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Paper for the House Committee meeting on 11 October 2002

Report of the Bills Committee on Immigration (Amendment) Bill 2001

Purpose

This paper reports on the deliberations of the Bills Committee on Immigration (Amendment) Bill 2001.

The Bill

2. The Bill seeks to exclude Mainland officials holding Chinese Travel Permits (CTPs) with a specific endorsement from being treated as ordinarily resident in Hong Kong for the purpose of the Immigration Ordinance during their stay as such holders.

The Bills Committee

3. At the House Committee meeting on 30 November 2001, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon James TO Kun-sun, the Bills Committee has held two meetings with the Administration. The Bills Committee has also considered a written submission from the Constitutional Affairs Committee of the Law Society of Hong Kong (the Law Society). The membership list of the Bills Committee is in the **Appendix**.

Deliberations of the Bills Committee

Eligibility for permanent resident status

4. The Bills Committee notes that Article 24(2) of the Basic Law (BL) sets out the different categories of permanent residents of the Hong Kong Special Administrative Region (HKSAR). According to BL 24(2)(2) as implemented by paragraph 2(b) of Schedule 1 to the Immigration Ordinance, a Chinese citizen who

has ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR is a permanent resident.

5. Section 2(4)(a) of the Immigration Ordinance excludes the following categories of persons from being treated as ordinarily resident during the period they remain in Hong Kong -

- (a) with or without the authority of the Director of Immigration, after landing unlawfully;
- (b) in contravention of any condition of stay;
- (c) as a refugee;
- (d) while detained in Hong Kong under section 13(D) of the Immigration Ordinance pending a decision on whether permission to remain in Hong Kong should be granted or removal action should be taken;
- (e) while employed as a contract worker, who is from outside Hong Kong under a Government importation of labour scheme;
- (f) while being employed as a domestic helper from outside Hong Kong;
- (g) as a member of a consular post within the meaning of the Consular Relations Ordinance; and
- (h) as a member of the Hong Kong Garrison.

Need for the Bill

6. The Administration has advised the Bills Committee that it has been a longstanding policy to allow Mainland residents to enter Hong Kong under official sponsorship by the Central People's Government (CPG) to work in State organisations or enterprises in Hong Kong. Since the resumption of sovereignty, Mainland residents have been entering Hong Kong on the strength of CTPs (因公往來香港澳門特別行政區通行證) bearing a relevant exit endorsement for travelling to Hong Kong for employment.

7. Upon review by Government and clarification from the Mainland authorities on the duties of Mainland officials, the Administration has decided that those who are posted to Hong Kong under the directive of the State in their official capacity should not be treated as ordinarily resident in Hong Kong. They include officials sent by the CPG to work in -

- (a) the Liaison Office;
- (b) the Office of the Ministry of Foreign Affairs (MFAO) in Hong Kong;
- (c) Chinese enterprises which have been set up in Hong Kong with the approval of the Mainland authorities; and
- (d) staff sent from the Mainland to the Hong Kong Garrison.

It is not intended that these officials enter Hong Kong for the purpose of settlement in accordance with BL 22. These officials are required by the CPG to return to the Mainland upon expiry of their working assignment in Hong Kong.

8. The CPG has implemented with effect from 11 October 2001 a new administrative measure to clearly identify Mainland officials directed to work in Hong Kong. A special endorsement will be stamped on the CTPs of the officials concerned stating that "Holder of this document is a public official of the State directed to work in the Hong Kong/Macao Special Administrative Region" ("持證人係國家公職人員，受委派在香港、澳門特別行政區工作。").

9. The Administration has advised that the number of Mainland officials directed to work in Hong Kong who had acquired the right of abode was 1 360 as at 30 September 2001. The number was increased to 1 494 as at the end of August 2002. The Administration considers it necessary to introduce a legislative amendment to tie in with the new administrative measure. Once the amendment has been enacted, the Director of Immigration will have the necessary power to reject applications for permanent resident status from Mainland officials directed to work in Hong Kong, even though they may have stayed here for seven years or more.

The term "ordinarily resident"

10. In its deliberation, the Bills Committee has considered the meaning of the term "ordinarily resident" referred to in BL 24.

11. According to the legal adviser, the concept of "ordinarily resident" was interpreted by the Court of Final Appeal (CFA) in *Fateh Muhammad v. Commissioner of Registration & Another* in accordance with the common law. According to case law, the term was construed according to its natural and ordinary meaning. The meaning would depend on the context in which the term appears. In determining whether a person is ordinarily resident, there are two main considerations, namely, the residence must be voluntarily adopted and there must be a degree of settled purpose. However, custody in penal institutions and unlawful residence, e.g. in breach of the immigration laws, cannot be relied upon as constituting ordinary residence.

Consistency of the Bill with BL

12. The main concern of some members of the Bills Committee is whether the Bill is consistent with BL. They note that some members of the Law Society do not think that it is a proper function of Legislative Council (LegCo) to pass a piece of legislation to interpret BL and the Bill appears to be an attempt to amend BL to restrict the core constitutional right of certain persons to become permanent residents. It is considered that one should not derogate from, or restrict, the common law meaning of "ordinarily resided".

13. A few members point out that the categories of permanent residents of the HKSAR set out in BL 24 include, inter alia, Chinese citizens and persons not of Chinese nationality who have ordinarily resided in Hong Kong for a continuous period of not less than seven years. They question the basis for excluding Mainland officials who are Chinese citizens from being treated as ordinarily resident in Hong Kong. They consider that Mainland officials should be accorded the same treatment as persons not of Chinese nationality, in terms of eligibility for the right of abode in Hong Kong.

14. The Administration has explained that all Mainland officials posted to work in Hong Kong in their official capacity have to seek prior approval from the Hong Kong and Macao Affairs Office of the State Council, and are required to travel to Hong Kong on the strength of a CTP. Mainland officials posted to the CPG's Liaison Office in the HKSAR, MFAO or Hong Kong Garrison are subject to a limit of stay. For Mainland officials posted to work in Hong Kong for other organisations and enterprises, apart from the limit of stay they are also subject to a condition of stay that they shall only take up such employment as may be approved by the Director of Immigration.

15. The Administration points out that the Hong Kong Garrison is one of the categories excluded from being treated as ordinarily resident during the period they remain in Hong Kong under section 2(4)(a)(viii) of the Immigration Ordinance. The section was added to the Immigration Ordinance on 1 July 1997. BL 17(3) provides that laws enacted by LegCo must be reported to the Standing Committee of the National People's Congress (NPCSC) and any law returned by NPCSC due to non-conformity with the provisions of BL regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR shall immediately be invalidated. The consistency of the section with BL has never been called into question by the NPCSC. The Administration is of the view 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. In addition, the Mainland authorities have made it clear that these Mainland officials are not intended to enter Hong Kong for settlement for the purpose of BL 22(4).

16. Some members point out that a generous and purposive approach should be adopted in the interpretation of BL, especially when the issue of basic human rights is involved. The fact that more than 1 400 Mainland officials have already acquired the permanent resident status implies that this category of persons have all along been regarded as ordinarily resident in Hong Kong in the context of BL 24 and the Immigration Ordinance. They consider that the Administration is seeking to impose restrictions on the meaning of "ordinarily resident" in BL 24 through amendment of local legislation. Miss Margaret NG has reservations about the approach and has indicated that she does not support the Bill.

17. The Administration has explained that, according to CFA's decision in *Chong Fung Yuen*, when interpreting the provision that defined the categories of permanent residents, the court should simply consider the language in the light of any ascertainable purpose and the context. That was to be contrasted with the interpretation of other provisions in Chapter III of the BL containing constitutional guarantees of freedoms to which a generous interpretation should be given. The Administration has noted that the term "ordinarily resident" is not defined in BL. As CFA had recognised, the term should be looked at in its particular context. The term should be interpreted in accordance with its purpose in the context of BL 24 and with section 2(4) of the Immigration Ordinance, which exclude certain categories of persons from being treated as ordinarily resident during the period they remained in Hong Kong. The purpose of the Bill is to provide "details" for the implementation of BL 24. The Administration stresses that the Bill is legally in order and consistent with BL.

18. Some members of the Bills Committee are in support of the Bill. They agree with the view of the Administration that the Bill merely seeks to provide "details" for the implementation of BL 24. They also consider that Mainland officials directed to work in Hong Kong should be treated on par with members of consular posts or the Hong Kong Garrison. As the Bill will clarify the status of Mainland officials posted to work in Hong Kong, they urge for its early enactment in the interest of Hong Kong. A member also considers that when BL 24(2) is read in conjunction with BL 22(4) which provides that the number of persons who enter Hong Kong for the purpose of settlement should be determined by CPG after consultation with the Government of the HKSAR, it is clear that Mainland officials directed to work in Hong Kong should not be regarded as ordinarily resident.

Legislative restrictions or clarifications of constitutional provisions

19. Members have requested the Administration to provide information on court cases as examples to illustrate how local legislation could impose restrictions on, or clarify, certain constitutional provisions.

20. The Administration has advised that as BL states general principles and 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. In the Administration's view, it would be within the legislative competence of LegCo to specify, by way of legislative amendment to section 2(4) of the Immigration Ordinance, the Mainland officials referred to in the Bill whose residence could fairly be regarded as extraordinary and falling outside the meaning of "ordinary residence" under BL 24.

21. The Administration has also pointed out that it is for HKSAR courts to determine questions of consistency between local legislation and BL when they arise. The Administration has quoted for members' reference a number of occasions in judicial proceedings where the constitutionality of local legislation with reference to particular BL provisions were examined.

Alternative options

22. Some members consider that if it was the CPG's policy that Mainland officials directed to work in Hong Kong should not be entitled to permanent resident status in Hong Kong, the problem should be resolved by administrative measures instead of enacting the Bill. They have sought the comment of the Administration on the alternative options suggested by the Law Society, e.g. to require Mainland officials to return to the Mainland before they have resided here for seven years, to refuse to approve their applications for permanent resident status, or to impose a CPG approval requirement for people from the Mainland seeking permanent resident status in the HKSAR.

23. The Administration considers the options proposed are either not relevant in the present context or involve administrative measures outside the purview of the Government of HKSAR. As regards the proposal to implement the new policy by administrative means, the Administration considers that it is in the general public interest to inject greater clarity in local legislation so that people know where they stand and how they will be affected.

Retrospective effect of the Bill

24. The Law Society has queried why the Bill would have no retrospective effect if the Bill was consistent with the interpretation of BL 24, as advised by the Administration. Members have requested for the Administration's response.

25. The Administration has explained that as the meaning of the term "ordinarily resident" in respect of Mainland officials was not certain at the time and therefore it had been construed in favour of those Mainland officials who have lived in Hong Kong for seven years or more. As a matter of general legal policy,

actions involving retrospectivity should only be considered in exceptional circumstances. The Administration does not consider that the present circumstances justify taking retrospective action to invalidate the permanent resident status of the Mainland officials concerned.

26. The Administration has also confirmed that although the CPG has issued the special endorsement with effect from 11 October 2001, the proposed legislative amendment will have no retrospective effect on Mainland officials who are eligible for the permanent resident status before commencement of the Bill.

Recommendation

27. The Bills Committee recommends that the Second Reading debate on the Bill be resumed on a date to be advised by the Administration.

Advice sought

28. Members are invited to note the recommendation of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
10 October 2002

Bills Committee on Immigration (Amendment) Bill 2001

Membership list

Chairman

Hon James TO Kun-sun

Members

Dr Hon David CHU Yu-lin, JP

Dr Hon LUI Ming-wah, JP

Hon Margaret NG

Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP

Hon Andrew WONG Wang-fat, JP

Dr Hon Philip WONG Yu-hong

Hon Howard YOUNG, JP

Hon LAU Kong-wah

Hon Miriam LAU Kin-ye, JP

Hon Emily LAU Wai-hing, JP

Hon Abraham SHEK Lai-him, JP

Hon Henry WU King-cheong, BBS, JP

Hon LEUNG Fu-wah, MH, JP

Hon Audrey EU Yuet-mee, SC, JP

(Total : 15 Members)

Clerk

Mrs Percy MA

Legal Adviser

Mr Arthur CHEUNG

Date

2 July 2002