Chinese Asylum Applications under U.S. Immigration Policy: Firm Resettlement in Hong Kong

Frannie S. Mok
Chinese Asylum Applications under U.S. Immigration Policy: “Firm Resettlement” in Hong Kong

By Frannie S. Mok*

I. INTRODUCTION

The United States Immigration and Naturalization Services (INS) has a wide range of discretionary power in allowing aliens to enter the United States as well as in granting them permanent residency.1 “Firm resettlement” is one of the discretionary devices often used by the INS to deny asylum applications.2 Firm resettlement occurs when an alien stays in a third country before applying for asylum even though the alien may not be able to obtain a permanent resident status in that country. Under current immigration law, an asylum officer or immigration judge will deny an asylum application if it is determined that an applicant has been firmly resettled in a third country before applying for asylum in the United States.3

Although the use of firm resettlement as a factor in denying asylum applications is not limited to applicants from a specific country, the author has chosen to focus on Chinese applicants to illustrate the problems arising from the application of firm resettlement. Specifically, this Note focuses on the INS denial of asylum applications from Chinese citizens who temporarily stayed in Hong Kong before submitting their applications. Part II of this Note examines the current United States asylum policy and compares the standard of proof required for asylum to the similar but different standard used to with-
hold deportation. The section then outlines the authorities for using firm resettlement as a basis for denying asylum applications. Part III discusses the immigration policy of Hong Kong. In particular, illegal entrants have no statutory asylum rights in Hong Kong. Therefore, legal residence is rarely granted to illegal aliens from China. This situation is further complicated by the fact that in 1997 the British government will return the sovereignty of Hong Kong to China. Due to this uncertain future, Hong Kong is currently very unstable politically and economically. Finally, Part IV argues that the INS should not deport Chinese asylees to Hong Kong without regard for the asylees' illegal status in Hong Kong because such deportation would render the asylees stateless and provide them with no physical or legal security.

II. U.S. IMMIGRATION POLICY

A. Asylum & Refugees


The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.\footnote{Refugee Act §201(b), U.S.C. § 1158(a), (emphasis added).}

1. Definition of Refugee

The U.S. ratified the 1967 United Nations Protocol Relating to the Status of Refugees\footnote{Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268 [hereinafter Protocol]. The Protocol is a confirmation of the 1951 U.N. Convention. Convention, infra note 8. The only important difference is that the Protocol makes the Convention applicable to all refugees, not only to those who became refugees "as a result of events occurring before January 1, 1951" which had been a limitation on the definition of a refugee in the Convention.} in 1968,\footnote{Sajid Qureshi, Opening the Floodgates? Eligibility for Asylum in the U.S.A. and the U.K., 17 ANGLO-AM. L. REV. 83, 87 (1988).} and the Refugee Act subsequently adopted the definition of refugee as stated in the 1951 United Nations
Convention Relating to the Status of Refugees ("Convention"). Section 1101(a)(42)(A) of the Immigration and Nationality Act (INA) defines a refugee as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of, the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.9

The applicant bears the burden of establishing that he is a refugee as defined by the Act.10

2. Well-Founded Fear of Persecution

The first step in establishing eligibility for relief requires an alien to show persecution on account of one or more of five reasons: race, religion, nationality, membership in a particular social group, or political opinion.11 The alien must then establish that there is a well-founded fear of persecution in the future if the alien returns to the country.12 To establish a “well-founded fear” of persecution, an alien must meet a hybrid standard consisting of both a subjective and an objective component.13 The alien needs to demonstrate a subjective fear of persecution based on objective evidence proving either past persecution14 or good reason to fear future persecution.15 The objec-

---


9. 8 U.S.C. § 1101(a)(42)(A) (1988). Compare with the definition of refugee in the Convention, which states: “the term to any person who: . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention, supra note 8, at 152.

10. 8 C.F.R. § 208.13(a) (1992).


12. Id.

13. See Garcia-Ramos v. INS, 775 F.2d 1370 (9th Cir. 1985).


15. Ayala-Lopez v. INS, 907 F.2d 154, 155 (9th Cir. 1990) (quoting Vilorio-Lopez v. INS, 852 F.2d 1137, 1140 (9th Cir. 1988)).
tive component may be proved by affidavits, journalistic accounts of other examples of persecution in the country involved, or testimony corroborating the alien's claim. If an alien enters the United States for reasons other than genuine fear of persecution, such as economic opportunities, to avoid the draft, or avoid criminal prosecution, asylum will not be granted.

3. The "Handbook"

In determining whether a genuine case of persecution exists, courts have followed the analysis set forth in the Handbook on Procedures and Criteria for Determining Refugee Status. The Handbook provides significant guidance and an internationally recognized interpretation of the Protocol. For instance, in Matter of Acosta, the Board of Immigration Appeals (BIA) followed the Handbook's definition of a refugee which required personal "fear," or a genuine apprehension or awareness of danger in another country, to be a person's primary motivation for seeking refugee status. The BIA found that no other motivation, including dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, could satisfy the definition of a refugee.

The Salvadoran asylum applicant in Acosta formed a cooperative organization of taxi drivers of about 150 members in 1976. In 1978, the cooperative and its drivers began receiving requests from anti-government guerrillas for work stoppages. Beginning in 1979, taxis were seized and burned and drivers were assaulted or killed.

The BIA followed the Handbook's guidelines and applied the fear standard in holding that the alien's fear was not well-founded because he failed to show that the guerrillas' persecution of taxi drivers occurred throughout the entire country of El Salvador, instead of only occurring in the city where the alien resided.

---

16. Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986).
20. Id. at 221-22.
21. Id. at 216.
22. Id.
23. Id.
24. Id. at 235-36.
4. Department of State Advisory Opinions

Meeting the definition of refugee does not automatically entitle an alien to asylum. The decision to grant a particular application rests in the discretion of the immigration judge or asylum officer. The INS is required by regulations to obtain an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State before any hearings. The advisory opinions give the District Directors of the INS information regarding the aliens and the political conditions in the aliens' countries. An immigration judge's refusal to request a responsive advisory opinion from the Bureau will constitute an abuse of discretion.

The Bureau at its option may issue a non-binding comment that will be considered by the Asylum Officer, together with any other credible evidence, in deciding the outcome of an asylum application. While an asylum application is technically non-appealable, the alien may nevertheless renew the application in an exclusion or deportation hearing. An exclusion hearing is initiated when the INS files a notice to a previously detained applicant for a hearing before an immigration judge. A deportation hearing is initiated by filing an order to show cause with an immigration judge. The renewed application is then appealable to BIA and reviewable by United States Courts of Appeals.

5. "Totality of Circumstances" Test

The BIA has adopted a "totality of the circumstances" test in determining whether asylum will be granted. The main factors are set forth in Matter of Pula. The asylum applicant in Pula was born in

29. 8 C.F.R. § 208.12(a) (1992).
30. 8 C.F.R. § 208.18(b) (1992).
31. Id.
32. 8 C.F.R. § 3.14(a) (1992).
33. Id.
34. 8 C.F.R. § 208.18(d) (1992).
Albania and fled to Yugoslavia in 1966. In determining whether asylum should be granted, the BIA set forth the following nine factors for consideration:

1. whether the applicant passed through any other country or arrived in the United States directly from his home country;
2. whether orderly refugee procedures were available in the third country;
3. the length of time the applicant remained in the third country;
4. the applicant's living conditions, safety and potential for long-term residency in the third country;
5. whether the applicant has relatives legally in the United States or has other personal ties in the United States motivating his desire to seek asylum here;
6. the applicant's ties to any other country where he does not fear persecution;
7. the seriousness of the applicant's fraud if he engaged in fraud to circumvent refugee procedures;
8. general humanitarian considerations such as the alien's tender age or poor health; and
9. whether discretionary factors should be weighed in light of the unusual harsh consequences of deportation where the applicant has met his burden for asylum but not for withholding of deportation.

After careful evaluation of all the factors in the applicant's situation, the BIA held that the applicant should be granted asylum.

B. Withholding of Deportation

Under United States immigration regulations, the Attorney General may not deport an alien if there is a high probability that the alien will be persecuted in the proposed country of deportation. Prior to 1968, the Attorney General had discretion to grant withholding of deportation to aliens under section 243(h) of INA. However, in 1968, the United States agreed to comply with the substantive provisions of the Convention (the counterpart of section 243(h) of the U.S. statute). This section imposes a mandatory duty on contracting states not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated reasons. 8 U.S.C. § 1253(h) (1952).

37. Id. at 468.
38. Id.
39. Id. at 473-74.
40. Id. at 474-75.
41. Section 243(h) of the INA provides that an alien shall not be returned to a country where his life or freedom would be threatened on account of one of the enumerated reasons. 8 U.S.C. § 1253(h) (1952).
42. Cardoza-Fonseca, 480 U.S. at 429.
threatened on account of one of the enumerated reasons.\textsuperscript{43} The statutory language embodies the language of the Convention on \textit{non-refoulement},\textsuperscript{44} which states that "no contracting State shall expel or return (\textit{refouler}) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."\textsuperscript{45} This deportation relief protecting against deportation to a specific country is mandatory to qualified applicants.\textsuperscript{46}

\textbf{1. Burden of Proof}

The burden of proof is on the applicant to establish that "his life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion."\textsuperscript{47} The applicant's life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on one of these five grounds.\textsuperscript{43} If the applicant is found to have suffered persecution in the past, it is presumed that his life or freedom would be threatened on return to that country.\textsuperscript{49}

The respondent in \textit{Matter of Lam} fled from the People's Republic of China (PRC) to Macau and entered Hong Kong secretly in 1961.\textsuperscript{50} He entered the United States in 1974 as a nonimmigrant crewman using a Hong Kong seaman's book.\textsuperscript{51} The immigration judge denied Lam's applications for asylum and voluntary departure.\textsuperscript{52} However, the immigration judge withheld deportation to the PRC, and Lam was

\textsuperscript{43} Id.
\textsuperscript{44} \textit{Non-refoulement} is defined as a "fundamental humanitarian principle under which a refugee should not be forcibly returned to a county where he is likely to suffer political persecution." Roda Mushkat, \textit{Refugees in Hong Kong: Legal Provisions and Policies}, 10 H.K.L.J. 169, 176 (1980).
\textsuperscript{45} Convention, \textit{supra} note 8, 19 U.S.T. at 6276. "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the country." \textit{Id.}
\textsuperscript{46} 8 C.F.R. § 208.16(c)(1) (1992).
\textsuperscript{47} 8 C.F.R. § 208.16(b) (1992).
\textsuperscript{48} 8 C.F.R. § 208.16(b)(1) (1992).
\textsuperscript{49} 8 C.F.R. § 208.16(b)(2) (1992).
\textsuperscript{50} \textit{Matter of Lam}, 18 I. & N. Dec. 15, 16 (1981).
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
ordered to be deported to Hong Kong instead. The BIA held that Lam was never physically persecuted in Hong Kong, and his fear that Hong Kong would be taken over by the communists was purely speculative and, therefore, insufficient to warrant a grant of section 243(h) relief as to Hong Kong. The case was remanded on the issue of whether Lam was firmly resettled in Hong Kong.

2. Asylum v. Withholding of Deportation

An application for asylum is also deemed to constitute an application for the withholding of deportation. Although the two paths are closely related and appear to overlap, they involve different procedures, provide different forms of relief, and place different burdens of proof on the alien. Under the current law, asylum applies to a broad class of refugees who are eligible for discretionary relief, whereas withholding of deportation applies to a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger. An alien granted asylum may apply for adjustment of status after one year, whereas an alien who has only been granted withholding of deportation has no such means available for becoming a permanent resident.

The Supreme Court in INS v. Cardoza-Fonseca held that the well-founded fear standard for asylum is more generous than the clear probability standard that governs withholding of deportation proceedings. As the Court mentioned, "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." currently, there is no definite standard for "well-founded fear" and courts have given meaning to the standard through a process of case-by-case adjudication. If an asylum application is denied but the application for withholding of deportation to a specific country is granted, the immigration judge may order deportation to the country of firm resettlement or another

53. Id.
54. Id. at 20.
55. Id. See infra text accompanying notes 65-118.
56. 8 C.F.R. § 208.3(b) (1991).
57. Cardoza-Fonseca, 480 U.S. at 424.
60. Cardoza-Fonseca, 480 U.S. at 431.
61. Id.
62. Id. at 448.
designated country for which the order of withholding does not apply.\(^63\)

As mentioned above, asylum is a type of discretionary relief whereas withholding of deportation is a type of mandatory relief. However, there are several enumerated situations in which an immigration judge or asylum officer must deny an asylum application. These situations include: (1) the alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community; (2) the applicant has been "firmly resettled" in a third country; or (3) there are reasonable grounds for regarding the alien as a danger to the security of the U.S.\(^64\)

C. Firm Resettlement

Firm resettlement occurs when an alien "prior to arrival in the United States, entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."\(^65\) The rationale behind firm resettlement is that Congress did not intend that an alien, though formerly a refugee, would be considered a refugee for the purpose of gaining entry into the United States after the alien has established roots or acquired a residence in a third country.\(^66\) The Supreme Court first considered the issue of firm resettlement in *Rosenberg v. Woo.*\(^67\) In that case, Yee Chien Woo had fled mainland China in 1959 and resided with his family in Hong Kong until 1968.\(^68\) He later came to the United States as a business visitor and sought classification as a refugee.\(^69\) The Supreme Court held that firm resettlement was relevant in determining the availability of asylum to an alien.\(^70\)

In *Matter of Ng*, Ng fled the PRC to Macao in 1965 and was smuggled into Hong Kong in 1969.\(^71\) He successfully obtained a Hong


\(^{64}\) 8 C.F.R. § 208.14(c)(1)-(3) (1991).

\(^{65}\) 8 C.F.R. § 208.15 (1991) (emphasis added).


\(^{67}\) Woo, 402 U.S. at 49.

\(^{68}\) *Id.* at 50.

\(^{69}\) *Id.*

\(^{70}\) *Id.* at 56.

\(^{71}\) Matter of Ng, 17 L & N. Dec. 536, 537 (BIA 1980).
Kong identity card\textsuperscript{72} under his brother's name.\textsuperscript{73} He was paroled into the United States as a refugee in San Francisco in 1977.\textsuperscript{74} When the deception was discovered in 1979, Ng's parole was revoked and exclusion proceedings were initiated against him.\textsuperscript{75} On appeal, the BIA held that if Ng had been firmly resettled in Macao, his failure to disclose his true identity would constitute a material misrepresentation since it would have concealed his ineligibility for refugee status.\textsuperscript{76}

Although it is deemed a form of mandatory denial of asylum, "firm resettlement" actually is a discretionary device. The determination of whether an alien has been firmly resettled in a third country has been and is subject to a discretionary interpretation. As the BIA noted, "the question of firm resettlement is one of fact."\textsuperscript{77}

Moreover, the definition for firm resettlement in the regulations appears to have been developed from case law. The immigration authorities and federal courts have balanced the length of residency against other factors indicating the security and permanency of residence. As one court stated, "the test is whether it appears from all the circumstances that [the asylee] has found shelter in that [third] country, such that he is no longer in flight to avoid persecution."\textsuperscript{78} Following the Supreme Court's decision in \textit{Woo}, courts have found factors such as an alien's legal status, economic status, and family ties germane to the determination of firm resettlement.

\textbf{1. Length of Residency and Employment in Third Country}

In evaluating the issue of firm resettlement, the length of one's residency in a third country is a relevant factor, although it may not be the sole determinative factor. Additionally, the fact that an alien is able to obtain employment in a third country strongly suggests that he has been firmly resettled there.

\textsuperscript{72} "A Hong Kong Identity Card merely has a person's name, photograph, date of birth or age, a number and reference to nationality. It is a card required of all persons in Hong Kong pursuant to the Registration of Persons Ordinance of 1960. It is not a travel document and confers no residence privileges." Chinese Am. Civil Council v. Attorney Gen. of U.S., 566 F.2d 321, 323 n.2 (D.C. Cir. 1977).

\textsuperscript{73} Matter of Ng, 17 I. & N. Dec. at 537.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 538.

\textsuperscript{77} Matter of Lam, 18 I. & N. Dec. at 19.

\textsuperscript{78} Chan, 454 F. Supp. at 36 (citing \textit{Woo}, 402 U.S. at 56-57).
For instance, the alien in *Matter of Sun* fled the PRC and entered Taiwan as a refugee in 1949.\textsuperscript{79} He was a member of the Taiwanese Armed Forces until 1962.\textsuperscript{80} After his discharge, he was employed in Taiwan from 1962 to 1965.\textsuperscript{81} The BIA found that the alien had been firmly resettled in Taiwan because he had all the rights of residence and employment there and could no longer claim that he was fleeing from persecution.\textsuperscript{82}

The BIA also applied the same length of stay and employment tests in a 1967 case, *Matter of Moy*, and a subsequent case, *Matter of Soleimani*. The applicant in *Moy* fled the PRC in 1949 at the age of seventeen and remained in Hong Kong as a student.\textsuperscript{83} In 1956 he went to Colombia for employment.\textsuperscript{84} He was first admitted to the United States in 1958 as a visitor, then as a nonimmigrant student.\textsuperscript{85} The BIA, in denying the application, held that Moy had been firmly resettled in Colombia because he was engaged in a farming partnership there that owned land.\textsuperscript{86}

In *Matter of Soleimani*, the applicant was a citizen of Iran who left her country and entered Pakistan without a visa in 1981.\textsuperscript{87} She finally flew to Israel after unsuccessful attempts to stay in Greece and Italy.\textsuperscript{88} The applicant intended to remain in Israel until the situation in Iran improved.\textsuperscript{89} However, she never worked or owned property in Israel and was never offered an Israeli citizenship or resident status.\textsuperscript{90} The BIA reversed the immigration judge's denial of asylum and held that the alien's temporary stay in Israel did not constitute a firm resettlement because she stayed there for only ten months and never worked or sought employment during that period of time.\textsuperscript{91}

2. *Parents' Status Imputed to Minor Asylees*

The immigration authorities and courts have occasionally determined a minor's residence by referring to the status of the minor's
parents. The applicant in *Matter of Hung* had fled the PRC in 1949 with her parents at the age of seven when the Communists took over their district. She resided in Hong Kong for six or seven years before coming to the United States as a non-immigrant student. A few years later, her family was admitted to the United States under the Hong Kong Parolee Program, and their status was subsequently adjusted to that of permanent residents. The BIA held that the applicant had not been firmly resettled in Hong Kong. Moreover, the applicant was qualified for refugee status because when she entered the United States, she was an unemancipated minor and was a member of the household of her parents whose refugee status had been recognized by the INS.

The BIA applied similar reasoning in *Matter of Ng*. In this case, Ng fled the PRC in 1949 or 1950 with his family when he was about eleven years old. He then resided in Hong Kong until 1962 before entering the United States as a student. The BIA indicated that although Ng held a Hong Kong Certificate of Identity and a Hong Kong Identity Card, the possession of such documents was not conclusive evidence of firm resettlement. Instead, the court resolved the case based on the residency of Ng’s father. The court held that Ng was ineligible for refugee status because he had been firmly resettled in Hong Kong when his father, owner of an import-export business in Hong Kong, had been firmly resettled there prior to his entry into the United States.

3. Possession of Travel Document from Third Country

As seen from *Ng*, the possession of a travel document for return to a third country is not conclusive evidence of resettlement in

---

93. *Id.* at 181.
94. *Id.*
95. *Id.*
96. *Id.*
98. *Id.* at 411.
99. *Id.*
100. A Hong Kong Certificate of Identity is the equivalent of a passport; whereas a Hong Kong Identity Card is not a travel document and confers no residence privileges. *Chinese Am. Civil Council*, 566 F.2d at 322 n.2.
102. *Id.*
103. *Id.*
the third country. This theory is also apparent in Matter of Chai.\textsuperscript{104} The applicant in Chai fled the PRC to Hong Kong in 1955 when he was fifteen years old.\textsuperscript{105} He remained in Hong Kong until 1960 when he entered the United States as a student.\textsuperscript{106} The BIA held that he had not been firmly resettled in Hong Kong although he possessed a Hong Kong Certificate of Identity for return to Hong Kong.\textsuperscript{107}

4. Legal Status in Third Country

Finally, the opportunity for an alien to obtain permanent residency in a third country is prima facie evidence that the alien has firmly resettled in that country. In Chinese American Civil Council \textit{v.} Attorney General, the Immigration Officer notified each of the five applicants that since they were eligible for "Chinese resident"\textsuperscript{108} status within the meaning of the Hong Kong Immigration Ordinance, they enjoyed the privilege of unconditional residence and were deemed to be firmly resettled.\textsuperscript{109} The District of Columbia Circuit Court agreed with the INS and affirmed the lower court’s finding that the applicants had been firmly resettled in Hong Kong.\textsuperscript{110} The recent case \textit{Matter of D—L— & A—M—} reaffirms the principle that legal status in the third country is an important factor in establishing whether an alien is firmly resettled.\textsuperscript{111} In that case, the applicants, a husband and his wife, had lived in Spain for six years after fleeing Cuba.\textsuperscript{112} The BIA found that because the applicants had the option to become permanent residents of Spain, they had been firmly resettled there.

The immigration authorities and courts appear to have disregarded the alien’s illegal status in a third country in the determination of the question of firm resettlement. However, current law provides that an asylee may overcome a firm resettlement presumption by establishing that:

\begin{itemize}
  \item 105. \textit{Id.} at 82.
  \item 106. \textit{Id.}
  \item 107. \textit{Id.} at 83.
  \item 108. "The Ordinance accords 'Chinese resident' status to those persons who have legally resided in Hong Kong for 7 or more years and to those persons who have been residing in Hong Kong, whether legally or not, since prior to April 1, 1965." Chinese Am. Civil Council, 566 F.2d at 323 n.5.
  \item 109. \textit{Id.}
  \item 110. \textit{Id.} at 326.
  \item 112. \textit{Id.} at 8-9.
\end{itemize}
his entry into [the third country] was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation; or [t]hat the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled.\textsuperscript{113}

This statutory language suggests that if an alien illegally enters a third country and if the alien is not entitled to a legal residency or work authorization in the third country, the alien should not be considered to have been firmly resettled in that country.

Indeed, one court has held that the fact that an alien who resided in Hong Kong for four years was not a Hong Kong resident was not determinative of whether he had been firmly resettled. In \textit{Chan v. Riley}, Chan fled the PRC in 1969 with his mother and three brothers to join his father who had lived in Hong Kong for over fifteen years.\textsuperscript{114} Chan resided in Hong Kong for four years before entering the United States as a nonimmigrant visitor.\textsuperscript{115} When he entered the United States, he possessed a Hong Kong Certificate of Identity.\textsuperscript{116} The District Court held that the fact that Chan was not considered a Hong Kong resident (under its ordinance requiring a seven-year stay to acquire such status) is not determinative of the firm resettlement issue.\textsuperscript{117} The court further held that the INS was free to consider all the facts in reaching its conclusion.\textsuperscript{118}

\section*{D. Safe Haven}

Similar to firm resettlement, the "safe haven" concept is another discretionary device the INS may use to deny asylum applications.\textsuperscript{119} Although the term is not defined or mentioned in any statute, at least one court has stated that "discretionary denial of [asylum applications] involves refugees who have found a safe haven in another country before entering the United States."\textsuperscript{120} This category of discretionary denial provides a less stringent basis for the INS to deny

\begin{flushleft}
\textsuperscript{113} 8 C.F.R. § 208.15(a)-(b) (1992).
\textsuperscript{114} \textit{Chan}, 454 F. Supp. at 36.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{120} Doherty v. INS, 908 F.2d 1108, 1121 (2d Cir. 1990).
\end{flushleft}
an asylum application. That is, even if the alien is not firmly resettled in a third country, the INS may deny an application based on the safe haven concept.

The safe haven concept is often articulated in advisory opinion letters issued in connection with asylum applicants of Salvadoran and Guatemalan applicants who arrive from Mexico. These letters contain "categorical statements that the applicant has found safe haven in Mexico without any discussion of the conditions under which the applicant lived or of his legal status in Mexico." The "safe haven" concept was also considered in *Diaz v. INS*. The case was brought by a group of aliens, primarily from Central America, who sought permission to work in the United States pending resolution of their applications for political asylum. A Ninth Circuit district court granted a preliminary injunction restraining the District Director from denying work authorizations based on the ground that the asylees gave up a safe haven in a third country (Mexico) before entering the United States.

### III. HONG KONG'S RELATION TO CHINESE ASYLEES

As a practical matter, refugees do not seek asylum until they reach what is perceived as a safe place. Periodic stops do not necessarily mean that the refugee's aim to reach the shores of the destination country, in this case, the United States, has in any sense been abandoned. Congress has recognized the necessity for a refugee to hide in a third country while awaiting the opportunity to apply for asylum. Accordingly, Congress has enacted statutes to grant political asylum to an alien irrespective of his or her illegal status when entering the United States. Hong Kong is a territory where Chinese asylees often find it safe to stay before applying for political asylum to foreign countries because of its proximate location to China and its historical, political, and economic stability.

Hong Kong is a densely populated city situated on the southern coast of the PRC. It enjoys a high standard of living and is seen by many citizens of the PRC as an economic, financial, and industrial

---

121. Miller, *supra* note 119.
122. *Id.* at 47.
124. *Id.* at 641.
125. *Id.* at 657.
126. 8 U.S.C. § 1158(a).
Accordingly, many Chinese citizens seek relocation to Hong Kong, both legally and illegally. For example, a total of 27,826 illegal immigrants entered Hong Kong from mainland China in 1990.127 Refugees fleeing persecution by the Communist Party often temporarily reside in Hong Kong awaiting opportunities to flee to other countries. The task of the immigration authorities is "complicated by the fact that Hong Kong is regarded by the British Government as a colony of the United Kingdom, and by the Chinese Government as an integral part of the People's Republic of China."128

A. Hong Kong Immigration Policy

Hong Kong has been a colony of Great Britain since 1842 when it was ceded by China as a result of the Opium War.129 Hong Kong statutory law is made by the legislature and the Governor of Hong Kong and is interpreted by the Hong Kong courts.130 However, this law and its interpretation are controlled by the British statutory and common law. Immigration control began in 1923 when the Passports Ordinance was enacted.131 After several stages of development and numerous amendments to the regulations, the current immigration policy in Hong Kong was enacted in chapter 15 of the Immigration Ordinance.132

B. Hong Kong Immigration Ordinance

Similar to the rights a U.S. citizen has in our nation, the "Hong Kong permanent resident" enjoys the right of abode in Hong Kong.133 A "Hong Kong permanent resident" is "any person who is wholly or partly of Chinese race and has at any time been ordinarily resident in

130. Peter Wesley-Smith, An Introduction to the Hong Kong Legal System 11 (1987).
131. Chen, supra note 128, at 635.
132. The Immigration Ordinance was first enacted in 1971. After many amendments, the most current edition is L.N. 447 of 1991 [hereinafter Immigration Ordinance].
133. Id. pt. 1A, § 2A.
Hong Kong for a continuous period of not less than seven years." The term "ordinarily resident" is defined as "lawfully ordinarily resident" by Hong Kong courts. The right of abode given to Hong Kong permanent residents includes: (a) the right to land in Hong Kong; (b) the right not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay that is imposed shall have no effect; (c) the right not to have a deportation order made against him; and (d) the right not to have a removal order made against him.

Under the 1989 Immigration (Unauthorized Entrants) Order, any Vietnam or Macau residents or former residents or any citizens of the PRC who leave or seek to leave China and enter Hong Kong without special documents are considered unauthorized entrants to Hong Kong. A "one-way exit permit" is required for a PRC citizen to enter and permanently remain in Hong Kong. Immigrants who obtain this permit are known as "legal immigrants." Furthermore, a person may not land in Hong Kong without the permission of an immigration officer unless he enjoys the right of abode in Hong Kong, has the right to land in Hong Kong as a resident British citizen or a resident United Kingdom belonger, or has the right to land as a member of the crew of an aircraft or as a serviceman. Thus, citizens from the PRC who illegally enter Hong Kong are not considered residents under the Immigration Ordinance.

134. Id. sched. 1. Hong Kong "permanent resident" includes the category of people who were formerly considered "Hong Kong belongers." Hong Kong belongers acquired their status by birth, naturalization, adoption, registration or marriage. See W.S. Clarke, Hong Kong Immigration Control: The Law and the Bureaucratic Maze, 16 H.K.L.J. 342, 343-51 (1986).
136. Immigration Ordinance, pt. IA, § 2A(1).
139. Id.
141. Id. pt. III, § 8. A resident British citizen has a status equal to that of a Chinese resident except that the person comes from the United Kingdom rather than China. Clarke, supra note 134, at 351.
142. Immigration Ordinance, pt. III, § 8. A United Kingdom belonger refers to a citizen of the United Kingdom and Colonies by reason of birth, adoption, naturalization, or registration in the United Kingdom, who has been ordinarily resident in Hong Kong for a continuous period of not less than seven years. Clarke, supra note 134, at 352.
144. Id. § 10.
C. Policy on Illegal Entrants to Hong Kong

1. Statutory Rights for Asylum

Wary of encouraging the flow of illegal immigrants from China, the United Kingdom has not extended to Hong Kong its ratification of the Convention and Protocol. Accordingly, the Immigration Ordinance of Hong Kong does not provide Hong Kong immigration officials with any authority to grant asylum except in a special section granting temporary stay for Vietnamese refugees. Under that section, an immigration officer may permit any person who was previously a resident of Vietnam or who was born after December 31, 1982, and whose father or mother was previously a resident in Vietnam, to remain in Hong Kong as a refugee pending his resettlement elsewhere.

2. Offenses for Illegal Entry

No penalties are imposed by the Hong Kong authorities for illegal entry. However, helping illegal aliens enter Hong Kong is a serious criminal offense. Anyone who provides transportation for, arranges, or assists an unauthorized entrant’s passage to Hong Kong, is subject to a fine of $5 million and imprisonment for life on conviction or is subject to a fine of $100,000 and imprisonment for three years on summary conviction. Similarly, anyone assisting an unauthorized entrant to remain in Hong Kong is liable for a fine of $200,000 and ten years of imprisonment on conviction and is liable for a fine of $100,000 and three years of imprisonment on summary conviction.

3. Removal Order

Since there is no official classification of refugees in Hong Kong, no special protection against expulsion is granted to illegal aliens. A removal order may be made against a person requiring him to leave Hong Kong if the person is an undesirable immigrant who has been ordinarily resident in Hong Kong for less than three years, or if the person has landed in Hong Kong unlawfully, or has contravened a condition of his stay or is not a person who enjoys the right of abode.

145. Mushkat, supra note 44, at 172.
147. Id. pt. VIIA, § 37(C), (D).
148. Id. pt. VIIA, § 37(D)(a).
in Hong Kong. Removal orders are appealable to the Immigration Tribunal, whose decisions are final. However, the immigration official’s exercise of discretion is not subject to review by the Immigration Tribunal.

4. Deportation Order

A deportation order may be made against an immigrant, other than a British citizen or a United Kingdom belonger, if the immigrant has been found guilty in Hong Kong of an offense punishable with imprisonment for at least two years, or if deemed to be conducive to the public good. It appears that whether or not a refugee is “deported” or “removed” from Hong Kong depends on the interpretation given by the authorities to the terms “undesirable” and “public good.” In most cases, the Hong Kong government has followed the humanitarian principle of non-refoulement and not returned a refugee to his country of origin when there is a genuine possibility of persecution.

5. Policy on Search of Illegal Aliens

Due to the significant number of illegal entrants, Hong Kong has adopted strict policies for discovering illegal aliens. In Hong Kong, every person who is over fifteen years old is required to carry an identity card or some other acceptable proof of identity at all times, and to produce such proof of identity on demand by the police or an immigration officer. Failure to present an identity for inspection without reasonable excuse is considered to be a violation of the immigration law and is subject to a fine of $1,000. Strict regulations are also imposed to eliminate unauthorized employment. Any person who is found at a place where employees are in the employment of an employer will be presumed to be an employee of that employer. Employers are required to inspect the employee’s identity before

149. Id. pt. V, § 19(1).
150. Chen, supra note 128, at 661. In other words, whether or not a person is ultimately to be repatriated is a matter within the discretion of the Director of Immigration.
152. Mushkat, supra note 44, at 176-77.
153. “Every person who (a) has attained the age of fifteen; and (b)(i) is the holder of an identity card or is required to apply to be registered under the Registration of Persons Ordinance (Cap.177); or (ii) is the holder of a Vietnamese refugee card, shall have with him at all times proof of his identity.” Immigration Ordinance, pt. IVA, § 17(c)(1).
154. Immigration Ordinance, pt. IVB, § 17(c)(2)-(3).
155. Id. pt. IVB, § 17(N).
hiring. An employer may be subject to a fine of $250,000 and imprisonment for three years if he employs someone who is not lawfully employable. Further, an employer must keep a record of the documents proving that the employees are employable. A $10,000 fine may be levied on employers who fail to keep proper records.

D. The Implications of 1997

Sovereignty over Hong Kong will return to the PRC on July 1, 1997, upon the expiration of the lease held by the United Kingdom under the terms of the Nanking Treaty. The British government commenced negotiations with the PRC Government over the issue of sovereignty in 1982, which led to the signature of the Sino-British Joint Declaration. Under the terms of the Joint Declaration, Hong Kong will become a Special Administrative Region (SAR) of the PRC after 1997. Despite its loss of sovereignty, Hong Kong will continue to enjoy a high degree of autonomy, except in foreign and defense affairs. As of 1997, the capitalist economic and trade systems will remain unchanged for 50 years, but the existing constitutional devices will be replaced by a new constitution, the Basic Law, pursuant to the Joint Declaration. Neither the Joint Declaration nor Basic Law provides for future immigration law. However, under the Basic Law, the entry into Hong Kong will continue to be regulated in accordance with the present practice.

Hong Kong's fate is now tied to political developments in China. It is unknown at this point whether any significant change in the pres-

156. Id. pt. IVB, § 17(J).
157. Id. pt. IVB, § 17(I).
158. Id. pt. IVB, § 17(K).
159. Id. pt. IVB, § 17(M).
160. Chen, supra note 128, at 633. More than ninety percent "of the total land area of the present territory of Hong Kong was leased to Britain in 1898 for a period of 99 years."
162. 23 I.L.M. at 1375.
163. Id. at 1369.
164. The Basic Law was adopted by the National People's Congress of the PRC on April 4, 1990. Sung & Lee, supra note 127, at 1.
165. Joint Declaration, supra note 161, at 1372.
166. Id. annex I, § XIV.
ent inflow of legal and illegal immigrants from mainland China to Hong Kong will result.

**E. Firm Resettlement in Hong Kong**

Many refugees fled the PRC and temporarily and illegally stayed in Hong Kong before they found an opportunity to apply for asylum in the United States. Under the Hong Kong Immigration Ordinance, these refugees are not recognized as legal residents. They will not be entitled to a legal status or work authorization no matter how long they reside in Hong Kong. If a refugee can prove a bona fide persecution from the PRC but his asylum application is denied by the United States based on firm resettlement in Hong Kong, he will not be deported to the PRC according to the United States asylum law in conformity with the Protocol; instead, he will be deported to Hong Kong.

Despite this situation, the Hong Kong government and immigration authorities will not grant the refugee a permanent residence or work authorization unless the authorities give special consideration to the refugee and grant him permission to land in Hong Kong. Such deportation by the United States forces the asylee to become stateless. Moreover, the asylee would not be able to earn a living in Hong Kong due to the restrictive policy prohibiting undocumented workers.

The existence of a present and continuing offer of resettlement by a third country appears to be the most important factor in deciding whether an alien has secured a place of resettlement. The basic idea of firm resettlement doctrine is to deny the benefit of asylum only to refugees who have already "found shelter in another nation and [thus have] begun to build new lives." This author believes that deporting a refugee to a third country that is not willing to offer or no longer offers a residence to the refugee ignores the refugee’s basic human right to safety. Refugees deserve physical, legal, and financial safety. Such safety needs to be guaranteed by a country that is willing to grant the refugees legal residencies.

Finally, even if the asylee is allowed to stay in Hong Kong, there is a possibility that he may be persecuted when Hong Kong is returned to the PRC in 1997 because no law has been enacted to protect Chinese citizens who illegally leave their country. The United States should adopt a special immigration policy to protect these asylees by relaxing its scrutiny of firm resettlement as a factor in determining whether grant asylum. It is not uncommon for the United States to

---

167. Woo, 402 U.S. at 56.
Hastings Int'l & Comp. L. Rev.

adopt special immigration policies tailored to refugees from specific countries. For example, in response to the massacre at Tiananmen Square in Beijing, President Bush published an Executive Order on April 11, 1990, deferring the departure of all nationals of the PRC and their dependents until January 1, 1994, if they were in the U.S. between June 5, 1989, and April 11, 1990.

IV. CONCLUSION

In accordance with U.N. Convention standards, United States immigration regulations must be implemented in a fashion that does not violate the non-refoulement principle or refugees' rights to protection. The current United States firm resettlement standard, which allows the INS to deport asylum applications without regard to the applicant's physical safety or legal status in a third country, fails to meet the minimum standards of non-refoulement as required by international law.

United States courts have considered many factors, as discussed above, in deciding whether a refugee has been firmly resettled prior to coming to the United States. However, the relative weight that should be afforded to each factor has never been determined. It is unclear what degree of resettlement would provide a refugee with the kind of safety he or she deserves. There is a need for uniformity in application of the tests used by the courts to determine the resettlement issue.

The ultimate goal of the firm resettlement doctrine is to deny asylum only to refugees who have attained permanent residence in third countries. However, a third country which refuses to give legal rights to refugees and fails to protect their basic rights should not be considered a permanent abode. Thus, when U.S. immigration authorities and courts evaluate the issue of firm resettlement in Hong Kong, they should carefully consider the "legal status" of a Chinese asylee residing in Hong Kong. In many cases, it is obvious that the Chinese refugees have not found a resettlement in Hong Kong which is in any

168. See Richard A. Boswell, Immigration and Nationality Law 553-59 (1992). "Extended Voluntary Departure" and "Temporary Protected Status" are special programs enacted under the Immigration Act of 1990 to protect aliens from being returned to a particular country that is or has been in political turmoil.

169. Id. at 559.

170. The minimum standards of non-refoulement require that a refugee should not be forcibly returned to a country where he is likely to suffer political persecution. See Mushkat, supra note 44, at 176 n.140.
meaningful way "firm." The return of the sovereignty of Hong Kong to the PRC has caused many emigrants to flee Hong Kong. Accordingly, more asylum applications to the United States are expected in the coming years. The United States should adopt a clear policy regarding the Chinese asylees residing temporarily in Hong Kong to avoid inconsistency in future case adjudications.