There shall be free flow of capital. (BL Articles 109/112/114/116)”

The document includes sections on the protection of rights and freedoms in the HKSAR, education, science, culture, sports, religion, labour and social services, and external affairs. The document also indicates that:

The power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People’s Congress (SCNPC). The SCNPC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the HKSAR. The courts of HKSAR may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts of the

HKSAR, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the HKSAR, and if such interpretation will affect the judgments on the cases, the courts of the HKSAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the HKSAR. (BL Article 158)

The power of amendment of the Basic Law shall be vested in the NPC. No amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Hong Kong. (BL Article 159)<sup>4</sup>

A copy of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is attached.<sup>5</sup>

## Attachments

1. *Koe v Minister for Immigration and Ethnic Affairs and Others* (1997) 78 FCR 289, Legal Online website  
<http://subscriber.lawbookco.com.au/ThomsonNXT4/pdf/pdf.aspx/LAWREP-078-FCR-0289.pdf?ref=LAWREP-078-FCR-0289.pdf> – Accessed 26 March 2010.
2. MRT-RRT Legal Services 2010, *A Guide to Refugee Law in Australia*, Chapter 2.
3. US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – China (includes Tibet, Hong Kong, and Macau)*, March.
4. 'Some facts about the Basic Law' 2008, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website, 17 March  
<http://www.basiclaw.gov.hk/en/facts/index.html> – Accessed 18 February 2010.
5. People's Republic of China 1990, 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China', The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website, 4 April  
[http://www.basiclaw.gov.hk/text/en/basiclawtext/images/Basic\\_Law.pdf](http://www.basiclaw.gov.hk/text/en/basiclawtext/images/Basic_Law.pdf) - Accessed 25 March 2010.

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<sup>4</sup> 'Some facts about the Basic Law' 2008, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website, 17 March <http://www.basiclaw.gov.hk/en/facts/index.html> – Accessed 18 February 2010 – Attachment 4.

<sup>5</sup> People's Republic of China 1990, 'The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China', The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website, 4 April [http://www.basiclaw.gov.hk/text/en/basiclawtext/images/Basic\\_Law.pdf](http://www.basiclaw.gov.hk/text/en/basiclawtext/images/Basic_Law.pdf) - Accessed 25 March 2010 – Attachment 5.