President's ruling on
Committee Stage Amendments to
Immigration (Amendment) Bill 2000
proposed by Hon Ambrose LAU Hon-chuen, JP

Hon Ambrose LAU, as Chairman of the Bills Committee which has examined the Immigration (Amendment) Bill 2000 (the Bill), has given notice to move amendments to the Bill on behalf of the Committee, if the Bill gets its Second Reading at the Council meeting to be held on 27 June 2001. The amendments are in three parts:

(a) to amend the proposed section 2AB(7)(a) at two places. The purpose of the first amendment is to provide that, whilst the Director of Immigration will have the power proposed by the Bill to require an applicant and a claimed parent to undergo a genetic test in the manner specified by the Director where the Director is not satisfied that the applicant was born of the claimed parent, the applicant and the claimed parent will have a choice of undergoing a genetic test conducted in a manner other than that specified by the Director. The purpose of the second amendment is to provide that the notice of the manner specified by the Director conducting the genetic test is subsidiary legislation which is subject to the scrutiny of the Legislative Council;

(b) to amend the proposed section 2AB(11) to provide that the notice, of the fee that may be charged by the Director for the genetic test conducted in the manner specified by the Director, is also subsidiary legislation; and

(c) subject to the passage of the aforesaid amendments, to make consequential amendments to the proposed section 2AB(12).

The Administration's view

2. The Secretary for Security (S for S), who has been invited to offer her comments on the proposed amendments, has submitted the Administration's view that the first amendment to the proposed section 2AB(7)(a) is beyond the scope of the Bill and is therefore out of order.

3. The Administration submits that the Bill's clear object is to give legislative backing to the Director to *specify a genetic test* by notice in the

Gazette in cases where the Director is not satisfied that a Certificate of Entitlement applicant is born of a person of whom he/she claims to be born. All operative provisions in the Bill are concerned only with the genetic test procedure *specified* by the Director. Hence, the Bill's scope is clearly restricted by simple reference to its provisions. To add at Committee Stage an amendment which in effect gives legislative backing to *any* genetic test procedure of an applicant's choosing fundamentally alters the focus of every operative provision in the Bill.

4. Citing my previous rulings on the question of scope (which I shall refer to later in this ruling), the Administration further states that overwhelming evidence of the restricted purpose and nature of the Bill is consistently found in the LegCo Brief on the Bill; the S for S's speech when moving the Bill's Second Reading; the Bill's Explanatory Memorandum; and the exchanges between the Administration and the Bills Committee. To allow the amendment would be to introduce a fundamental change to the main principle of the Bill. This clearly contravenes Rules 56 and 57(4)(a) as the amendment is clearly beyond the scope of the Bill.

Response from Hon Ambrose LAU

5. In response to the Administration's submission, Mr LAU has passed to me a copy of the opinion of the legal adviser to the Bills Committee on the matter, and has advised that he and those members of the Bills Committee whom he has been able to contact within the time available endorse the opinion.

6. On the question of whether the amendment in question would alter the Bill's focus and scope, quoting the Administration's responses to his letter dated 8 February 2001, the legal adviser to the Bills Committee states that although the proposed new section 2AB(7) is the key provision which empowers the Director to specify a genetic test procedure, the Administration has given the Bills Committee the clear understanding that the Bill already envisages an applicant's choice not to take the specified test or to arrange his/her own test, and that the Director would still have to consider its results regardless. The proposed amendment is to bring out clearly the underlying effect of the Bill, i.e. in allowing the Director to provide his own genetic test, it does not preclude an applicant from obtaining test result from a non-specified procedure. What the proposed amendment does not do is to curtail the provision empowering the Director to specify his own genetic test procedure and to charge a fee.

7. A relevant extract of the legal adviser's opinion in this regard is appended below:

"17. At this point, it is necessary to refer to my letter to the Administration dated 8 February 2001. In the letter, I recapitulated an agreement with the Administration at the Bills Committee meeting on 6 February 2001 thus -

> "At the meeting of the Bills Committee on 6 February 2001, you agreed that the Bill does not have the effect of preventing an applicant (or for that matter the claimed parent), if required by the Director of Immigration to undergo the genetic test as specified, from refusing to undergo such test and preferring a similar test by another laboratory (or set of laboratories). In the latter event, the Director also could not refuse to consider the result of a self-arranged test for what it is worth."

18. In response to one of the 4 questions that I followed up from that agreed position, the Administration has this to say -

> "Where an applicant submits test results from a non-prescribed genetic test procedure (even though by an accredited laboratory), the Director would still assess and consider, among other things, the integrity of the test procedure as well as the accuracy and reliability of the test results ..... The Director may draw adverse inference, or any other inference, depending on whether he is satisfied with, among other things, the integrity of the test procedure or the accuracy and reliability of the test results obtained through a self-arranged procedure ..... if the applicant maintains his refusal to go through the prescribed genetic test." "

Advice of Counsel to the Legislature

8. Counsel to the Legislature has given me a detailed analysis of the legal effect of section 2AB(7) to (12) proposed in the Bill, and advised that it seems clear that the main principle of the Bill is to give express statutory powers to the Director, when processing an application for certificate of entitlement, to require an applicant and a claimed parent to undergo a genetic test and to specify by notice published in the Gazette the manner of the genetic test. Any proposed amendment which seeks to remove these legislative proposals at Committee Stage should be considered as altering the fundamental principles of the Bill rather than its details. Proposed amendments for other purposes may be discussed at Committee Stage if they are on the details of the main principle of the Bill or relevant to the subject matter of the Bill.

9. The effect of Mr LAU's proposed amendment to section 2AB(7)(a) is to make clear in legislation that an applicant or claimed parent, when

required by the Director to undergo a genetic test, has a choice of undergoing a genetic test in a manner specified by the Director or in any other manner. It is not seeking to remove the main legislative proposals and should not be considered as altering the fundamental principles of the Bill for that reason.

10. According to Counsel, the key procedural issue for consideration by the President in the current case is whether the subject matter of the proposed amendment, which deals with the same subject the Bill seeks to deal with, i.e. the requirement of genetic test result to prove parentage, can be regarded as within the scope of the Bill and relevant to its subject matter when the subject matter of the amendment is not precluded by the terms of the Bill but is not within the contemplation of the Bill. In Counsel's view, whether the subject matter of the amendment is within the contemplation of the Bill is irrelevant. Indeed, it would be difficult to imagine that the Bill would be drafted with a possible amendment in mind. Nevertheless, as is clear from the Administration's response to the legal adviser to the Bills Committee's letter dated 6 February 2001, the Administration had clearly agreed with the Bills Committee that the Bill does not have the effect of preventing an applicant or a claimed parent from undergoing a non-specified genetic test.

My opinion

11. Rule 57(4)(a) of the Rules of Procedure provides that an amendment to a bill must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates.

12. It is apparent that all parties agree that section 2AB(7) of the Bill is to give express statutory power to the Director of Immigration to require a genetic test to be conducted in the manner specified by the Director. At issue is the Administration's claim that the amendment proposed by the Bills Committee will fundamentally alter the focus of the Bill by seeking to give legislative backing to any genetic test procedure of an applicant's choosing. I note the point made by the legal adviser to the Bills Committee that, during the deliberations of the Bills Committee on the proposed amendment, the Government delegation neither drew attention to the question of scope nor expressed doubts about its admissibility under the Rules of Procedure.

13. On the other hand, the Administration's responses to the legal adviser's letter of 8 February 2001 leave me in no doubt that, whilst section 2AB(7) seeks to give express statutory powers to the Director to require a genetic test to be conducted in the manner specified by the Director, the Administration has acknowledged the scenario in which the applicant or his/her claimed parent does not undergo the specified test but takes a non-specified test, or simply fails to undergo a test at all. I also take note of the claim made by the Bills Committee through its legal adviser that its proposed amendment does

not seek to curtail the power of the Director to specify his own genetic test procedure and to consider the results of the test, but seeks to spell out clearly the Director's duty to also consider results in non-specified tests in determining the applications. Neither the Bill nor the proposed amendment provides that a positive result from a genetic test or a failure to undergo a test would necessarily dictate the result of the application.

14. In its submission, the Administration offers the view that "to add at Committee Stage an amendment which in effect gives legislative backing to any genetic test procedure of an applicant's choosing fundamentally alters the focus of every operative provision in the bill". That focus, according to the Administration, is "legislative backing for genetic test procedures specified by the Director of Immigration". It appears that the submission is founded on my earlier Ruling on the proposed amendments to the Provisions of Municipal Services (Reorganization) Bill (the Reorganization Bill). In that Ruling, I considered the amendments which sought to restore the substantial part of the legal concept of having municipal councils independent of government to perform municipal services functions as altering the fundamental principles of the Reorganization Bill rather than its details, for reason that the removal of all municipal services functions from the then existing provisional municipal councils was integral to the objects of the Reorganization Bill. I was not referring to an amendment to simply alter the objects of the Reorganization Bill, but one which sought to amend it to keep the municipal councils which the Bill proposed to extinguish. The amendment proposed to section 2AB(7)(a) in this Bill would bring in a choice between a specified genetic test and a non-specified one which an applicant or a claimed parent would be able to undergo at his option anyway, if the Director requires an applicant and a claim parent to undergo a genetic test.

15. The Administration's submission also contains an examination of contextual materials in connection with the Bill, in order to ascertain the principal objectives intended to be achieved by the Bill. This approach is adopted because it was one applied by me when considering the proposed amendments to the Building Management (Amendment) Bill 2000. In that bill, there was no evidence that it was drafted in such a manner as to make clear that it was presented for passage on a "take it or leave it" basis. So far, there have been very few such bills. A bill that may be described as such and had left very little room for substantive amendment is the Employment (Amendment) Bill 2000. That bill was introduced to clarify that the taking part by an employee in a strike is not a lawful ground for an employer to terminate the employee's contract of employment. It did not seek to introduce any new policy or to modify existing policies already reflected in legislation.

Ruling

16. Having considered the submission of the Administration, the opinion of the legal adviser to the Bills Committee and the advice of Counsel to the Legislature, I am of the opinion that Mr Ambrose LAU's proposed amendment to section 2AB(7)(a) is relevant to the subject matter of the Bill and the subject matter of the clause to which it relates and is within the scope of the Bill. I rule that Mr LAU may move the proposed amendment.

(Mrs Rita FAN)
President
Legislative Council

26 June 2001