

立法會
Legislative Council

LC Paper No. CB(2)149/09-10
(These minutes have been seen
by the Administration)

Ref : CB2/BC/8/08

**Bills Committee on
Immigration (Amendment) Bill 2009**

**Minutes of meeting
on Tuesday, 29 September 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon Miriam LAU Kin-ye, GBS, JP (Chairman)
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon WONG Yung-kan, SBS, JP
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, JP
Hon LI Fung-ying, BBS, JP
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan
Hon Paul TSE Wai-chun

Members absent : Dr Hon Philip WONG Yu-hong, GBS
Hon CHIM Pui-chung
Hon WONG Kwok-kin, BBS

Public Officers attending : Security Bureau

Mr NGAI Wing-chit
Deputy Secretary for Security (3)

Mr W H CHOW
Principal Assistant Secretary for Security (D)

Mr Edward YU
Assistant Secretary for Security (D3)

Immigration Department

Mr Corrado CHOW
Assistant Director of Immigration
(Enforcement and Torture Claim Assessment)

Department of Justice

Mr Allen LAI
Senior Government Counsel

Clerk in attendance : Ms Betty FONG
Chief Council Secretary (2)2

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Josephine SO
Senior Council Secretary (2)1

Ms Anna CHEUNG
Legislative Assistant (2)2

Action

I. Meeting with the Administration

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Administration's response to issues raised at meetings
[LC Paper No. CB(2)2517/08-09(03)]

2. The Administration briefed members on its response to issues raised and concerns expressed by members and deputations at meetings of the Bills Committee held on 8 and 27 July 2009, details of which were set out in LC Paper No. CB(2)2517/08-09(03).

Follow-up actions to be taken by the Administration

3. The Bills Committee requested the Administration to -
- (a) provide information on whether there had been judicial review cases from persons released on recognizance/bail who tried to challenge the court's decisions with regard to the conditions of

Action

recognizance imposed on them; and

- (b) provide a legal analysis setting out its considerations for the proposed formulation of the new section 38AA, with emphasis on the reasons why this option was more appropriate than making "prohibition from work" a recognizance condition to be prescribed to illegal immigrants (IIs), and whether there would be any legal risk in adopting this option.

Clause-by-clause examination of the Bill

[LC Paper Nos. CB(3)718/08-09, CB(2)2116/08-09(02), CB(2)2517/08-09(01) and (02)]

4. The Bills Committee conducted and completed a clause-by-clause examination of the Immigration (Amendment) Bill 2009. The Chairman concluded that the Bills Committee had completed its scrutiny work.

Legislative timetable

5. Members noted that the Administration would give notice for resumption of the Second Reading debate on the Bill at the Council meeting on 11 November 2009, and a written report on the deliberations of the Bills Committee would be submitted to the House Committee at its meeting on 23 October 2009.

II. Any other business

6. There being no other business, the meeting ended at 6:10 pm

Council Business Division 2
Legislative Council Secretariat
29 October 2009

**Proceedings of the meeting of the
Bills Committee on Immigration (Amendment) Bill 2009
on Tuesday, 29 September 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000408	Chairman	Opening remarks	
000409 – 001600	Admin	Briefing on the Administration's response to issues raised by members at the meetings on 8 and 27 July 2009 (LC Paper No. CB(2)2517/08-09(03))	
001601 - 003554	Chairman Hon James TO Admin	<p>Reasons provided by the Administration for not making "prohibition from work" a recognizance condition to be prescribed to illegal immigrants (IIs) (Paragraph 6 of LC Paper No. CB(2)2517/08-09(03))</p> <p>Overseas practices regarding access to work for torture claimants/refugees/asylum seekers and the detention arrangements (Annex D to LC Paper No. CB(2)2517/08-09(03))</p> <p>Release on bail granted by a court of a person arrested or detained on a criminal charge with conditions imposed in accordance with the Criminal Procedure Ordinance (Cap. 221); the Director of Immigration (D of Imm)'s discretion to grant a person release on recognizance as provided under the Immigration Ordinance (Cap. 115) (IO)</p> <p>Mr James TO's views/enquiries -</p> <p>(a) it was a deviation from the international norm/practice for the Administration to deal with problems relating to unlawful employment without a comprehensive review on the torture claim screening mechanism in the first place, and to prohibit torture claimants from working indiscriminately. While the Administration should deter abuse of the torture claim system, it should give some thoughts to individual screened-in cases which merited special consideration;</p> <p>(b) to allow more flexibility in dealing with the problem of unlawful employment by torture claimants, the Administration should consider implementing recognizance granted to IIs under a new statutory regime, so as to provide a legal basis for the authorities concerned to make "prohibition from work" a recognizance condition on a case-by-case basis and violation of the condition an offence; and</p> <p>(c) whether there had been judicial review cases from persons released on bail who tried to challenge the court's decisions with regard to the</p>	

Time marker	Speaker	Subject	Action required
		<p>provisions of recognizance imposed on them</p> <p>The Administration advised that -</p> <ul style="list-style-type: none"> (a) the 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention) was applicable to the United States and Canada. These countries allowed asylum applicants and refugee claimants to work so as to fulfill their obligations in accordance with the Refugee Convention; (b) the Refugee Convention, however, did not apply to the Hong Kong Special Administrative Region (HKSAR). The HKSAR Government did not have any obligation to admit persons seeking refugee status or to handle refugee status determination; (c) in considering whether or not to allow torture claimants to work in Hong Kong, the Administration had taken into account a number of factors. Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Administration would not remove a person to another country if he would face torture on return. However, this did not mean that the persons concerned were entitled to the right of work. While the Administration might make reference to overseas practices, it should also take into account the facts that other countries had circumstances different from Hong Kong and that they had different asylum policy. The Government's aim was to provide support which was considered sufficient to prevent a person from becoming destitute while at the same time not to create a magnet effect which would have serious implications on the sustainability of the economy; (d) the proposed offence against the taking of employment or establishing/joining in business by IIs was consistent with the spirit of IO that IIs and all other ineligible persons (including refugees, asylum seekers and torture claimants) were not allowed to work in Hong Kong; and (e) the Administration was reviewing the torture claim screening mechanism. It planned to introduce a legislative regime with comprehensive and effective procedures for assessing torture claims made under CAT. Issues on the treatment of screened-in claimants would be further considered in the context 	
003555 - 003843	Hon LAU Kong-wah Admin Chairman	The Administration clarified that the object of the Immigration (Amendment) Bill 2009 (the Bill) was to tackle the problem of persons engaged in illegal employment, irrespective of whether that person was	

Time marker	Speaker	Subject	Action required
		a torture claimant, an asylum seeker or a refugee	
003844 - 005716	Hon James TO Admin Chairman	<p>The Court of First Instance's judgment in the judicial review case (<i>Iqbal Shahid, Waseem Abbas & Others v Secretary for Justice</i>) and its implications</p> <p>Mr James TO remained of the view that there was a need to differentiate torture claimants from IIs as far as the right of work was concerned. He reiterated that the problem of CAT claimants taking up illegal employment should first be handled in the context of a comprehensive policy review before the introduction of the Bill, and the question of whether CAT claimants should be allowed to work should be considered on the merits of individual cases. He queried the appropriateness to specify an offence against the taking of unlawful employment to cover all IIs (including torture claimants) at this point of time when the results of the Administration's comprehensive review on torture claim screening mechanism were still pending</p> <p>The Administration advised that allowing torture claimants to undertake employment while undergoing screening could potentially attract more economic migrants coming to Hong Kong. Under CAT, the Administration would not remove a person to another country if he would face torture on return. However, this did not mean that the persons concerned were entitled to the right to work. As for screened-in claimants, they were still subject to removal from Hong Kong if the risk to torture was eliminated, and they might also be removed to a safe alternate country or territory</p> <p>Referring to paragraph 6(b) of LC Paper No. CB(2)2517/08-09(03), Mr James TO asked whether there had been judicial review cases from persons released on recognizance/bail who tried to challenge the court's decisions with regard to the conditions of recognizance imposed on them</p> <p>The Administration advised that the imposition of a recognizance with conditions on persons subject to detention (including IIs) was different from imposing conditions of stay on visitors. Generally speaking, a person subject to detention but released on recognizance would be detained again if he failed to comply with the recognizance conditions imposed on him. However, where permission was given under IO to a person to land or remain in Hong Kong, an immigration officer or immigration assistant might impose a limit of stay and such other conditions of stay as he thought fit, being conditions of stay authorized by D of Imm, either generally or in a particular case. The conditions were set out in the Immigration Regulations (Cap. 115A), and section 41 of IO provided that any person who contravened a condition of stay in force in respect of him should be guilty of an offence</p>	<p>Admin to provide the requested information (paragraph 3(a) of the minutes refers)</p>

Time marker	Speaker	Subject	Action required
		<p>Mr James TO was unconvinced of the reasons provided by the Administration for not making "prohibition from work" a recognizance condition to be prescribed to IIs. He remained of the view that the Administration should consider implementing recognizance granted to IIs under a new statutory regime so as to provide a legal basis for immigration officers to impose "prohibition from work" in the grant of recognizance to IIs</p> <p>Mr James TO requested the Administration to provide a legal analysis setting out its considerations for the proposed formulation of the new section 38AA, with emphasis on the reasons why this option was more appropriate than making "prohibition from work" a recognizance condition to be prescribed to IIs, and whether there would be any legal risk in adopting this option</p>	<p>Admin to provide the requested information (paragraph 3(b) of the minutes refers)</p>
005717 - 005900	Chairman Hon James TO Admin	Clause-by-clause examination of the Bill [LC Paper Nos. CB(2)2116/08-09(02) and CB(2)2517/08-09(01) & (02)]	
005901 - 005931	Chairman	Examination of the long title of the Bill	
005932 - 005949	Chairman	Examination of the short title and timing for commencement of the Bill	
005950 - 010537	Chairman Admin Hon LAU Kong-wah ALA4	Examination of clauses 3 and 4 - interpretation of the Bill; new definition of "valid travel document" as defined in clause 3(b) of the Bill; the phrase "establishes to the satisfaction of an immigration officer or immigration assistant" in the new section 2(1)(b)(i) of IO; whether the Administration had identified any countries or places, other than Macao, whose residents might enter Hong Kong by virtue of the new definition of "valid travel document" as defined in the proposed new section 2(1)(b); elaboration on clause 4 which sought to amend section 17G of IO	
010538 - 011621	Chairman Admin ALA4 Hon LAU Kong-wah Hon Paul TSE	<p>Examination of clause 5 of the Bill which sought to add a new section 38AA to IO to prohibit IIs or persons who were subject to removal or deportation orders from taking up employment or establishing/joining in any business</p> <p>The Administration confirmed that the proposed new section 38AA(1)(a) would apply to IIs taking up employment or establishing/joining in business (including IIs released on recognizance)</p> <p>Definition of "employment, whether paid or unpaid" under the proposed new section 38AA(1); whether the interpretation of the meaning of "employment" as defined in the Employment Ordinance (Cap. 57) should apply to the proposed new section 38AA(1) of</p>	

Time marker	Speaker	Subject	Action required
		<p>IO; whether participation in voluntary work would fall within the meaning of "unpaid employment"</p> <p>The Administration's explanation on its policy intent to use the phrase "whether paid or unpaid" to cover both payment-in-kind and payment-in-cash employment to plug the possible loophole, and elaboration on the ordinary dictionary meaning of the word "employment"</p>	
011622 - 012134	Hon Paul TSE Admin Chairman	<p>The Administration confirmed that IIs not authorized to remain in Hong Kong under section 13 of IO might also be subject to the proposed offence in the new section 38AA(1). As regards the future prosecution policy in respect of IIs who took up illegal employment, it would be subject to legal advice</p> <p>The Administration advised that the proposed penalty level for contravening the offence in the new section 38AA was a fine at level 5 and imprisonment for 3 years, the maximum penalty level for contravening the existing offences of "unlawful remaining" and "breach of conditions of stay" under sections 38(1)(b) and 41 of IO would be a fine at level 4 and imprisonment for 3 years and a fine at level 5 and imprisonment for 2 years respectively</p> <p>On the question of whether participation in voluntary work would fall within the meaning of "employment", the Administration advised that the decision would depend on individual circumstances in each case, but in general, whether the person concerned had an obligation to work for the employer was a key consideration</p>	
012135 - 012723	Hon LAU Kong-wah Chairman Hon Paul TSE Admin	<p>Mr LAU Kong-wah's view/suggestion -</p> <p>(a) it was unacceptable for participation in voluntary work to be regarded as a form of employment; and</p> <p>(b) the Administration should consider including in IO an express definition for the term of "employment" to avoid confusion</p> <p>Mr Paul TSE held the view that the drafting of the new section 38AA(1) was sufficiently clear. On the question of whether participation in voluntary work would fall within the meaning of "unpaid employment", he opined that the crux of the matter was whether the work would incur a binding commitment or obligation on the person who took up the voluntary work</p> <p>The Administration explained that the phrase "employment, whether paid or unpaid" was used for the purpose of maintaining consistency with the relevant provisions under the Immigration Regulations to provide for the condition for visitors not to take paid or unpaid employment. The</p>	

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		Administration's intention was to cover all scenarios, including payment-in-kind employment, for the avoidance of doubt	
012724 - 013634	Chairman Admin Hon LAU Kong-wah Hon Paul TSE ALA4	<p>Whether the term "有薪或無薪的僱傭工作" in the proposed new section 38AA(1) needed to be reworded as "有薪酬或無薪酬的僱傭工作"; the Administration advised that the term "有薪或無薪的僱傭工作" was consistent with other provisions in IO and the meaning of the term in the English text should be sufficiently clear to cover payment-in-kind employment</p> <p>The Administration advised that whether there was an employment relationship would depend on the facts and circumstances of individual cases, and whether or not an obligation was imposed on a person to perform the work was one of the determining factors in deciding the existence of such a relationship</p> <p>The Administration advised that the proposed offence against IIs taking up employment would cover self-employed persons</p>	
013635 - 013855	Chairman Admin	Examination of clauses 6 and 7 of the Bill which sought to amend section 61(1) of IO and the Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) by providing that a visa might be issued in a manner other than an endorsement on a valid travel document	
013856 - 014031	Chairman Clerk	The Chairman concluded that the Bills Committee had completed the scrutiny of the Bill, and a report would be submitted to the House Committee for consideration on 23 October 2009 recommending resumption of Second Reading debate on the Bill at the Council meeting on 11 November 2009	

Council Business Division 2
Legislative Council Secretariat
29 October 2009

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