

Immigration (Amendment) Bill 2001

Purpose

The Constitutional Affairs Committee (“the Committee”) of the Law Society of Hong Kong provided to the Bills Committee on 30 August 2002 the different views expressed by members within the Committee on the Immigration (Amendment) Bill 2001. This paper contains the Administration’s response.

Consistency with the Basic Law

2. Some members of the Committee do not think it is a proper function of the legislature to pass a piece of legislation to interpret the Basic Law. Other members have reservation on the Bill which appears to them to be an attempt to amend the Basic Law to restrict a core constitutional right to be a permanent resident, as a result of a change in policy after consultation with the Mainland authorities. It is considered that one should not derogate from, or restrict the common law term “ordinarily resided”.

3. The Bill is not an amendment of the Basic Law. The term “ordinarily resided” is not defined in the Basic Law. As explained in a separate paper submitted to the Bills Committee, the Basic Law states general principles and expresses purposes without condescending to particularity and definition of terms. Local legislation may help determine and give effect to the broad objectives and purposes of the constitution by providing “details” for the implementation of the latter.

4. The fact that the term “ordinarily resided” is a qualification in Article 24(2) of the Basic Law does not mean that the common law meaning of the term “ordinarily resided” cannot be subject to statute law. This is supported by the leading case on the meaning of ordinarily resident in *Reg. v. Barnet L.B.C., ex parte Shah* [1983]2 AC 309 where Lord Scarman said that “*Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.*” This is further elaborated by the learned author Ian A. Macdonald QC in his book “Macdonald’s Immigration Law & Practice” [paragraph 5.17, 5th Edition of June

2001] that “(F)or the purposes of immigration and nationality law, ordinary residence contains statutory requirements over and above those in the common law”.

5. Locally, the Court of Final Appeal (CFA) in *Fateh Muhammad v Commissioner of Registration* had ruled that the meaning of the term "ordinarily resident" depends on the context in which the expression appears. No single judicial pronouncement or combination of such pronouncements in regard to the meaning of the expression can be conclusive for the purposes of every context in which the expression appears. Historically, section 2(4) of the Immigration Ordinance (Cap.115), since its enactment in October 1971, has been the provision, subject to amendments from time to time, to cater for classes of persons remaining in Hong Kong who shall not be treated as ordinarily resident. It is to be noted that the CFA in *Fateh Muhammad* had held that section 2(4)(b) of the Immigration Ordinance is constitutional.

6. The Committee has also raised its observations on the role of the Standing Committee of the National People’s Congress (NPCSC) in the legislation process and the various scenarios that may arise. The policy intention as embodied in the Bill to exclude Mainland officials from being treated as ordinarily resident in Hong Kong during any period in which they are directed to work in Hong Kong in their official capacity is in the same nature as section 2(4)(a)(viii), which provides that the period of stay of the Hong Kong Garrison in Hong Kong will not be treated as ordinary residence. Article 17 of the Basic Law provides that laws enacted by the HKSAR legislature must be reported to the NPCSC for the record. If the NPCSC, after consulting the Committee for the Basic Law, considers that any law enacted by the legislature is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question. Any law so returned will be immediately invalidated. Section 2(4)(a)(viii) was added to the Immigration Ordinance on 1 July 1997. The station of the Garrison in the HKSAR is clearly a matter within the responsibility of the Central Authorities. The consistency of section 2(4)(a)(viii) with the Basic Law has never been called into question by the NPCSC. We believe that the nature of the presence of Mainland officials is analogous to that of the Garrison (i.e. they are all posted to Hong Kong in their official capacity) and given the fact that the Mainland authorities have made it clear that these Mainland officials are not intended to enter Hong Kong for settlement for the purpose of Article 22(4) of the Basic Law, the Bill is consistent with the Basic Law.

Commencement of the Bill

7. The Bill will come into force only after enactment by LegCo on an appointed commencement date to be published in the Gazette. The Committee questioned why the Bill would have no retrospective effect if the Bill was consistent with the “true interpretation” of the Basic Law. As a matter of general legal policy, we believe that actions involving retrospectivity should only be considered in exceptional circumstances. From 1 July 1997 to 31 August 2002, a total of 1 494 Mainland officials holding Chinese Travel Permits (因公往來香港澳門特別行政區通行證) have acquired right of abode in Hong Kong. We do not consider that the present circumstances justify our taking retrospective action to invalidate the permanent resident status of the Mainland officials concerned.

Other Options Proposed by the Law Society

8. The Committee has suggested some other alternative options that might be pursued instead of enacting the Bill. With respect, the suggestions are either not relevant in the present context or involving administrative measures outside the purview of HKSARG.

Conclusion

9. We are grateful for the views expressed by the Committee which provides us the opportunity to give further thoughts to the issues. There is, however, nothing in the views expressed that detracts the Government from its view that the Bill is legally proper and consistent with the Basic Law. We urge the Bills Committee to lend support to the early enactment of the Bill.

*Security Bureau
September 2002*