

立法會
Legislative Council

LC Paper No. LS113/01-02

Paper for the Security Panel

**Director of Immigration's Discretionary Power
under the Immigration Ordinance**

The Security Panel at its meeting on 24 January 2002 asked for a paper from the Administration on the exercise of the Director of Immigration's discretionary power under the Immigration Ordinance (Cap. 115).

Legal Service Division's Comments

2. The Administration's paper was issued on 24 May 2002 and circulated on 27 May 2002 vide CB(2)2069/01-02(01) to Panel Members. It summarizes the general principles for the exercise of the Director's discretionary power under the Immigration Ordinance, with reference to leading local cases in which the issue was considered.

3. However, it may be helpful to Members' understanding to draw attention to the following, in addition to the very broad principles set out in the Administration's paper from those cases -

- (a) In the Lau Kong-yung case, it is also established that "there is no enforceable duty imposed by the Ordinance to take account of discretionary considerations. The Director can have regard to them, if he so chooses, but he is at liberty to disregard them." (as per Sir Anthony Mason NPJ)
- (b) In the Ho Ming-sai case, Litton, J.A. has stated that "The Director has a very wide discretion under s. 13 of the Immigration Ordinance, and it is not for the courts to say how that discretion should be exercised. An illegal immigrant could not *expect* to be permitted to remain in Hong Kong by the Director; indeed, if the Director were to exercise his discretion under s. 13 to create such an expectation, he would be acting contrary to the whole scheme of the Ordinance, which is to regulate the lawful entry of persons into Hong Kong, either on a temporary or a permanent basis. The Director has clearly much wider considerations to bear in mind, in exercising his discretion under s. 13, than the welfare of the applicants."

- (c) In the Chan Heung-mui case, Litton, J.A. has made this observation: "Section 13 of the Ordinance imposes no statutory duty of any kind upon the Director, beyond the broad duty falling upon him to administer the scheme of immigration control embodied in the Ordinance fairly and properly. Section 13 is an empowering provision: it would be an odd thing if, because of the current 'humanitarian' practice of the Director, his future powers of action were to become emasculated. A court would hesitate, in construing a statute, to give it such effect."

- (d) In the Ng Siu-tung case, it is reaffirmed by the Court of Final Appeal that "... the Director of Immigration has a discretion under ss. 11, 13 and 19(1) of the Immigration Ordinance to allow persons, who do not satisfy Part 1B of the Immigration Ordinance, to enter and reside in Hong Kong. He cannot, however, lawfully exercise such discretion in respect of an innominate class of persons since to do so will undermine the legislative scheme as a whole. Even if he could, he would be entitled to decide that whatever expectations these persons might have, they are overridden by the overwhelming force of immigration policy which underlies the immigration legislation validated by the Interpretation."

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