



Australian Government
Refugee Review Tribunal

Country Advice Hong Kong

China – Hong Kong – HKG36187 –
Christians – Returnees – Overseas criminal
convictions
1 March 2010

1 Please give an update on the position of Christianity in Hong Kong.

The government of the People's Republic of China does not have jurisdiction over religious practice in Hong Kong. The *Basic Law of the Hong Kong Special Administrative Region* is the constitutional document for the Hong Kong Special Administrative Region (HKSAR) and has been in effect since 1 July 1997¹. Of general relevance to the status of religious freedom, Articles 4-5 of the Basic Law stipulate that the HKSAR "shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law" and that "the previous capitalist system and way of life shall remain unchanged for 50 years".²

The *Basic Law of the Hong Kong Special Administrative Region* also specifically stipulates that Hong Kong residents shall have freedom of religious belief and freedom to participate in religious activities. Article 32 of the Basic Law states:

Article 32

Hong Kong residents shall have freedom of conscience.

Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.³

Further to this, Article 141 proscribes restriction, by the government, of religious belief or religious activity which does not contravene the laws of the Region.⁴

The US Department of State's 2009 report on religious freedom in China observed that the Basic Law of the HKSAR "provides for freedom of religion, and other laws and policies contributed to the generally free practice of religion", and that "approximately 43 per cent of the population practices some form of religion", including an estimated 350,000 Protestant Christians, 450,000 Roman Catholics and 4,600 Jehovah's Witnesses.⁵

¹ 'Some facts about the Basic Law' 2008, The Basic Law website, 17 March

<http://www.basiclaw.gov.hk/en/facts/index.html> – Accessed 18 February 2010 – Attachment 1.

² 'Basic Law Full Text – Chapter I: General Principles' 2008, The Basic Law website, 17 March

http://www.basiclaw.gov.hk/en/basiclawtext/chapter_1.html – Accessed 18 February 2010 – Attachment 2.

³ 'Basic Law Full Text – Chapter III: Fundamental Rights and Duties of the Residents' 2008, The Basic Law website, 17 March http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html – Accessed 19 February 2010 – Attachment 3.

⁴ 'Basic Law Full Text – Chapter VI: Education, Science, Culture, Sports, Religion, Labour and Social Services' 2008, The Basic Law website, 17 March http://www.basiclaw.gov.hk/en/basiclawtext/chapter_6.html – Accessed 18 February 2010 – Attachment 4.

⁵ US Department of State 2009, *International Religious Freedom Report 2009 – China*, October – Attachment 5.

The report further observed that “[t]he Basic Law provides for freedom of religion, and the Bill of Rights Ordinance prohibits religious discrimination by the HKSAR Government” and that, in the period covered by the report, there had been “no reports of societal abuses and discrimination based on religious belief or practice”.⁵

A broader search of the sources consulted found no information to indicate that freedom of Christian religious belief and lawful practice is restricted in the HKSAR.

2 Please provide information on the Chinese government’s position in relation to persons convicted of a crime overseas.

The *Criminal Law of the People’s Republic of China* allows the re-prosecution of an offence committed outside of the territory of the People’s Republic of China. However, decisions to re-prosecute are discretionary and the circumstances under which a returning national would be punished in China for a crime committed elsewhere and for which he had already been punished are not stipulated.

Articles 7 and 10 of the general provisions in Part 1 of the *Criminal Law of the People’s Republic of China* relevantly state:

Article 7

This law is applicable to PRC citizens who commit the crimes specified in this law outside the territory of the PRC; but those who commit the crimes, provided that this law stipulates a minimum sentence of less than a three-year fixed-term imprisonment for such crimes, may not be dealt with.

...

Article 10

Any person who commits a crime outside PRC territory and according to this law bear criminal responsibility may still be dealt with according to this law even if he has been tried in a foreign country; however, a person who has already received criminal punishment in a foreign country may be exempted from punishment or given a mitigated punishment.⁶

Crimes relating to drug trafficking are covered in Section 7 of the *Criminal Law of the People’s Republic of China*.⁶

In December 2008, the Country Information Service of the Department of Immigration and Citizenship sought advice from the Australian Department of Foreign Affairs & Trade (DFAT) regarding any known examples, since 2005, of prosecution by the Chinese authorities of returnee nationals who had been convicted and sentenced abroad for serious crimes. DFAT advised, in part:

As mentioned in reftel, China does not apply the principle of double jeopardy – returnees can be tried for offences they committed and served sentences for in Australia.

Post has no first-hand information on examples, since 2005, of prosecutions by the Chinese authorities of returned PRC nationals who had previously been sentenced and convicted overseas for serious crimes.

⁶ *Criminal Law of the People’s Republic of China* (Promulgated 14 March & Effective 1 October 1997), AsianLII website, <http://www.asianlii.org/cgi-bin/disp.pl/cn/legis/cen/laws/cl104/cl104.html?query=^guanzhi> – Accessed 17 February 2010 – Attachment 6.

Post is aware of examples where PRC nationals, who had previously been convicted and sentenced abroad, were detained for questioning by PRC authorities. Under normal circumstances, the maximum detention period is fifteen days, though this can be extended, depending on the circumstances of the case.⁷

The UK Home Office's *Country of Origin Information Report – China*, released in January 2010, cited advice from the UK Foreign & Commonwealth Office of 15 July 2005 which stated, in part:

The circumstances under which an individual would be punished in China for a crime committed in a foreign country for which he had already been punished in that country are unstipulated. The Chinese authorities are most likely to take this action if the crime had received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of. Our Embassy in Beijing is unaware of such instances. The specific inclusion in the Criminal Law of 'exemptions' from second punishment in China for crimes committed abroad suggests that the authorities would not take further action against ordinary criminal offences.⁸

The UK Home Office's *Operational Guidance Note – China* released in June 2009 provided advice on "double jeopardy" amongst other main categories of claims for asylum, and noted, in conclusion:

The Chinese legal system allows for double jeopardy in which Chinese citizens can be punished/imprisoned on return to China for crimes they have committed and been punished for in other countries. However, the IAT found in **JC (double jeopardy: Art 10 CL) China CG [2008] UKIAT 00036** [sic] that the use of the legal provisions is discretionary and extremely rare. Without particular aggravating factors, the risk falls well below the level required to engage international protection under the Refugee Convention or the ECHR. The risk of prosecution should be considered on the individual circumstances of a case and case owners should have particular regard to the factors set out at Paragraph 273 (19) of the determination.⁹

The United Kingdom Asylum and Immigration Tribunal (UKAIT) case cited in the *Operational Guidance Note – China* includes 24 pages of expert evidence, including academic and legal opinion on the likelihood of further punishment of a returnee who had been convicted and punished for a crime committed abroad. That evidence included a report by Professor Michael J E Palmer, a senior Professor of Law with the School of Oriental and African Studies at the University of London, referred to at paragraphs 76-88 of the decision. Professor Palmer is cited as having stated that an absence of reported cases of re-prosecution under Article 10 of the revised Criminal Law "reflects, in my view, not an absence of such cases but, rather, a problem of reporting – reflecting in part the problem of the secrecy that pervades important areas in the operation of the legal system in the PRC".¹⁰

The evidence of Professor Fu Hua Ling, an Associate Professor at Hong Kong University, was considered at paragraphs 151-176 of the UKAIT decision. Professor Fu is cited as having observed, in part:

⁷ DIAC Country Information Service 2009, *Country Information Report No. 09/04 – Double Jeopardy for serious crimes in China* (sourced from DFAT advice of 22 January 2009), 29 January – Attachment 7.

⁸ UK Home Office 2010, *Country of Origin Information Report – China*, January – Attachment 8.

⁹ UK Home Office 2009, *Operational Guidance Note – China*, 10 June – Attachment 9.

¹⁰ UK Asylum and Immigration Tribunal 2008, *JC (double jeopardy: Art 10 CL) China CG [2008] UKAIT 00036* – Attachment 10.

5. The rationale behind Article 10 of the CL is that China, as a sovereign state, refuses to recognize foreign penal judgments unless such recognition arises in accordance with any international agreement which China has signed. The rule against double jeopardy does not apply in China in principle.

...

7. Article 10 is intended to avoid a situation in which a foreign court treats a Chinese offender with undue lenience. The article gives the procuracy the discretion to prosecute or not to prosecute a Chinese citizen who was tried by a foreign court for an offence committed overseas depending on the seriousness of the offence committed and penalties imposed by the foreign courts. The Chinese procuracy may re-prosecute the offender for the same offence to compensate for the undue lenience. The same article also authorizes the court to exempt the offender, when re-prosecuted, from any further punishment in China and give only mitigated penalties depending on the seriousness of the overseas offence and the severity of the overseas penalty.¹⁰

However, Professor Fu also observed:

As a result of the enhanced international cooperation in criminal matters, China has also agreed to comply with the rule against double jeopardy where there are bi-lateral treaties in place. It is therefore increasingly unlikely that China will re-prosecute offences that have occurred overseas...¹⁰

Australia has had a bilateral extradition treaty with China since September 2007.¹¹

3 Please provide information on the Hong Kong government's position in relation to persons convicted of a crime overseas.

The legal principle of double jeopardy was considered in a 2001 report published by the Legislative Council Secretariat of the government of the HKSAR, which stated at paragraph 5.59:

Section 11(6) of the *Hong Kong Bill of Rights Ordinance* provides that “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong”. The common law principle as applied in Hong Kong also stipulates that so long as the relevant foreign court has exercised valid jurisdiction over the defendant, then the defendant cannot be tried in Hong Kong for the same offence regardless of whether or not he was convicted or held not guilty by the foreign court.¹²

Information on the HKSAR Department of Justice website indicates that the national laws of the PRC relating to criminal offences and punishments in matters relating to drug trafficking are not applicable in the HKSAR and that Hong Kong's common law system remains extant. The HKSAR Department of Justice website also indicates that:

¹¹ Zhu Xiaolei 2008, ‘To Catch a Thief’, *Beijing Review*, 7 June http://www.bjreview.com.cn/world/txt/2008-06/07/content_126045.htm – Accessed 1 March 2010 – Attachment 11.

¹² Chau, Pak-kwan and Lam, Stephen 2001, ‘Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders’, Legislative Council website, March <http://www.legco.gov.hk/yr00-01/english/library/erp05.pdf> – Accessed 23 February 2010 – Attachment 12.

Courts in the HKSAR exercise independent judicial power, including the power of final adjudication. They are not subject to a superior court in the Mainland. In other words, judgments of Mainland courts are not binding on the courts of the HKSAR. Moreover, law enforcement departments of the Mainland cannot exercise any jurisdiction in the HKSAR.¹³

Further to the common law requirement to not retry, the HKSAR is a signatory¹⁴ to the International Covenant on Civil and Political Rights (ICCPR) which states at Article 14(7):

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.¹⁵

No information was found to indicate that Hong Kong has failed to meet its obligations under Article 14(7) of the ICCPR.

List of Sources Consulted

Internet Sources:

Government Information & Reports

UK Foreign & Commonwealth Office website <http://www.fco.gov.uk>

UK Home Office website <http://www.homeoffice.gov.uk/>

US Department of State website <http://www.state.gov/>

United Nations (UN)

UN High Commissioner for Refugees (UNHCR) Refworld

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>

Non-Government Organisations

Amnesty International website <http://www.amnesty.org>

Freedom House website <http://www.freedomhouse.org>

Human Rights Watch website <http://www.hrw.org>

International News & Politics

BBC News <http://news.bbc.co.uk>

South China Morning Post <http://www.scmp.com>

Topic Specific Links

Department of Justice website <http://www.doj.gov.hk/eng>

Government of Hong Kong website <http://www.gov.hk/en>

Hong Kong Lawyer website http://www.hk-lawyer.com/InnerPages_features/0/1474/2009/11

Hong Kong Legal Information Institute website <http://www.hklii.org/>

Law Reform Commission of Hong Kong website

http://www.hkreform.gov.hk/en/members/double_jeo.htm

Legislative Council website <http://www.legco.gov.hk>

Security Bureau website <http://www.sb.gov.hk/eng>

The Basic Law website <http://www.basiclaw.gov.hk/en>

Search Engines

Copernic <http://www.copernic.com/>

¹³ 'The Legal System in Hong Kong' 2009, Government of the Hong Kong Special Administrative Region – Department of Justice website, 7 October <http://www.doj.gov.hk/eng/legal/index.htm#17> – Accessed 23 February 2010 – Attachment 13.

¹⁴ 'List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region' 2009, International Law Division, Department of Justice, 11 December <http://www.legislation.gov.hk/interlaw.htm> – Accessed 23 February 2010 – Attachment 14.

¹⁵ International Covenant on Civil and Political Rights, Office of the United Nations High Commissioner for Human Rights website <http://www2.ohchr.org/english/law/ccpr.htm> – Accessed 23 February 2010 – Attachment 15.

Databases:

FACTIVA (news database)

BACIS (DIAC Country Information database)

REFINFO (IRBDC (Canada) Country Information database)

ISYS (RRT Research & Information database, including Amnesty International, Human Rights Watch, US Department of State Reports)

MRT-RRT Library Catalogue

Attachments

1. 'Some facts about the Basic Law' 2008, The Basic Law website, 17 March
<http://www.basiclaw.gov.hk/en/facts/index.html> – Accessed 18 February 2010.
2. 'Basic Law Full Text – Chapter I: General Principles' 2008, The Basic Law website, 17 March
http://www.basiclaw.gov.hk/en/basiclawtext/chapter_1.html – Accessed 18 February 2010.
3. 'Basic Law Full Text – Chapter III: Fundamental Rights and Duties of the Residents' 2008, The Basic Law website, 17 March
http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html – Accessed 19 February 2010.
4. 'Basic Law Full Text – Chapter VI: Education, Science, Culture, Sports, Religion, Labour and Social Services' 2008, The Basic Law website, 17 March
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5. US Department of State 2009, *International Religious Freedom Report 2009 – China*, October.
6. *Criminal Law of the People's Republic of China (Promulgated 14 March & Effective 1 October 1997)*, AsianLII website, <http://www.asianlii.org/cgi-bin/disp.pl/cn/legis/cen/laws/cl104/cl104.html?query=^guanzhi> – Accessed 17 February 2010.
7. DIAC Country Information Service 2009, *Country Information Report No. 09/04 – Double Jeopardy for serious crimes in China* (sourced from DFAT advice of 22 January 2009), 29 January. (CISNET People's Republic of China CX219269)
8. UK Home Office 2010, *Country of Origin Information Report – China*, January.
9. UK Home Office 2009, *Operational Guidance Note – China*, 10 June.
10. UK Asylum and Immigration Tribunal 2008, *JC (double jeopardy: Art 10 CL) China CG [2008] UKAIT 00036*. (CISNET CISLib)
11. Zhu Xiaolei 2008, 'To Catch a Thief', *Beijing Review*, 7 June
http://www.bjreview.com.cn/world/txt/2008-06/07/content_126045.htm – Accessed 1 March 2010.

12. Chau, Pak-kwan and Lam, Stephen 2001, 'Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders', Legislative Council website, March <http://www.legco.gov.hk/yr00-01/english/library/erp05.pdf> – Accessed 23 February 2010.
13. 'The Legal System in Hong Kong' 2009, Government of the Hong Kong Special Administrative Region – Department of Justice website, 7 October <http://www.doj.gov.hk/eng/legal/index.htm#17> – Accessed 23 February 2010.
14. 'List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region' 2009, International Law Division, Department of Justice website, 11 December <http://www.legislation.gov.hk/interlaw.htm> – Accessed 23 February 2010.
15. International Covenant on Civil and Political Rights, Office of the United Nations High Commissioner for Human Rights website <http://www2.ohchr.org/english/law/ccpr.htm> – Accessed 23 February 2010.