

LEGISLATIVE COUNCIL BRIEF
Immigration Ordinance
(Chapter 115)

IMMIGRATION (AMENDMENT) BILL 2000

INTRODUCTION

At the meeting of the Executive Council on 19 September 2000, the Council ADVISED and the Chief Executive ORDERED that the Immigration (Amendment) Bill 2000, at *Annex A*, should be introduced to the Legislative Council to-

- (a) empower the Director of Immigration (the Director) to specify a genetic test procedure by notice in the Gazette whereby persons who claim ROA under paragraph 2(c) of Schedule 1 to the Immigration Ordinance may follow when the Director, on the basis of evidence submitted by the claimants, is not satisfied that the claimants are born to a Hong Kong permanent resident; and
- (b) empower the Director to charge a fee for the performing of the genetic test mentioned in (a) above. The amount of the fee may be determined by the Director with the approval of the Financial Secretary by notice in the Gazette.

BACKGROUND AND ARGUMENT

General Background

2. Under para 2(c) of Schedule 1 to the Immigration Ordinance, persons of Chinese nationality born outside Hong Kong to a parent who at the time of his birth was a Hong Kong permanent resident listed in para

2(a) or 2(b) of the Schedule are Hong Kong permanent residents^{Note}. According to the judgment of the Court of Final Appeal delivered on 29 January 1999, such persons include those who were born out of wedlock to a male Hong Kong permanent resident. Relative to children born within wedlock, children born out of wedlock are less likely to be able to provide sufficient documentary evidence to substantiate their parentage claims.

3. Persons claiming ROA under that provision have to apply for a Certificate of Entitlement (C of E) in such manner as prescribed by the Director by notice in the Gazette pursuant to para 2AB(2) of the Immigration Ordinance. A copy of the Gazette notice is at *Annex B*.

4. In accordance with the manner specified, a Mainland resident applying for a C of E has to submit his application to the Director through the Bureau of Exit-entry Administration (BEEA) of the Ministry of Public Security. An application for a C of E may be regarded as an application for exit approval (i.e. a One-way Permit) as required by Article 22(4) of the Basic Law and the interpretation of such provision given by the Standing Committee of the National People's Congress (NPCSC) on 26 June 1999.

Genetic test procedure

5. A C of E applicant, born within or out of wedlock, has to submit evidence on his claimed parentage with a Hong Kong permanent resident parent. Where the Director is not satisfied with the claimed parent and child relationship on the basis of the available documentary proof submitted by an applicant, it is our policy that the applicant will be required to undergo a genetic test specified by the Director. Written consent of the applicant will be obtained before carrying out the test.

^{Note} Persons referred to in para 2(a) and 2(b) of Schedule 1 to the Immigration Ordinance are respectively -

- (a) A Chinese citizen born in Hong Kong -
 - (i) before 1 July 1987; or
 - (ii) on or after 1 July 1987 if his father or mother was settled or had the right of abode in Hong Kong at the time of his birth or at any later time.
- (b) A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the HKSAR.

6. The Director has agreed with BEEA the genetic test procedure as regards applicants from the Mainland. In essence, the procedure envisages that the BEEA will provide its assessment to the Director as to whether an applicant will be required to undergo a genetic test, based on the documentary evidence provided in an application. The Director will make the final decision on whether a genetic test would be required and, if so, will inform the Mainland authorities accordingly. The Mainland authorities will then be responsible for taking and testing the tissue specimens of an applicant and his/her mother (or father) residing in the Mainland. In Hong Kong, Immigration Department will be responsible for taking the tissue specimens of the applicant's father (or mother) in Hong Kong and the test will be conducted by the Government Laboratory.

7. An applicant may refuse to undergo a genetic test. This refusal, together with other evidence submitted by him, will form the basis on which the Director will take a decision on his application, while the Director may draw such adverse inferences from the refusal as he considers appropriate. In submitting an application for a C of E, an applicant may also volunteer to undergo the specified genetic test before the Director examines his application. In such circumstances, the Director, likewise, will base his decision regarding the application on the results of the test and any other evidence submitted by the applicant.

8. The test results of the Mainland authorities and the Government Laboratory will be exchanged for collaborative analysis independently. Findings of the analysis will again be exchanged for cross checking before the test reports are issued to Immigration Department and the BEEA. Based on the reports, Immigration Department and the BEEA will process the application for a C of E and a One-way Permit respectively.

9. There will be a full array of measures in place to prevent any fraud and to ensure stringent and reliable technological standards of the genetic test procedure. Details are set out at *Annex C*.

10. As regards C of E applicants residing in places other than the Mainland, namely, Macau, Taiwan or overseas countries, likewise they will have to submit documentary evidence to prove their claimed relationship with their Hong Kong permanent resident parent. Those whose claimed parentage is in doubt will be required to come to Hong Kong to have their tissue specimens taken by Immigration Department

and tested by the Government Laboratory.

11. To implement the genetic test procedure, we need to introduce legislative amendments to the Immigration Ordinance so that the Director will have legal power to specify the procedure and to charge a fee on a full cost recovery basis for the test. On a case by case basis, the fee charged by the Administration may be waived where justified pursuant to section 39A of the Public Finance Ordinance.

THE BILL

12. The proposed section 2AB(7)(a) (**clause 2(b)**) empowers the Director to require a C of E applicant and his/her claimed parents to undergo a genetic test in such manner as specified by the Director by notice in the Gazette, whenever the Director is not satisfied with the claimed parentage for establishing ROA under para 2(c) of Schedule 1 to the Immigration Ordinance.

13. The proposed section 2AB(8) (**clause 2(b)**) allows the Director to draw such adverse inferences from the failure of a C of E applicant or his/her claimed parents to undergo the prescribed genetic test as he considers proper.

14. The proposed section 2AB(9) (**clause 2(b)**) states that the Director shall inform a person who is required to undergo a genetic test of the provision of the proposed section 2AB(8).

15. The proposed section 2AB(10) (**clause 2(b)**) enables the Director to charge a fee for the test performed on the Hong Kong permanent resident father (or mother) of the applicant.

16. The proposed section 2AB(11) (**clause 2(b)**) allows the Director, with the approval of the Financial Secretary, to specify the amount of fee charged for the genetic test by notice in the Gazette.

17. The proposed section 2AB(12) (**clause 2(b)**) makes it clear that the Gazette notice on the genetic test procedure and the fee for the test is not subsidiary legislation.

18. The existing provisions which are being amended are at *Annex D*.

PUBLIC CONSULTATION

19. The Panel on Security of the Legislative Council was consulted on the proposed genetic test procedure at its meeting held on 1 June 2000. The Panel Members noted the full array of measures that would be taken to ensure reliability of the test results and to guard against fraud as outlined in *Annex C*. Some Panel Members were concerned about the possibility of abuses. They suggested random application of a repeated genetic test at the control point. The Administration explained that according to legal advice, the proposal was unacceptable as it would amount to an arbitrary and discriminatory practice against those who had undergone a genetic test. Once a person has been issued with a C of E, he enjoys the right of abode which embodies, amongst other things, the right to land. Unless there is convincing evidence of fraud, there will be no basis for the Director to cast doubt on the eligibility of a C of E holder. In the event of fraud, Immigration Department has power under the Immigration Ordinance to conduct investigation and where justified revoke the C of E and repatriate the cheaters to the Mainland.

BASIC LAW IMPLICATIONS

20. The Department of Justice advises that the proposed amendments are consistent with the Basic Law.

HUMAN RIGHTS IMPLICATIONS

21. The Department of Justice advises that the proposed amendments are consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

22. The amendments in the Bill do not affect the current binding effect of the existing provisions of the Immigration Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

23. The Government Laboratory will set up a Parentage Testing Section to carry out genetic tests arising from C of E applications. This would entail an annual recurrent cost of \$8.7 million for eight additional staff plus consumables, and a non-recurrent cost of \$2.3 million for acquisition of the necessary equipment and facilities. In addition, the Immigration Department will require 27 additional posts at an annual staff cost of \$21.2 million to process C of E applications including related matters arising from the genetic test procedure, and to handle related appeal and judicial review cases. The Secretary for Security has secured the necessary resources for implementation of the proposals. Fee will be charged for conducting the genetic tests to cover the full costs of providing the service.

LEGISLATIVE TIMETABLE

24. The legislative timetable is -

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|------------------------------------------------------------------------|-------------------|
| Publication in the Gazette | 29 September 2000 |
| First Reading and commencement of Second Reading debate | 18 October 2000 |
| Resumption of Second Reading debate, committee stage and Third Reading | to be notified |

Subject to passage of the Bill by the Legislative Council, the genetic test procedure will operate by the end of 2000.

PUBLICITY

25. A press release will be issued on the proposed legislative amendments. A spokesman will also be made available to answer enquiries.

CONTACT PERSON FOR ENQUIRIES

26. Enquiries about this brief may be made to Ms Linda KP So, Principal Assistant Secretary for Security (C) at 2810 2330.

Security Bureau
27 September 2000

A BILL

To

Amend the Immigration Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Immigration (Amendment) Ordinance 2000.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Certificate of entitlement

Section 2AB of the Immigration Ordinance (Cap. 115) is amended -

(a) by repealing subsection (4);

(b) by adding -

"(7) Where the Director in processing an application made under subsection (1) is not otherwise satisfied that the applicant is born of a person of whom the applicant claims to be born, the Director -

(a) may require the applicant and the person to undergo a genetic test conducted in such manner as the Director may specify by notice published in the Gazette to

establish the claimed parentage; and

- (b) shall consider the result of the test and determine the application accordingly.

(8) The Director may draw such adverse inferences from the failure of -

- (a) an applicant; or
- (b) a person of whom an applicant claims to be born,

to undergo a genetic test referred to in subsection (7)(a) as he considers proper and determine the application accordingly.

(9) Where the Director requires a person to undergo a genetic test under subsection (7)(a), he shall inform the person of the provision of subsection (8).

(10) The Director may charge a fee for a genetic test referred to in subsection (7)(a).

(11) The Director may, with the approval of the Financial Secretary, specify the amount of the fee charged under subsection (10) by notice published in the Gazette.

(12) A notice under subsection (2)(a), (7)(a) or (11) is not subsidiary legislation."

Explanatory Memorandum

Certain persons who claim to be permanent residents of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 to the Immigration Ordinance (Cap. 115) have to apply for a certificate of entitlement before they can establish their status as such residents. The purpose of this Bill is to empower the Director of Immigration to require the relevant parties in an application for a certificate of entitlement to undergo a genetic test to establish parentage relationship. The Director may charge a fee for the test.

**Measures to be taken by the
Mainland authorities against fraud**

- (a) when submitting the application, the applicant and his/her claimed mother (father) will be required to provide photos and fingerprints for subsequent verification of their identities in the process of specimen-taking;
- (b) the public security officers responsible for taking the specimens will be required to confirm by signature that they have checked the identification documents and fingerprints of the applicant and his/her claimed mother (father);
- (c) the supervising officers of the public security officers responsible for taking the specimens will monitor the specimen taking process and confirm this by signature;
- (d) random checks on the specimen-taking process will be conducted by the public security authorities;
- (e) the specimens test will be conducted only by the Criminal Technology Division of the Guangdong Provincial Public Security Department. No other laboratories will be appointed to perform the task. The specimen taking and testing procedures will be conducted within the same building to ensure direct delivery of the specimens to the laboratory. The specimens will be put into security envelopes with tamper-proof seals; and
- (f) the testing organization will perform the tests in order of the bar codes without knowing the identity of the applicant or his/her claimed mother (father).

**Measures to be adopted to ensure
stringent and reliable technological standards**

- (a) the Government Laboratory and Immigration Department made a site visit to the Criminal Technology Division of the Guangdong Provincial Public Security Department for a deeper understanding of the technological standard of the Division, and considered that it is technologically ready for the conduct of the genetic tests;
- (b) the Mainland authorities will forward the test results, together with the raw analytical data, to the Government Laboratory to enable the latter to have a full understanding of the process that the Mainland authorities have gone through in attaining the results;
- (c) in conducting the tests, the Criminal Technology Division of the Guangdong Provincial Public Security Department will fully follow the procedures adopted by the Government Laboratory. For this purpose, the Guangdong laboratory paid a five-day study visit to the Government Laboratory in July 2000. Both sides will conduct simulated tests to ensure smooth communication and operation; and
- (d) as both sides will exchange the test results (i.e. the Mainland authorities will forward the test results concerning the applicant and his/her mother (father) to Hong Kong while Hong Kong will forward the test results of the applicant's father (mother) to the Mainland), and will conduct analysis and comparisons independently before coming to a conclusion, the procedure will be closely monitored.

PART IB

PROVISIONS RELATING TO PERMANENT RESIDENTS
UNDER PARAGRAPH 2(c) OF SCHEDULE 1**2AA. Establishing status of permanent resident under paragraph 2(c) of Schedule 1**

(1) A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be established by his holding of—

- (a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document;
- (b) a valid HKSAR passport issued to him; or
- (c) a valid permanent identity card issued to him.

(2) A person's right of abode in Hong Kong by virtue of his being a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be exercised upon the establishment of his status as such a permanent resident in accordance with subsection (1) and, accordingly, where his status as such a permanent resident is not so established, he shall, for the purposes of this Ordinance, be regarded as not enjoying the right of abode in Hong Kong.

2AB. Certificate of entitlement

(1) Any person who—

- (a) immediately before 1 July 1997 did not enjoy the right of abode in Hong Kong under this Ordinance as then in force;
- (b) is not the holder of a valid HKSAR passport or valid permanent identity card; and
- (c) claims to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1,

may apply to the Director for a certificate of entitlement.

(2) An application under subsection (1)—

- (a) shall be made in such manner as the Director may specify by notice in the Gazette;
- (b) may be made on behalf of an applicant by his parent, legal guardian or any other person acceptable to the Director and for the purposes of subsection (6)(b)(ii) and (iii) and section 2AD(1) such parent, legal guardian or other person shall be regarded as the applicant.

(3) An application under subsection (1) which is not made in accordance with subsection (2)(a) and accompanied by the prescribed fee, if any, shall not be accepted.

(4) A notice under subsection (2)(a) is not subsidiary legislation.

(5) For the removal of doubt, it is hereby declared that the making of an application under subsection (1) does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Director on the application.

(6) Upon receipt of an application under subsection (1), the Director acting through an immigration officer authorized by him shall—

- (a) where he is satisfied upon such proof specified by the Director that the applicant is a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1, issue a certificate of entitlement to the applicant in the prescribed form and in such manner as the Director may determine;
- (b) where he is not satisfied that the applicant is a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1—
 - (i) refuse the application;
 - (ii) notify the applicant in writing the reason of the refusal; and
 - (iii) inform the applicant the right of appeal to the Tribunal.

2AC. Issue of duplicate

(1) If a certificate of entitlement issued to a person is lost or destroyed, he may apply to the Director for a certified duplicate of the certificate.

(2) An application under subsection (1)—

- (a) shall be made in such manner as the Director may specify by notice in the Gazette;
- (b) may be made on behalf of an applicant by his parent, legal guardian or any other person acceptable to the Director and for the purposes of subsection (6)(b)(ii) and (iii) and section 2AD(2) such parent, legal guardian or other person shall be regarded as the applicant.

(3) An application under subsection (1) which is not made in accordance with subsection (2)(a) and accompanied by the prescribed fee, if any, shall not be accepted.

(4) A notice under subsection (2)(a) is not subsidiary legislation.

(5) For the removal of doubt, it is hereby declared that the making of an application under subsection (1) does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Director on the application.