Legislative Council
Panel on Security

Background paper prepared
by Legislative Council Secretariat

Issue of right of abode in the Hong Kong Special Administrative Region of persons born in the Mainland to Hong Kong permanent residents

30 May 2002

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Issue of right of abode in the Hong Kong Special Administrative Region of persons born in the Mainland to Hong Kong permanent residents

Purpose of paper

This paper gives a brief background of the issue of the right of abode (ROA) in the Hong Kong Special Administrative Region (HKSAR) of persons born in the Mainland to Hong Kong permanent residents.

Article 24 of the Basic Law, Immigration (Amendment) (No. 2) Ordinance 1997 and Immigration (Amendment) (No. 3) Ordinance 1997

2. The Immigration (Amendment) (No. 2) Ordinance 1997 was enacted by the Provisional Legislative Council (PLC) on 21 June 1997 to take effect on 1 July 1997. It stipulated, among other things, that for a person of Chinese nationality to be eligible for ROA under category 3 of Article 24(2) of the Basic Law (BL), at least one of his/her parents who is of Chinese nationality must be a permanent resident under category 1 or 2 of BL 24(2) at the time of his/her birth. Another provision stipulated that in order to be entitled to ROA under BL 24, a person born out of wedlock may acquire the status of a Hong Kong permanent resident only through his/her mother, and not the father, unless the mother and father subsequently married.

3. The Immigration (Amendment) (No. 3) Ordinance 1997 was enacted on 10 July 1997, with retrospective effect from 1 July 1997, to provide procedures by which persons may establish their entitlement to ROA in the HKSAR under category 3 of BL 24(2). This Ordinance, through introduction of the Certificate of Entitlement (C of E) Scheme, provided that a person's status as a permanent resident of the HKSAR under category 3 of BL 24(2) could only be established by his/her holding, among other things, a valid travel document with a valid C of E affixed to it. For persons in the Mainland claiming ROA, this means that they would have to apply in the Mainland for a One-way Permit (OWP) and a C of E in order to come to Hong Kong for settlement.

Rulings of Court of First Instance and Court of Appeal in 1997 and 1998

4. On 9 October 1997, the Court of First Instance, in a test case, affirmed the legality of the Immigration (Amendment) (No. 3) Ordinance 1997 and the C of E Scheme. The Court also affirmed that the retrospective effect of the Ordinance was

valid and constitutional. In addition, the Court ruled that for a child to be qualified under category 3 of BL 24(2) as an "eligible child", the determining factor was the birth, and not the marital status of the child's parents.

5. The Government lodged an appeal against the judgment on the issue of the entitlement of children born out of wedlock. The Court of Appeal made a decision on 2 April 1998, upholding the lawfulness of the C of E Scheme and its retrospectivity, but the C of E Scheme was held not to apply to persons who are here and came to Hong Kong before 1 July 1997. The provisions excluding these children from the ambit of category 3 of BL 24(2) was ruled unconstitutional.

6. Another test case concerns the stipulation in the Immigration (Amendment) (No.2) Ordinance 1997 that in order for a child of Chinese nationality born outside Hong Kong to enjoy ROA in Hong Kong, at least one of his parents should be of Chinese nationality and had ROA at the time of the child's birth. The Court of First Instance handed down its judgment on 26 January 1998 holding that the provision contravened BL 24. The Government lodged an appeal against this judgment. On 20 May 1998, the Court of Appeal overturned the Court of First Instance's ruling and made a judgment that the "at the time of birth" provision was consistent with the BL.

Judgment of the Court of Final Appeal delivered on 29 January 1999

7. All parties concerned in these cases lodged appeals against the respective parts of the judgments which were not in their favour. The Court of Final Appeal (CFA) delivered its judgment on 29 January 1999 in respect of the case of CHAN Kam-nga and 80 others, the case of NG Ka-ling, NG Tan-tan, the case of TSUI Kuen-nang and the case of CHEUNG Lai-wah. Based on the speech delivered by the Secretary for Security (S for S) during the motion debate on "New Arrivals from the Mainland" at the Council meeting on 28 April 1999 and the judgment, the main issues determined in the judgment, apart from the interpretation of the BL, are as follows -

a. The C of E Scheme is consistent with the BL. Those who claim ROA under category 3 of BL 24(2) can only have their status as a permanent resident of the HKSAR established by holding a C of E;

b. Those who claim ROA must remain in the Mainland in order to apply for a C of E;

c. The C of E need not be affixed to the OWP;

d. The retrospective effect of the Immigration (Amendment) (No. 3) Ordinance 1997 was ruled unconstitutional;

e. Children born in places outside Hong Kong (including the Mainland) to parents, either of whom was not a Hong Kong permanent resident at the time of their birth but subsequently became one, are also entitled to ROA; and

f. These children include those born out of wedlock to a father who is a permanent resident of Hong Kong.

Forecasts of number of eligible persons for right of abode announced by Secretary for Security on 28 April 1999

8. In her speech delivered during the motion debate on "New Arrivals from the Mainland" at the Council meeting on 28 April 1999, S for S announced that based on the findings available in mid-April 1999 of the Special Topic Enquiry on "Hong Kong Residents with Spouses/Children in the Mainland" conducted by the Census and Statistics Department (C & SD), the number of persons in the Mainland with ROA in Hong Kong as a result of the judgment of the CFA reached 1 675 000, of which 692 000 were eligible children of the first generation while 983 000 were eligible children of the second generation. (The final figures released in June 1999 were revised as follows : the number of eligible children of the first generation was 693 000, the number of eligible children of the second generation was 910 000, totalling 1 603 000.)

9. S for S also made the following points at the Council meeting on 28 April 1999 -

a. Under the BL, when these persons with ROA had lived in Hong Kong for seven years, their children born in the Mainland would also be entitled to ROA, with the right passing onto the future generations indefinitely;

b. If the Administration continued to admit only 150 persons each day, C of E applicants would have to wait for 10 years or more. If all of the 700 000 eligible persons of the first generation were to be admitted within three years, 640 OWP holders, on average, would need to be admitted each day; and

c. The C & SD had found that there were also about 100 000 spouses of Hong Kong residents still living in the Mainland who were eligible for settlement in Hong Kong. The daily quota might need to be increased to 1 000.

House Committee's discussion on the Administration's assessment of service implications arising from the admission of 1 675 000 Mainland residents and possible solutions

10. The House Committee held a series of special meetings between 6 and 21 May 1999 to discuss with the Administration the service implications of the arrival of 1 675 000 people eligible for the ROA in the HKSAR and, the way forward including possible solutions/options to follow up the issue. The House Committee also invited statisticians, academics, economists, legal experts, etc, to present their views on the issue at the meetings. Members may wish to refer to **Appendix I** for further details.

Debate in Council on 19 May 1999 on the Government motion moved by the Secretary for Security

11. On 19 May 1999, the Council held a debate on the Government motion "that this Council supports the Chief Executive's decision to request the State Council to approach the Standing Committee of the National People's Congress to interpret Article 22(4) and Article 24(2)(3) of the Basic Law" moved by S for S. A total of 35 Members voted in favour of the motion and two Members voted against the motion.

Chief Executive's "Report on seeking assistance from the Central People's Government in solving problems encountered in the implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China"

12. The Chief Executive (CE)'s "Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" dated 20 May 1999 was lodged with the Hong Kong and Macau Affairs Office on 21 May 1999 for submission to the State Council. It was stated in the Report that "the CFA's interpretation of the relevant provisions of the Basic Law is different from the HKSAR Government's understanding of the wording, purpose and legislative intent of these provisions. Queries and arguments as to whether the CFA's interpretation is in line with the Basic Law have been raised in the community. Public opinion is overwhelmingly in favour of an early resolution of this issue".

13. The Report further stated that "as the issue is one of principle involving how the Basic Law should be interpreted, and as the control of entry of Mainland residents into Hong Kong has a bearing on the relationship between the Central Authorities and the HKSAR, and the HKSAR Government is no longer capable of resolving the ROA issue on its own, the HKSAR Government has decided to request the State Council to ask the NPCSC to interpret, under the relevant provisions of the Constitution and the Basic Law, Articles 22(4) and 24(2)(3) of the Basic Law

according to the true legislative intent".

Debate in Council on 26 May 1999 on Hon Albert HO's motion on "Interpretation of the Basic Law"

14. On 26 May 1999, Hon Albert HO Chun-yan moved the motion "that, in order to uphold the principles of "one country, two systems", a high degree of autonomy and judicial independence, this Council objects to the Standing Committee of the National People's Congress interpreting those articles of the Basic Law relating to the limits of the autonomy of the Hong Kong Special Administrative Region". The motion was put to vote and negatived.

Special meetings of the Panel on Constitutional Affairs

15. Between the period of 29 May 1999 and 25 June 1999, the Panel on Constitutional Affairs held five special meetings to discuss the ROA issue. Members may wish to refer to **Appendix II** for further details.

Decision of the Standing Committee of the National People's Congress

16. In an information paper entitled "Interpretation of Articles 22(4) and 24(2)(3) of the Basic Law by the Standing Committee of the National People's Congress" dated 28 June 1999 issued by the Security Bureau, it was stated that "the State Council accepted on 10 June the Chief Executive's request on seeking an interpretation of the Standing Committee of the National People's Congress (NPCSC) and approached the NPCSC accordingly. After consulting its Committee for the Basic Law, the NPCSC gave an interpretation of the two BL provisions on 26 June". The bilingual text of the interpretation of NPCSC on BL 22(4) and BL 24(2)(3) on 26 June 1999 (NPCSC's interpretation) was gazetted on 28 June 1999.

17. Based on the paper referred to in the above paragraph, the gist of NPCSC's interpretation delivered on 26 June 1999 is summarised as follows -

a. Under BL 24(2)(3), persons of Chinese nationality born outside Hong Kong are eligible for ROA only if, at the time of their birth, at least one of their parents belongs to the category listed in BL 24(2)(1) or 24(2)(2);

b. Under BL 22(4), the phrase "people from other parts of China" means people from various provinces, autonomous regions and municipalities directly under the Central Government, including persons of Chinese nationality in the Mainland born of Hong Kong permanent residents.

This confirms that Mainland exit procedures, including the OWP quota arrangement for settlement in Hong Kong, apply to all such Mainland residents; and

c. Parties concerned in the litigation in respect of which the CFA delivered a judgment on 29 January 1999 shall not be affected by NPCSC's interpretation.

Categories of persons affected by the interpretation of the Standing Committee of the National People's Congress

18. The NPCSC's decision confines eligibility for ROA to the first generation of Mainland persons born to Hong Kong permanent residents. According to the key figures released in June 1999 in respect of the survey conducted by the C & SD, the number of eligible persons was estimated at 693 000, of which 188 000 were persons born within registered marriage and 505 000 were persons born out of registered marriage. The figures have not included 98 000 persons who have ROA prior to the CFA ruling but have not yet come to Hong Kong for settlement.

19. In an information paper entitled "Interpretation of Articles 22(4) and 24(2)(3) of the Basic Law by the Standing Committee of the National People's Congress" dated 28 June 1999 prepared by the Security Bureau, the House Committee was informed that persons who were present in Hong Kong and lodged ROA claims with the Director of Immigration (D of Imm) during the periods 1 July to 10 July 1997 (Category (A)) or 11 July 1997 to 29 January 1999 (Category (B)) were regarded as parties involved in the CFA judgment and would be unaffected by the NPCSC's interpretation. The paper further mentioned that there were 3 700 persons in Category (A) and (B), the ROA claims of 964 persons had been established and claimants had already been informed. Of the other persons (totalling about 2 700) whose claims would be processed in accordance with the CFA judgment, the paper stated that about 900 of them were currently in Hong Kong. They would not need to return to the Mainland before their claims were processed and results made known; and the remaining 1 800 had returned to the Mainland. The D of Imm would discuss with the Mainland authorities to arrange for their entry when their claims for ROA had been established.

20. On 18 January 2000, the Panel on Security was informed that about 1 000 persons had already acquired ROA. 360 out of the 900 persons who were in Hong Kong in June 1999 mentioned in paragraph 19 above had been issued identity cards. Among those 1 800 persons who had returned to the Mainland, 700 had already come to Hong Kong legally.

The case of LAU Kong-yung and 16 other claimants of right of abode

21. On 3 December 1999, the CFA ruled in favour of the D of Imm in his appeal against the case of LAU Kong-yung and 16 other claimants of ROA in Hong Kong by descent on the basis that at least one parent is a permanent resident of Hong Kong. Of the 17 claimants, 16 had overstayed in Hong Kong in breach of the conditions of stay imposed by the D of Imm and one had come to Hong Kong illegally.

The case of XIE Xiaoyi, the case of TAM Nga-yin, LUI Yiu-leung and CHAN Wai-wah and the case of CHONG Fung-yuen

Judgment of the Court of Appeal delivered on 16 March 2000

22. On 16 March 2000, the Court of Appeal ruled in favour of the D of Imm in his appeal against the orders of ROA in Hong Kong on XIE Xiaoyi, TAM Nga-yin, LUI Yiu-leung and CHAN Wai-wah born outside Hong Kong but who had been adopted by Hong Kong permanent residents. The adoption of all these persons took place in the Mainland.

Judgment of the Court of Appeal delivered on 27 July 2000

23. On 27 July 2000, the Court of Appeal ruled against the D of Imm in his appeal against the claim of CHONG Fung-yuen that he was a permanent resident of the HKSAR by virtue of the provisions contained in BL 24(2)(1) as his paternal grandfather had been residing in Hong Kong since 1978. CHONG Fung-yuen was born on 29 September 1997, shortly after his parents came to Hong Kong on a Two-way Permit (TWP). His parents were then lawfully in Hong Kong. But neither his father nor his mother was settled in Hong Kong or had ROA in Hong Kong at the time of his birth or subsequently.

Judgment of the Court of Final Appeal delivered on 20 July 2001

24. On 20 July 2001, the CFA ruled against the D of Imm in his appeal against the ruling of the Court of Appeal in respect of the claims of CHONG Fung-yuen.

25. The CFA also ruled against TAM Nga-yin, CHAN Wai-wah and XIE Xiaoyi in their appeal against the ruling of the Court of Appeal in respect of their claims that they are permanent residents with the ROA within BL 24(2)(3). The appellants are Chinese citizens born on the Mainland who had been adopted by permanent residents of the HKSAR. In gist, the CFA's judgment ruled that adoption did not confer ROA under BL 24(2)(3).

The case of NG Siu-tung and others, the case of LI Shuk-fan and the case of SIN

Hoi-chu and others, involving 5 113 (originally 5 352) applicants

Judgment of the Court of First Instance delivered on 30 June 2000

26. On 30 June 2000, the Court of First Instance ruled in favour of the D of Imm and dismissed the applications for judicial review by ROA claimants in three cases (i.e. the case of NG Siu-tung and others, the case of LI Shuk-fan and the case of SIN Hoi-chu and others) involving 5 352 applicants. The claimants were Mainland residents who had come to Hong Kong and sought to establish and exercise their ROA. They did not have the exit permits from the Mainland. Many claimants were born when neither parent was a permanent resident. Most claimants were in Hong Kong while some had returned to the Mainland. Other than some who had come to Hong Kong illegally, most had entered Hong Kong on a TWP and had overstayed.

Judgment of the Court of Final Appeal delivered on 10 January 2002

27. On 10 January 2002, the CFA delivered its ruling in respect of three appeal cases, i.e. the case of NG Siu-tung and others, the case of LI Shuk-fan and the case of SIN Hoi-chu and others, involving 5 113 (originally 5 352) applicants. The appellants alleged that they should have their claims for ROA in Hong Kong verified according to the judgments delivered by the CFA on 29 January 1999. Based on the "Summary of judgment of the Court of Final Appeal" in respect of the three cases issued by the Judiciary on 10 January 2002, the issues raised by the applicants are as follows –

a. Upon the true construction of the sentence "judgments previously rendered shall not be affected" in BL 158(3), they all have an accrued right under the judgments in NG Ka-ling and CHAN Kam-nga and should not be affected by the NPCSC's interpretation (the "judgments previously rendered" issue);

b. Even if they are held to be persons affected by the NPCSC's interpretation, as a result of the public statements and representations made by the Government to the applicants and the manner in which the NG Ka-ling and CHAN Kam-nga litigation was conducted, they all have a legitimate expectation, to which effect should be given, namely, the expectation that they would receive the same treatment as the parties in those two cases and that their claims for permanent resident status would be verified according to the two judgments (the "legitimate expectation" issue);

c. Even if they fail on the first two grounds, in all the circumstances of this case, in view of the grave injustice suffered by the applicants, it would be unfair and an abuse of process for the D of Imm to execute the removal orders against the applicants and the court should prevent such an abuse

of process by staying the removal orders (the "abuse of process" issue);

d. Those applicants who arrived in Hong Kong prior to 1 July 1997 (Period 1) are not subject to BL 22(4) or the NPCSC's interpretation and those who arrived between 1 July and 10 July 1997 (Period 2) are not affected either by the NPCSC's interpretation or the Immigration (Amendment) (No. 3) Ordinance 1997 which was held not to apply retrospectively (the "Periods 1 and 2" issue); and

e. Those applicants who arrived between 1 July 1997 and 29 January 1999 have a legitimate expectation that, provided they can satisfy the conditions contained in the policy decision, they will be treated as if they were parties to the judgments in NG Ka-ling and CHAN Kam-nga (the "Concession" issue).

28. On the "judgments previously rendered" issue, the CFA ruled against the applicants.

29. On the "legitimate expectation" issue, the CFA ruled -

a. In favour of the D of Imm in respect of the general statements made by CE and Government officials. CFA held that whatever expectations the applicants might have, they were overridden by the immigration legislation validated by the NPCSC's interpretation;

b. In favour of the applicants who received proforma replies sent by the Legal Aid Department between 7 December 1998 and 29 January 1999; and

c. In favour of the applicant who received a letter dated 24 April 1998 from S for S.

30. On the "abuse of process" issue, the CFA ruled in favour of the D of Imm and held that the removal orders and the execution of such orders did not amount to an abuse of the process of the court.

31. On the "Periods 1 and 2" issue, the CFA ruled in favour of the applicants who arrived in Period 1 and were born after at least one of their parents had become a permanent resident of the HKSAR. It ruled against applicants who arrived in Period 1 but were born before one of their parents had become a permanent resident of the HKSAR. It also ruled against applicants who arrived in Period 2.

32. On the "Concession" issue, the CFA ruled against the D of Imm on what amounted to a claim but in favour of the D of Imm on other issues. It held that there

was no misinterpretation or misapplication of the policy decision by the D of Imm, although the CFA found that in certain cases the D of Imm had applied too strict a construction of what constituted a claim falling within the policy decision.

Meeting of the Panel on Security on 24 January 2002 on issues relating to the judgment of the Court of Final Appeal delivered on 10 January 2002 in respect of appeal cases concerning the right of abode in the Hong Kong Special Administrative Region

33. The Panel on Security discussed at its meeting on 24 January 2002 issues relating to the judgment delivered by the CFA on 10 January 2002 in respect of appeal cases concerning ROA in the HKSAR.

34. Some Members pointed out that although the Administration had reiterated many times that no amnesty would be granted to ROA claimants, some concern groups and organisations were still urging the Administration to grant amnesty to these claimants. This would only generate false hopes for ROA claimants. In the view of these Members, the immigration regime would be undermined if ROA claimants who had entered Hong Kong illegally or overstayed were not repatriated. Some other Members also considered it inappropriate from a legal point of view to grant amnesty to all ROA claimants who did not succeed in their appeals.

35. Regarding adopted children, some Members expressed concern that young children who were adopted by Hong Kong permanent residents would be repatriated, and some of these children had no one to depend on in the Mainland.

36. The Administration had stressed that no amnesty would be granted for ROA claimants who did not succeed in their appeals to the CFA to stay in Hong Kong, because any amnesty would only tempt more people in the Mainland to enter illegally or overstay in Hong Kong. It would also be unfair to applicants who had returned to the Mainland or were waiting in the Mainland for OWP. The Administration respected the CFA judgment delivered on 10 January 2002, and would take necessary measures to implement it in accordance with the law.

37. The Administration also stressed that D of Imm would only exercise his discretion under the Immigration Ordinance on a case-by-case basis and where there were exceptional humanitarian and compassionate grounds.

38. Regarding young children who had no one to depend on when they returned to the Mainland, the Administration advised that it intended to seek the assistance of the relevant Mainland authorities to provide the necessary assistance and care for these children.

39. Members suggested that the Administration should discuss with the Mainland

the creation under the points system of the OWP Scheme an additional category for children aged over 18 of Hong Kong permanent residents to apply for OWP. Members also suggested that the Administration should explore with the Mainland authorities the possibility of granting TWPs with multiple-entry and longer visiting periods to Mainland residents.

40. Regarding the question of whether forced repatriation of a large scale would be carried out after the grace period, the Administration stated that it could not disclose operational details, but assured Members that should repatriation be necessary, only minimum force would be used.

Other relevant information

41. Members may wish to refer to -

a. **Appendix III** for details on legislative amendments introduced after the NPCSC's interpretation;

b. **Appendix IV** for information relating to C of E; and

c. **Appendix V** for information relating to ROA of adopted children.

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Council Business Division 2
Legislative Council Secretariat
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Appendix I

Deliberations at House Committee meetings held between 6 and 21 May 1999 on service implications arising from the admission of 1 675 000 Mainland residents and possible solutions

Service implications

At the special House Committee meeting on 6 May 1999, the Acting Chief Secretary for Administration (CS) explained that according to the CFA ruling, the Hong Kong Special Administrative Region (HKSAR) must process applications for the Certificate of Entitlement (C of E) within a reasonable period of time. The Administration considered it reasonable to assume that the first generation of new arrivals would be absorbed in three years' time, and that the two generations be absorbed within 10 years. Referring to an information paper entitled "The Judgement of the Court of Appeal on Right of Abode Issue - Assessment of Service Implications" dated 6 May 1999 prepared by the Administration for the meeting, Acting CS pointed out that taxpayers would have to shoulder a capital expenditure of $710 billion in 10 years, while the recurrent expenditure of various services would reach $33 billion annually by the tenth year to meet the needs of an additional 1 675 000 people in respect of major services provided by the Government. Moreover, on top of the huge financial burden, land development of a large scale would certainly give rise to enormous planning and environmental problems. The Administration revealed that, on the basis of the existing planning criteria in Hong Kong, a total of 6 000 hectares of land would be needed to accommodate the additional population.

2. According to the assessment of the relevant bureaux detailed in the same information paper referred to in the above paragraph, the number of schools would have to increase by about 23% in 12 years' time and Government's long-term policy objective of requiring all new teachers to be trained graduates would almost certainly have to put back indefinitely. The admission of eligible persons would render the Government's key housing policy targets unachievable. There would be longer queues and more "turn-away" in General Outpatient clinics and the waiting time for first appointment for specialist outpatient clinics would deteriorate from the present 11 weeks to around 25 weeks by 2009. There would also be inevitable pressure on the provision of transport infrastructure, welfare services, etc. The rate of unemployment would eventually soar because of over-supply in the labour market. The problem of environment pollution would also aggravate.

3. Responding to queries about the accuracy of the Government's statistics, Acting CS said that "even if the assessment results were to be considerably discounted, we would still be talking about an exceptionally enormous burden. It is doubtful as to whether we could take it".

Available options and solutions

4. The House Committee at its special meeting on 14 May 1999 considered and passed the motion "that the House Committee requests the Hong Kong Special Administrative Region Government to deal expeditiously with the issue on the right of abode of the people in the Mainland born to Hong Kong residents, for this purpose to propose effective options, including requesting the Standing Committee of the National People's Congress to interpret the relevant provisions in the Basic Law, or making proposals for the National People's Congress to amend the Basic Law, this Council further urges the HKSAR Government to move as soon as possible a motion in the Legislative Council on its proposed option, stating also the reasons for rejecting other options". The motion was moved by Hon James TIEN Pei-chun and amended by Dr Hon LEONG Che-hung. A total of 37 Members voted in favour of the motion and four Members voted against the motion.

5. On 18 May 1999, CS informed the House Committee that the Chief Executive (CE) in consultation with the Executive Council (ExCo) had decided to enlist the assistance of the State Council under Articles 43 and 48(2) of the Basic Law (BL) to seek an interpretation of BL 22(4) and 24(2)(3) in accordance with the true legislative intent of the BL by the Standing Committee of the National People's Congress (NPCSC) in its June meeting.

6. Referring to the Administration's information paper entitled "Right of Abode: The Solution" tabled at the meeting, CS further informed the House Committee that the pros and cons of the following four options had been carefully considered by CE and ExCo before a decision was made -

a. All the persons who were eligible for the right of abode (ROA) by virtue of the Court of Final Appeal (CFA) judgement to be allowed to Hong Kong for settlement;

b. A new ruling to be delivered by CFA through new cases;

c. National People's Congress to amend the BL; and

d. NPCSC to interpret the relevant provisions of the BL.

7. The Secretary for Justice (S for J) emphasized that in finding a solution to the current problems, the HKSAR Government remained totally committed to the rule of law, the independence of the judiciary and the faithful implementation of the BL. S for J reaffirmed that option referred to in paragraph 6(a) was impracticable given the service implications of absorbing an additional 1 675 000 people from the Mainland within the coming decade.

8. Regarding the option referred to in paragraph 6(b), S for J explained that "the Administration has decided that it is not an acceptable solution. We cannot rely

on the mere possibility that the CFA might at some future point in time reverse its decision. That would be far too speculative an approach to pressing problems". She further said that "if the CFA did change its interpretation of the BL, there is a risk that this would be perceived to be the result of political pressure rather than reasoned legal debate. This would be very damaging to the credibility of the court".

9. In deciding between the options referred to in paragraph 6(c) and 6(d), S for J explained that "the Administration has been guided by firm principle, not expediency. The principle relied upon is that there is a fundamental difference between an interpretation and an amendment. An interpretation is based on the true legislative intent of a provision. An amendment changes the legislative intent of a provision." She further informed the House Committee that "when the Immigration Ordinance was amended in 1997 to introduce the one way permit and time of birth provisions, both the HKSAR Government and the legislature believed that they reflected the true legislative intent of BL 22(4) and 24(2)(3)" and that "the current debate on ROA is concerned with the true meaning of the BL. The ultimate authority to decide that question is the NPCSC, which has the constitution power to interpret that provision". S for J went on to say that "If the NPCSC interprets the two provisions differently from the CFA, then most of the current problems will be solved and there will be no need to amend the BL". S for J, however, emphasized that "NPCSC will not make an interpretation of the BL unless the issue cannot be resolved by the HKSAR and the Standing Committee is requested to do so".

10. In addition, Secretary for Security stated that the HKSAR Government would not seek an interpretation in respect of the ROA eligibility of children born out of wedlock. The existing legislation of both the Mainland and the HKSAR had already given children born within wedlock and out of wedlock equal status. Besides, in handling the issue of C of E, all the judges of the Court of First Instance, Court of Appeal and CFA had unanimously ruled that excluding children born out of wedlock from acquiring ROA through their fathers' permanent resident status not only was unreasonable but also contravened the International Convenant on Civil and Political Rights.

11. The information paper entitled "Right of Abode : The Solution" referred to in paragraph 6 also provided the Administration's rationale against the views that seeking an interpretation from NPCSC would undermine the rule of law, take away the CFA's power of final adjudication, undermine judicial independence and damage Hong Kong's autonomy. The main arguments put forward by the Administration are as follows -

a. It would be entirely consistent with the new constitutional order for the NPCSC to interpret the BL provisions relating to ROA, and for everyone, including the Judiciary, to be subject to that interpretation;

b. An NPCSC interpretation could change only the principles that are to be

applied to claims for ROA by other persons that are pending or are made in the future;

c. An NPCSC interpretation would not interfere with Hong Kong judges' freedom to decide future cases in accordance with the law;

d. The BL is derived from Article 31 of the Chinese Constitution. By virtue of BL 158(1), the ultimate authority to interpret the BL is given to the NPCSC, not to the HKSAR courts; and

e. An interpretation should not be seen as an "interference" with Hong Kong's autonomy but as a response to a strong demand in community for the current problems to be resolved.

Appendix II

Deliberations at special meetings of the Panel on Constitutional Affairs held between 29 May and 25 June 1999

At the five meetings of the Panel on Constitutional Affairs (CA Panel) held between 29 May and 25 June 1999, both the Administration and members of the public gave their views on, amongst other things, whether it was lawful or constitutional for the Hong Kong Special Administrative Region (HKSAR) Government or the Chief Executive (CE) to seek an interpretation and whether it was lawful or constitutional for the Standing Committee of the National People's Congress (NPCSC) to give one. The suggestion of setting up a formal mechanism for seeking interpretation of the Basic Law (BL) from the NPCSC was also discussed.

2. In response to the concerns raised by the CA Panel, the Constitutional Affairs Bureau issued an information paper in June 1999 which provided the following information -

a. BL 48(2) provides that one of CE's powers and functions is to be responsible for the implementation of the BL, BL43 provides that CE shall be the head of the HKSAR and shall represent the Region. CE shall be accountable to the Central People's Government and the HKSAR, in accordance with the provisions of the BL. It would therefore be appropriate for CE to act on behalf of the HKSAR and submit a report to the State Council for an NPCSC interpretation;

b. In accordance with Article 12 of the NPCSC's Standing Order, authorized organs or persons may submit a bill / motion for deliberation by the NPCSC. These organs include the State Council, Central Military Commission, Supreme People's Court, Supreme People's Procuratorate, Special Committees of the NPC and a joint submission by 10 or more members of the NPCSC;

c. BL 158(4) provides that the NPCSC shall consult the Committee for the BL of the HKSAR before giving an interpretation of the BL; and

d. The Administration would only seek the NPCSC's interpretation in the most exceptional circumstances. Setting up a mechanism is a complex issue which requires careful consideration. The HKSAR Government is not in a position to make any commitment.

Appendix III

Legislative amendments introduced after the interpretation of the Standing Committee of the National People's Congress

Legislative amendments to Schedule 1 to the Immigration Ordinance

In her speech delivered during the debate on the proposed resolution to amend Schedule 1 to the Immigration Ordinance at the Council meeting of 14 July 1999, Secretary for Security (S for S) explained that "the Standing Committee of the National People's Congress's (NPCSC's) interpretation has the same legal force and validity as the Basic Law (BL). The BL is both a national law and a law of the Hong Kong Special Administrative Region (HKSAR). The NPCSC's interpretation has thus already become part of our domestic law. No legislative amendments are therefore necessary to give effect to the NPCSC's interpretation. However, the Court of Final Appeal (CFA) in its judgment on 29 January has declared unconstitutional certain parts of the Immigration Ordinance, its Schedule 1, Form 12 in the Immigration Regulations, and the gazette notice issued by the Director of Immigration (D of Imm) for application procedures for Certificate of Entitlement. We consider it desirable to amend these instruments to remove any doubt as to their text, in the light of the CFA's judgment and the NPCSC's interpretation". S for S also said that the Administration would later on introduce other legislative amendments, for example, to specify the verification procedures likely to be required of persons born out of wedlock, and other related matters. The result of the vote on the proposed resolution was that 35 Members voted in favour of, and 20 Members voted against, the proposed resolution.

Immigration (Amendment) Ordinance 2001 - genetic test arrangements

2. In an information paper entitled "Verification of parentage of persons claiming right of abode - Genetic test arrangements" prepared by the Security Bureau dated 1 June 2000, the Panel on Security was informed of the genetic test arrangements reached between the Bureau of Exit-entry Administration of the Ministry of Public Security and the Immigration Department (ImmD) in early May 2000.

3. In gist, right of abode applicants born within or out of wedlock to parents of Hong Kong permanent resident have to produce evidence to prove their claimed relationship. In cases where the D of Imm is not satisfied with the claimed parent and child relationship on the basis of the available documentary proof submitted by an applicant, the applicant will be required to undergo the genetic test specified by the ImmD. Specifically, the Mainland authorities will 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, the ImmD will be responsible for taking the tissue specimens of the applicant's father (or mother) in Hong Kong. Consent of the applicant concerned is necessary before carrying out the test. To ensure the accuracy

and reliability of the genetic test results, a number of security measures and safeguards will be implemented by both sides.

4. The Immigration (Amendment) Bill 2000 was gazetted on 29 September 2000 and introduced into the Legislative Council on 18 October 2000. A Bills Committee was formed at the House Committee meeting on 20 October 2000 to study the Bill in detail. Despite divided views among members, a majority of members of the Bills Committee voted in favour of the Bills Committee moving an amendment to the effect that the Gazette notice in respect of the genetic test procedure and the fee for the genetic test should be subsidiary legislation. Similarly, a majority of members of the Bills Committee voted in favour of moving an amendment to the effect that in establishing the claimed parentage, an applicant could take a self-arranged genetic test. Both amendments were negatived at the Committee Stage. The Bill was enacted as Immigration (Amendment) Ordinance 2001 on 27 June 2001 and came into operation on 26 July 2001.

Further legislative amendment to Schedule 1 to the Immigration Ordinance

5. At the Council meeting on 15 May 2002, S for S moved a proposed resolution under section 59A of the Immigration Ordinance to amend Schedule 1 to the Ordinance to reflect the judgment of the CFA in the case of *Director of Immigration v. Chong Fung-yuen*, where the CFA held that the definition of "permanent resident in the Hong Kong Special Administrative Region" in paragraph 2(a) of Schedule 1 should include a Chinese citizen born in Hong Kong before or after the establishment of the HKSAR, irrespective of the status of his parent if he was born after such an establishment. The proposed resolution was carried.

Appendix IV

Information relating to Certificate of Entitlement

Application and verification procedures for Certificate of Entitlement

The Standing Committee of the National People's Congress has made it very clear in its interpretation on 26 June 1999 that Mainland residents need to obtain the necessary approval from the relevant Mainland authorities for entering Hong Kong for whatever purposes. On 12 July 1999, the Director of Immigration reached an agreement with the Bureau of Exit-entry Administration of the Ministry of Public Security on the arrangements for application, verification and issuing procedures for Certificate of Entitlement (C of E). The procedures were gazetted on 17 July 1999.

Statistics on Certificate of Entitlement

2. In reply to an oral question on statistics on Mainland persons who came to Hong Kong for settlement asked by Hon James TO at the Council Meeting on 9 January 2002, Secretary for Security informed Members that from 1 July 1997 to the end of December 2001, a total of 114 708 Mainland persons came to Hong Kong for settlement on the strength of an One-way Permit affixed with a C of E. As at the end of December 2001, about 9 000 eligible persons issued with a C of E were still residing in the Mainland, and 2 817 C of E applications were being processed by the Immigration Department.

Appendix V

Information relating to right of abode of adopted children

After the Court of Final Appeal's ruling on the case of TAM Nga-yin, Secretary for Security informed the media on 25 July 2001 that the Director of Immigration would exercise his discretion to grant right of abode to TAM Nga-yin on humanitarian grounds.

2. The Panel on Security discussed the issue of immigration policy on adopted children at its meeting on 1 November 2001. Some members pointed out that a number of adopted children were originally unattended orphans in the Mainland. These children would face a difficult life if repatriated to the Mainland. They considered that these children should be allowed to join their adopters in Hong Kong on humanitarian grounds. The Administration responded that under existing policy and in line with Article 22(4) of the Basic Law, all Mainland residents who wished to enter Hong Kong for settlement had to submit applications to the relevant Mainland authorities under the One-way Permit (OWP) scheme. Requiring all applications to be submitted in accordance with the OWP scheme was fair to all applicants under the scheme.