

Immigration Detention in Hong Kong: An Overview

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Immigration detention

Immigration detention is the practice of detaining people who are suspected of violating immigration rules in government facilities. In Hong Kong, immigration detention is a form of administrative detention; the decision to deprive a person of their liberty because of their immigration status is made by government officials and not the courts. If someone is accused of committing a crime the criminal charges against them ordinarily must be proved beyond reasonable doubt by the prosecution in a court of law. A court decides how long an individual convicted of a crime should be sent to prison. By contrast an immigration detainee loses their liberty without the check and balance of judicial scrutiny.

The purpose of immigration detention is supposed to be to facilitate imminent removals from HK. It should be used as a last resort and for the shortest possible time and not as a punishment.

Places of detention

People can be detained at CIC, MTK, the recently re-opened Tai Tam Gap Correctional Institution, prisons, police stations, border facilities and under the control of the Immigration Department and Correctional Services Department.

In the years 2011-2018 up to 17,752 people were detained annually at Castle Peak Bay Immigration Centre (CIC) and up to 7,942 people were detained annually at Mau Tau Kok Detention Centre (MTK).ⁱ

Points when can a person be detained

If a person does not hold a permanent Hong Kong Identity Card or have the right of abode, it is possible that at some point in the legal process related to immigration control, they could be subject to immigration detention. If a person is at risk of immigration detention, technically this could happen at any time. However, there are certain points where this is more likely to happen:

1. When a person enters or re-enters Hong Kong.
2. When a person's leave to remain i.e., visitor's visa expires, and they make a non-refoulement claim, i.e. they apply for protection from forcible return to their country of origin.
3. After a refusal decision in a person's non-refoulement claim against which there is no right of appeal. For example, if the person's non-refoulement claim is refused, and their

application to judicially review this refusal is rejected by a higher court, or, the highest court in Hong Kong, the Court of Final Appeal, refuses the claim.

4. At the conclusion of a criminal sentence and pending deportation or removal from Hong Kong.

Reasons a person can be detained

Detention is usually used in the following circumstances: to enable a person's deportation or removal from HK, to establish a person's identity or the basis of a person's non-refoulement claim, and/or where there is reason to believe that the person will not comply with any conditions attached to bail/recognizance, such as reporting regularly or living at a bail address.

S32 of the Immigration Ordinance (Cap 115)ⁱⁱ allows for the detention of persons by the immigration department or police in various circumstances, including the following:

- A person suspected of arrival without proper authorization i.e., a person who arrived without the appropriate visa.
- A person not having the right of abode or right to land, who has committed immigration offences involving making false statements or the use or possession of false documents i.e., someone who gives intentionally incorrect information to an immigration officer or who arrived with a passport with a false name and/or date of birth.
- A person here in breach of a condition of stay i.e., a person who has worked without permission or who has overstayed the time limitation on their visa.
- A person who is in a position where the government is considering removing them from HK through a removal order.
- A person who is pending removal or deportation, i.e. a removal or deportation order has already been made but has yet to be implemented.
- A person who has been convicted of an offense punishable by imprisonment of 2 years or more and is therefore deemed to be deportable under the IO. S37ZK of the Immigration Ordinance allows a non-refoulement protection claimant to be detained pending the final determination of the claimant's torture claim.

Length of detention

Different sections of the Immigration Ordinance provide for varying time limits on detention. Where extensions of detention are permitted this is usually with the authority of successively higher-ranking officers in the immigration service or the police.

- A person suspected of violating the Immigration Ordinance can be detained where "enquiry for the purposes of the Ordinance, other than the provisions relating to deportation, is necessary in the case of any person; and that such person will not comply

with immigration control, if he is not detained” (S26 of the IO). That person may be detained for an initial 48 hours under the authority of any member of the Immigration Service of the rank of chief immigration officer or a more senior rank, or any police officer of the rank of Superintendent or a more senior rank, and thereafter for no longer than a further 5 days under the authority of any member of the Immigration Service of the rank of principal immigration officer or a more senior rank or any police officer of the rank of assistant commissioner of police or a more senior rank.

- Once a person has been issued with a removal or deportation order, they can be detained and there is no statutory time limit on detention (S32(3) and S32(3)(A) of the IO).
- Similarly, under S37ZK of the IO, a person can be detained pending the final determination of their non-refoulement claim and there is no statutory time limit on detention.
- However, even in these situations where there isn't a specific time limit on the period of detention, a person can only be detained for a period that is “reasonable”. But what is reasonable will vary from case to case.ⁱⁱⁱ

Categories of people who should not be detained

There are certain categories of people that the Immigration Department in its Detention Policy^{iv}, says should not be detained. This includes where:

1. the detainee is a person under the age of 18;
2. the detainee is an elderly person requiring close supervision / medical care;
3. the detainee is a pregnant woman and there is no clear prospect of imminent removal;
4. the detainee is in serious medical / mentally ill-health condition;
5. the detainee is physically disabled requiring constant nursing care;
6. there is satisfactory evidence that the detainee has been tortured.

If a person is in one of these categories, the Immigration Department is required to treat detention as undesirable. But this does not necessarily mean that that people with these vulnerabilities cannot or will not be detained. However, the Detention Policy may be useful for arguing that such individuals should not be detained or that they should be released if they are detained.

The person will probably need to provide independent evidence of falling within one of these categories, for example if they are a survivor of torture. This is especially the case if being a part of one of these categories forms a central part of the person's non-refoulement claim. This is because the Immigration Department may not want to accept that the person is in one of these categories if it would mean they would have to believe what the person has said in their non-refoulement claim.^v

It would also be important to inform the Immigration Department if a person is pregnant.

Conditions and services in detention

CIC is the main immigration facility providing for medium and long-term detention for immigration detainees. It has a capacity of 500 detention places. The Immigration (Treatment of detainees) Order (Cap 115, S35 (1))^{vi} sets out the rules for how someone will be treated at CIC and includes information about living conditions and services. The CIC Operational Manual (Treatment of Detainees)^{vii} (“the Manual”) provides staff of CIC with guidance on the management of detainees regarding their daily routine and welfare. In 2010 the Immigration Department gave an undertaking to make the Manual available for public access, but to date this has not been done and it is unclear whether the Manual is still in use or if it has been updated. The list below is based upon the version of the Manual disclosed to the Legislative Council in 2010:

1. Detainees shall be treated with respect. Ill-treatment of detainees is forbidden by law.
2. Detainees have the right to ask an officer to inform a family member or friend of their detention as soon as they are detained.
3. Communication with friends and relatives is possible through visits, letters, and telephone calls.
4. Detainees are allowed access to a legal adviser via visits, telephone calls, and letters.
5. Daily outdoor exercise of no less than 1 hour a day if weather permits and provision for indoor exercise during rainy or inclement weather. Detainees shall be given access to a doctor if a person is injured or sick.
6. Detainees shall be provided with a separate bed and clean bedding.
7. Any body searches of detainees shall be carried out by an officer of the same sex.

Detention of children

According to the Detention Policy, a person under 18 should not be detained. If a child is detained it should only be “with strong reasons, e.g., it is believed the child will be assisted to abscond, the child is likely to be removed from the HK within a short period of time, or the child is unaccompanied and would not be properly taken care of if he/she is not so detained.”^{viii}

If detention is considered necessary, then under paragraph 4 of the Immigration (Places of Detention) Order (Cap. 115, sub. Leg. B)^{ix} the child will be admitted to Tuen Mun Children and Juvenile Home which is operated by the Social Welfare Department. The Order guarantees that a child under detention shall receive the same treatment as a local child or juvenile detained in a place of refuge under S34E of the Protection of Children and Juveniles Ordinance (Cap 213).^x S 34E provides that any child who needs care and protection shall be taken to a place of refuge and the child must be brought before a juvenile court within 48 hours after being taken to the place of refuge. The court can order detention in the place of refuge for an initial 28 days so that further

enquiries about the child can be made, and further periods of detention can be obtained provided that the period of continuous detention does not exceed 56 days.

Unaccompanied minors who are refused permission to land are detained at the Airport Detention Quarters located inside the restricted area at Hong Kong International Airport pending removal to their home country.^{xi}

There have also been reports from civil society representatives that children have been detained at police stations and at Castle Peak Bay Immigration Centre, but to our knowledge, no official rules or statements address this.

How to seek legal advice on arrest

A member of the Immigration Service can arrest a person if s/he fails to produce on demand any proof of their identity. They may also arrest any person who they reasonably suspect may have committed an offence under the Immigration Ordinance. They may further arrest a person they reasonably suspect of being guilty of an offence under the Immigration Service Ordinance or of an offence specified under Schedule 2 of the Immigration Service Ordinance, if the offence is one where the person may be sentenced to a term of imprisonment, or if it appears to the member that service of a summons in relation to the offence is not possible. A person can also be arrested if an Immigration Service officer reasonably suspects s/he has landed in Hong Kong unlawfully and does not have legal permission to remain in Hong Kong.

If a person is investigated by the Immigration Department for any offence, s/he has the right to remain silent and to seek legal advice. If the police or Immigration Department believe a person has broken the law, that person can be charged with committing a crime. Once a person is charged with an offence, they would be brought before a Magistrate's Court, which is a lower court that holds a) trials for less serious offences and b) preliminary hearings (but not trials) for more serious offences.

If a person is charged with any offence in a Magistrate's Court, s/he can seek the help of the Duty Lawyer Service. If the person is charged with an offence under the Standard List of Offences of the Duty Lawyer Scheme^{xii}, s/he will be provided with free legal advice for the first court appearance without any means testing, i.e. regardless of their income level.

However, if they wish to have representation for subsequent court hearings, they will need to go to the Court Liaison Office to do a means test, to demonstrate that they genuinely are unable to afford adequate legal advice using their own resources. After passing the means test the person is only required to pay a one-off handling fee of HK\$610, and this is the only charge the person must pay, no matter how long the trial lasts.^{xiii}

If, after committal proceedings in the Magistrate's Court, the case is transferred to the District Court or the Court of First Instance of the High Court, s/he can apply for legal aid. A lawyer will be assigned to the person if they are eligible for legal aid.^{xiv}

How to seek legal advice in immigration detention

After a person is detained in CIC, their case will be allocated to a Welfare Officer in detention, who will be able to assist with different services, including helping to facilitate access to legal advice where this is available. A detainee should contact their Welfare Officer as soon as possible.

If the detainee already has a lawyer, the detainee should urgently inform them that they have been detained. The detainee will be allowed reasonable opportunity to communicate with a lawyer and to prepare their defense. They are given access to writing materials and letters should be posted without delay. The detainee will also be able to telephone their legal adviser.

If a detainee would like general legal advice, there is no government provided legal aid available. It is open to the detainee to write or telephone law firms and civil society organizations to see if they may be able to provide free legal advice and assistance. However, the detainee will not have access to computers or the internet in detention to be able to search up organizations that may be able to offer advice.

If a person believes they have been unfairly detained, they should seek legal advice on whether they can make a claim for unlawful detention or Habeas Corpus. If the detainee wishes to make a claim for unlawful detention or Habeas Corpus, they will be able to apply for legal aid. To successfully apply for legal aid, a person must satisfy both a means test^{xv} (to ensure the person genuinely requires financial assistance) and a merits test (to ensure the person has a reasonable claim that justifies the grant of legal aid). The Welfare Officer can assist with the application process.

A detainee should not sign any legal documents, they do not fully understand.

Provisions related to Bail^{xvi}

Following arrest, a person can be brought to an office of the Immigration Service or to the police station for enquiries. If the investigation cannot be completed immediately, the person may either be released unconditionally or bailed, upon payment of money or the provision of a surety, to appear at a certain date and time. If, after investigation, there is sufficient evidence against the person, they will either be charged and bailed to appear before a Magistrate or be detained and brought before a Magistrate within 48 hours of their arrest, where they can apply for bail, unless they are sooner released or otherwise detained, removed or deported under the Immigration Ordinance.

If a person is arrested, s/he can ask the Immigration Officer or police officer for bail. The general principle is that a person will be released on bail by entering recognisance with or without sureties for a reasonable sum, or on cash bail for a specified sum, as soon as possible after arrest, unless (1) the offense is of a serious nature, or (2) it is reasonably considered that a person should be detained pending their appearance before a Magistrate. If the Immigration Service or police deny bail and detain the arrested person, they must justify that such detention is reasonable having regard to the circumstances of the case. An arrested person will normally be released on bail, except:

1. Where the arrest is of a serious nature;
2. Where the person has been arrested on a warrant which does not allow bail;
3. Where the person may abscond;
4. Where the person may repeat the offense;
5. Where the person may interfere with witnesses, impede the investigation, or attempt to obstruct the course of justice;
6. Where the person should be detained in their own interests to protect them from acts committed by themselves or others; or
7. Where the person cannot produce a reasonable amount of bail money in circumstances where entering recognisance with or without sureties is not appropriate.

However, it is important to note that if someone is detained under S32 (detention pending removal or deportation) or S37ZK (detention pending a final decision in a person's non-refoulement claim) of the Immigration Ordinance, s/he will not have the right to apply for bail and can be detained indefinitely. A person detained under these provisions does not have to be brought before a Magistrate's Court. However, the Immigration Service carries out regular detention reviews to assess the continued appropriateness of detention, and detainees should be informed of the outcome of these reviews. Therefore, a person may be released on bail after a detention review even if they are not brought before a court.

How to make a complaint in detention

There is no confidential system for making a complaint in CIC or MTK.

In CIC, a complaint can be made to the Superintendent (who is the senior-most officer), or any officer authorized by the Superintendent to receive complaints, about the treatment they have received. The Superintendent is required to record the complaint and investigate it as soon as practicable after the complaint is made, and let the detainee know the outcome of the investigation.^{xvii}

In MTK the detainee can make their complaint to any officer, and that officer is then supposed to bring the complaint to the attention of an Assistant Principal Immigration Officer^{xviii}.

There is no independent, external complaints mechanism for detainees in CIC, MTK, or other detention facilities. Complaints against members of the Immigration Department are investigated internally by the Department.

Government-appointed Justices of the Peace provide the only form of external monitoring of immigration detention. They visit CIC every 2 weeks, and it is possible to make a complaint to them, although the experience of civil society organizations indicates that the identity of the people making these complaints is not kept confidential from detention staff.

The absence of an independent, external body to hear complaints impacts the effectiveness of complaints and monitoring procedures. The lack of confidentiality very likely deters detainees from complaining about their treatment in detention. This is borne out by statistics from 2010-2020 which show that the number of complaints was exceptionally low compared to the detainee population and none of the complaints were upheld.^{xix}

In 2019 Justices of the Peace visited MTK Detention Centre 4 times and did not receive any complaints.^{xx}

It is also possible to make a complaint in writing to the Ombudsman, who has the power to investigate complaints about poor management or service delivery by government departments and public agencies. Complaints can be made by letter to The Ombudsman, 30/F, China Merchants Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong or G.P.O. Box No. 3300, Hong Kong, by fax to (852) 2882 814, and by email to complaints@ombudsman.hk^{xxi}

How to seek other advice

If a detainee's friends or family needs support while the detainee is in detention, they could contact the [CIC Detainees Rights Concern Group](#) who make regular visits to people in detention and are gathering information about the detention system. They can be contacted via Facebook.^{xxii}

There is a list of items that friends and relatives can bring a detainee on the Correctional Services Department [website](#). It is important to note that the items need to fit the exact specifications listed on the website or they will not be given to detainees. For example, if the list specifies that "M&Ms" chocolates is allowed, then a different brand of the same item would not be allowed. It is also possible to bring unmarked books and other reading materials.

Preparations to make where a person is vulnerable to detention^{xxiii}

The person should:

- Keep a list of emergency contacts in a safe place and give it to someone else they trust to hold as well. This list might include close family and friends, their lawyer, hospitals or

doctors in case the person has a medical condition, friends who may have agreed to care for their children if they are taken into detention.

- Have copies of their documents and as well as giving them to their lawyer, give them to someone they trust. If a person is detained, it may become very difficult to access the documents if they are in a person's home. Scan and email themselves copies of the documents.
- If on medication, take this medication to detention, together with a prescription and a letter from the doctor to say why the medicine should not be stopped or changed.
- Give a trusted friend a copy of their house/room key so that if they are detained, the friend can help with obtaining important items. Only give a key to a trusted person and make sure this is permitted under the accommodation rules. Alternatively, give a trusted friend a consent letter to access the room if the person is detained. The letter can also be used to allow the trusted friend to contact the person's lawyer if necessary.
- Ask a trusted friend to inform International Social Services if the person has been detained as soon as possible. This should make it easier for entitlements to be reinstated when the person is released.
- Write down a list of important numbers, such as family and friends, lawyer, doctor, and keep them safe because mobile phones are taken from people in detention and returned on release.

About us

The Immigration Detention in Hong Kong Project is a 3-year research project at the Faculty of Law within the Chinese University of Hong Kong to evaluate the immigration detention system in Hong Kong in relation to vulnerable migrants. It is the first research project about immigration detention in Hong Kong. We aim to generate policy-oriented analysis that can help to improve the system and protect the rights and welfare of detainees and their families. To learn more about the project, please see the [project website](#).

Glossary

Court Liaison Officer – Part of the Duty Lawyer Service to help with a person’s non-refoulement claim.

Deportation – This is where a person who is lawfully in HK commits an offence punishable with not less than 2 years imprisonment and the Chief Executive deems it in the public good for him/her to be deported. Deportation can be for a fixed period or for life.

Duty Lawyer Service - The Duty Lawyer Service provides free legal services. Duty Lawyers are independent lawyers in private practice who are managed by the Duty Lawyer Service and funded by the Hong Kong government.

Habeas Corpus - This is a legal rule that requires a person who is detained to be brought before a court and that the government prove that the detention is justified.

Non-Refoulement Claim – A claim for Non-Refoulement Protection in Hong Kong.

Non-Refoulement Protection Claimant - A person who has applied for protection against being sent back to their home country.

Removal - This is where a person with no right to be or remain in HK or who has not complied with immigration conditions is removed. A person who has been removed is not prohibited from returning on another occasion.

Torture Claim: This is where a person fears torture or cruel, inhuman or degrading treatment or punishment. It is considered as part of a person’s Non-Refoulement Claim.

Unlawful detention – This is where the government detains a person without legal authority.

Endnotes

ⁱ Yearly admittances: <https://app.flourish.studio/story/701705/>

ⁱⁱ Immigration Ordinance (Cap 115) <https://www.elegislation.gov.hk/hk/cap115>

ⁱⁱⁱ Ghulam Rbani v. Secretary for Justice for and on behalf of the Director of Immigration [2014] HKCFA 21 at paragraphs 21-25
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=92003&QS=%2B&TP=JU

^{iv} HK Immigration Department’s Detention Policy
<https://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf>

^v Adapted from the Right to Remain Toolkit on Immigration Detention, A Guide to the UK Immigration and Asylum System <https://righttoremain.org.uk/toolkit/detention/>

^{vi} Immigration (Treatment of detainees) Order (Cap 115, S35 (1)) <https://www.elegislation.gov.hk/hk/cap115E>

- vii CIC Operational Manuel (Treatment of Detainees) https://www.legco.gov.hk/yr09-10/english/hc/sub_leg/sc52/papers/sc520315cb2-1083-2-e.pdf
- viii Legco Panel on Constitutional and Mainland Affairs, Hearing of the Second Report of the HKSAR under the UN Convention on the Rights of the Child, at paragraph 25.7: <https://www.legco.gov.hk/yr13-14/english/panels/ca/papers/ca1118cb2-268-4-e.pdf>
- ix Immigration (Places of Detention) Order (Cap. 115, sub. Leg. B) <https://www.elegislation.gov.hk/hk/cap115B>
- x S34E of the Protection of Children and Juveniles Ordinance (Cap 213) <https://www.elegislation.gov.hk/hk/cap213!en>
- xi Government's reply to the Committee on the Elimination of Discrimination Against Women, Paragraph 30-21, 14 August 2014, paragraph 30 of the Government's reply to the Committee on the Elimination of Discrimination Against Women <https://undocs.org/en/CEDAW/C/CHN/Q/7-8/Add.1>
- xii The Duty Lawyer Scheme, Standard List of Offences http://www.dutylawyer.org.hk/en/doc/Standard_List_of_Offences.pdf
- xiii <http://www.dutylawyer.org.hk/en/duty/magistrates.asp>
- xiv The Duty Lawyer Service, Free Legal Advice Scheme <http://www.dutylawyer.org.hk/en/free/free.asp>
- xv FAQ of the Legal Aid Department, <https://www.lad.gov.hk/eng/las/faq.html>
- xvi Adapted from "Guidance to an Arrested Person on Arrest and Detention" https://www.immd.gov.hk/pdf/arrestguide_en.pdf
- xvii Immigration Service (Treatment of detained persons) Order (Cap 115, S35 (1)) <https://www.elegislation.gov.hk/hk/cap115E>
- xviii Immigration Service (Treatment of detained persons) Order (Cap 331, Section 13A) <https://www.elegislation.gov.hk/hk/cap331C>
- xix Immigration Department, "Immigration Department Complaint Mechanism" (November, 2020). Available at https://accessinfo.hk/en/request/immigration_department_complaint#incoming-1499 as referenced by Justice Centre Hong Kong in the Parallel report to the Committee on the Elimination of Discrimination against Women Complimenting the ninth periodic report submitted by Hong Kong, China February 2021, https://www.justicecentre.org.hk/framework/uploads/2021/02/Justice-Centre-Hong-Kong-CEDAW-Lol-submission_updated.pdf
- xx JP Annual Report for 2019 https://www.info.gov.hk/jp/files/anreport19_eng.pdf
- xxi Office of the Ombudsman Hong Kong, How to Lodge A Complaint, https://www.ombudsman.hk/en-us/how_to_lodge_a_complaint.html
- xxii <https://www.facebook.com/pages/category/Political-Organization/CIC-Detainees-Rights-Concern-Group-108829650717736/>
- xxiii Adapted from the Right to Remain Toolkit on Immigration Detention, A Guide to the UK Immigration and Asylum System <https://righttoremain.org.uk/toolkit/detention/>