

LEGISLATIVE COUNCIL BRIEF

Immigration Ordinance (Chapter 115)

IMMIGRATION (UNAUTHORIZED ENTRANTS) (AMENDMENT) ORDER 2016

INTRODUCTION

A At the meeting of the Executive Council on 10 May 2016, the Council **ADVISED** and the Chief Executive **ORDERED** that the Immigration (Unauthorized Entrants) (Amendment) Order 2016 (“the Amendment Order”), at **Annex A**, should be made under section 37B of the Immigration Ordinance (Cap.115) (“the Ordinance”).

JUSTIFICATIONS

2. The number of non-ethnic Chinese illegal immigrants (“NECIIs”) smuggled into Hong Kong has drastically increased from an average of 46 per month in 2011 to 318 per month in 2015 (591% increase). Based on available information, in 2015, 63% of all NECIIs came (or claimed to have come) into Hong Kong by sea, and 37% by land.

3. Intelligence available to law enforcement agencies (“LEAs”) suggests that these smuggling activities are clearly syndicated. Some NECIIs claim to have paid a fee of up to \$70,000 to syndicates for the passage to and subsequent remaining in Hong Kong (which may include assistance in making a non-refoulement claim¹ to resist removal, food and

¹ Claims lodged by foreigners who smuggled into Hong Kong, or who overstayed the limit of stay allowed by the Immigration Department (“ImmD”) or were refused permission to land by ImmD on arrival, to resist removal to an alleged risk country on the ground that he will be subject to such risks as torture, cruel, inhuman or degrading treatment or punishment, or persecution, etc. at that country.

lodging, arranging for unlawful employment, providing legal support, etc.). Between 2012 and 2015, a total of 82 syndicated cases of NECIIs being smuggled into Hong Kong were smashed by the Police. 60% of the arrested arrangers / syndicates smuggled Vietnamese illegal immigrants (“VIIs”) (sometimes in addition to other NECIIs) into Hong Kong; the remaining 40% smuggled only NECIIs from countries other than Vietnam.

Part VIIA of the Ordinance

B 4. Part VIIA of the Ordinance (at **Annex B**) provides for a number of stringent penalties and strengthened enforcement powers against the smuggling of certain classes of illegal immigrants (“IIs”) declared under that Part as “**unauthorized entrants**” (“UEs”). They include –

- (a) each member of the *crew* (including the captain) and the *owner* and his *agent* of any *ship carrying a UE* on board into Hong Kong, or anyone who *arranges or assists or participates in making arrangements to enable a UE’s voyage or passage* to Hong Kong (whether by sea or by land) commits an offence and is liable on conviction on indictment to *imprisonment for 14 years* and a *fine of \$5,000,000* (sections 37C and 37D);
- (b) anyone who *assists a UE to remain* in Hong Kong is liable on conviction on indictment to *imprisonment for 10 years* and a *fine of \$500,000* (section 37DA);
- (c) the Director of Immigration is empowered to *seize any ship or property* used in the commission of offences under sections 37C and 37D *and any proceeds* directly or indirectly of such offences (sections 37E to 37G);
- (d) prosecution may be initiated in respect of *acts committed outside Hong Kong* (section 37J); and
- (e) where there are reasonable grounds for believing that a person may be the owner, the agent of the owner or a member of the crew of a ship, that person shall be *presumed to be such in the absence of evidence to the contrary* (section 37K).

5. Section 37B of Part VIIA of the Ordinance empowers the Chief Executive in Council to declare by order any class or description of persons who do not enjoy the right of abode or have the right to land under section 2AAA of the Ordinance as UEs. The present Immigration (Unauthorized

Entrants) Order (Cap.115D) (“the Order”) was made in the late 1970s / early 1980s. For historic reasons, only the following classes of IIs were declared as UEs –

- (a) persons resident or formerly resident in Vietnam;
- (b) persons who leave or seek to leave the People’s Republic of China² (now Mainland China) when not in possession of documents issued there permitting them to do so in accordance with its laws; and
- (c) persons resident or formerly resident in Macau, or who are or have been in Macau, whether in transit or in any other circumstances whatsoever.

6. There are no provisions comparable to those in Part VIIA under the Ordinance against persons or syndicates arranging the passage of NECIIs other than VIIs into Hong Kong or assisting them to remain. If caught, they are charged for aiding and abetting³ a person to enter Hong Kong illegally (in contravention of section 38(1)(a) of the Ordinance) or a person who has entered illegally to remain in Hong Kong (in contravention of section 38(1)(b)⁴ of the Ordinance). Both offences carry a maximum penalty of **3 years’ imprisonment** and a **level 4 fine (\$25,000)** on conviction on indictment. Sections 38(4)⁵ and 39⁶ of the Ordinance

² It has been interpreted by the Court that the People’s Republic of China in the context of the Immigration (Unauthorized Entrants) Order (Cap.115D) does not include Hong Kong. See *HKSAR v Luo Shui Ji* [2007] HKCLRT 127.

³ Section 89 of the Criminal Procedure Ordinance (Cap. 221) stipulates that “any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence.”

⁴ Section 38(1) stipulates that “subject to subsection (2), a person who (a) being a person who by virtue of section 7 may not land in Hong Kong without the permission of an immigration officer or immigration assistant, lands in Hong Kong without such permission; or (b) having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director, shall be guilty of an offence and shall be liable on conviction to a fine at level 4 and to imprisonment for 3 years.”

⁵ Section 38(4) stipulates that “if a person lands from a ship in contravention of subsection (1)(a) – (a) the captain of the ship; and (b) the owner of the ship and his agent, shall be guilty of an offence and shall be liable – (i) on conviction on indictment, to a fine of \$600,000 and to imprisonment for 7 years;.....”

⁶ Section 39(a) stipulates that "if a person on board a ship is seeking to land from the ship in contravention of section 38(1)(a), the captain of the ship shall be guilty of an offence and shall be liable – (a) on conviction on indictment, to a fine of \$600,000 and to imprisonment for 7 years;..... unless he proves that he did not know and had no reason to suspect that such person was seeking to land in contravention of section 38(1)(a)."

stipulate offences against the owner (and his agent) or the captain of any ship carrying any person who enters / seeks to enter Hong Kong illegally. The maximum penalty is *imprisonment for 7 years* and a *fine of \$600,000*. However, these two offences apply only to those smuggled through the sea, and only against the owner (and his agent) or the captain of the ship; on the other hand, the crew on board and other arrangers (e.g. truck driver smuggling IIs), etc. are not liable to be prosecuted thereunder.

7. As mentioned in paragraph 3 above, 40% of arrangers / syndicates arrested are involved in the smuggling of NECIIs from countries other than Vietnam. Even where there is sufficient evidence, these arrested persons could not be prosecuted under Part VIIA of the Ordinance. They could only be charged for lesser offences, for example, aiding and abetting NECIIs to unlawfully land in Hong Kong under section 38(1)(a) of the Ordinance, or section 39 in cases of the captain of a ship carrying any person seeking to land illegally.

8. There is a clear disparity in terms of the scope of punishable acts as well as the level of punishment between offences punishable under Part VIIA and other provisions of the Ordinance. The deterrent effect against smuggling of NECIIs (other than Vietnamese covered under Part VIIA) is insufficient having regard to the profitability of committing the crime and the criminality of the relevant offences. A comparison between the offences and penalties under Part VIIA in respect of UEs and aiding and abetting other NECIIs to enter / remain is set out in **Annex C**.

C

9. The Amendment Order expands the definition of UE to include major source countries, other than Vietnam, where NECIIs originate, i.e. **Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia, and Sri Lanka**, so as to immediately enhance the penalties against smuggling of IIs from these countries.

10. Being a UE in itself is not an offence under Part VIIA, though the II may be liable for other applicable offences⁷, subject to the availability of evidence. If a non-refoulement claim is made by a UE in Hong Kong, it will be screened in the same manner as those made by other NECIIs who are not UEs.

⁷ For example, landing in Hong Kong without the permission of an immigration officer or immigration assistant (section 38(1)(a) of the Ordinance), having landed in Hong Kong unlawfully, remaining in Hong Kong without the authority of the Director of Immigration (section 38(1)(b) of the Ordinance), using a forged, false, or unlawfully obtained or altered travel document (section 42(2)(b) of the Ordinance), being in Hong Kong in contravention of a deportation order (section 43(1) of the Ordinance), etc.

11. The situation of illegal immigration is acute and worsening. NECIIs now make up more than half of the non-refoulement claimants stranded in Hong Kong. Tough enforcement action against NECIIs is a key linchpin in our strategy in containing the number of claimants. Whilst LEAs are already stepping up their enforcement actions, they cannot achieve the desired deterrent effect against the lucrative smuggling syndicates unless the Order is amended in tandem to provide for the application of strengthened enforcement powers and more stringent penalties against the smuggling of NECIIs from countries other than Vietnam into Hong Kong. The early commencement of the Amendment Order is hence part and parcel of our enforcement efforts.

THE AMENDMENT ORDER

12. The Chief Executive in Council ordered that the Amendment Order be introduced to complement enforcement actions. The main provision of the Amendment Order amends paragraph 2(1)(a) of the principal Order to include persons resident or formerly resident in Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia or Sri Lanka. The existing provisions being amended are set out in **Annex D**. The Amendment Order shall commence on the date of publication in the Gazette so as to prevent syndicates from taking the last opportunity to smuggle NECIIs from these countries in large batches before the Amendment Order takes effect.

D

LEGISLATIVE TIMETABLE

13. The legislative timetable will be as follows –

Publication in the Gazette and commencement	20 May 2016
Tabling at the Legislative Council	25 May 2016

IMPLICATIONS OF THE PROPOSALS

14. Implementation of our recommendation would not require additional financial or manpower resources on top of available resources for tackling NECIIs and human smuggling syndicates. Financial

implications, if any, will be absorbed from within the existing resources of the relevant bureau/departments. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, productivity, family, gender, or environmental implications. This proposal is conducive to sustainability as it could improve social and public order by reducing illegal immigration.

PUBLIC CONSULTATION

15. The Legislative Council Panel on Security was briefed on 2 February 2016 on the Government's plan to launch a comprehensive review of the strategy of handling non-refoulement claims, including the proposal to amend the Order as a measure to strengthen pre-arrival control, and was generally supportive of the comprehensive review. The Panel was further consulted on the proposal of amending the Order on 12 April 2016. Whilst Members supported the Amendment Order to impose heavier penalties against smugglers, some Members expressed concerns on the negative vetting procedures and the lack of opportunity to examine provisions under the Amendment Order in detail before its commencement. In light of Members' views, we have confined the Amendment Order to only adding to the definition of UEs eight major source countries of NECIIs to immediately strengthen our enforcement efforts.

PUBLICITY

16. A press release will be issued on the gazettal of the Amendment Order. A spokesperson will be made available for answering media enquiries.

BACKGROUND

17. The Unified Screening Mechanism commenced in March 2014 to screen non-refoulement claims on all applicable grounds in one go. As at end April 2016, 11 178 claims were pending screening, of which over 50% are NECIIs. In a short span of 26 months, the number of new claims registered a 323% increase (i.e. from 102 per month on average between 2010 and 2013 to 431 per month between March 2014 and April 2016). Over 80% of claimants are from South or Southeast Asian countries including Vietnam (23%), India (19%), Pakistan (17%), Bangladesh (12%) and Indonesia (10%). The surge in claimants, coupled with their abuse of

our screening system and the worsening crime situation, have caused considerable public concerns over the social and public order issues brought about by the prolonged presence of a large and growing number of claimants in Hong Kong. In 2016-17, the estimated expenditure for handling non-refoulement claims will increase to \$1,135 million (52% increase comparing to the 2015-16 revised estimates). See **Annex E**.

E

18. To contain and reverse this trend, the Chief Executive announced in the 2016 Policy Address that the Government will launch a comprehensive review of the strategy of handling non-refoulement claims in four dimensions including pre-arrival control, screening procedures, detention, and removal and enforcement. Amongst these dimensions, pre-arrival control seeks to combat the problem at source.

19. Part VIIA of the Ordinance was enacted in 1979 to enable more effective action to be taken to prevent and to penalize trafficking in unlawful immigration amidst the Vietnamese boat people crisis, most notably after the mass arrival of boat people in large vessels. At that time, only two classes of persons were declared UEs: (a) any resident or former resident of Vietnam, and (b) any resident or former resident of Macau or any person, who was or has been in Macau, whether in transit or for whatever reasons. Persons holding a valid travel document are exempted. Those two classes were singled out as the principal risks of mass influx into Hong Kong at the material time. Subsequently, due to significant influx of IIs from the Mainland, the Government ceased the “touch-base policy”⁸ in October 1980 and declared Mainland residents without exit permit as UEs as well.

ENQUIRIES

20. Enquiries in relation to this brief can be directed to Mr Billy Woo, Principal Assistant Secretary for Security D, at 2810 2506.

Security Bureau
18 May 2016

⁸ Under the “touch-base policy”, IIs from the Mainland would be given permission to remain whenever they report themselves to a Registration of Persons Office for an identity card.

Immigration (Unauthorized Entrants) (Amendment) Order 2016

(Made by the Chief Executive in Council under section 37B of the
Immigration Ordinance (Cap. 115))

1. **Immigration (Unauthorized Entrants) Order amended**
The Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) is amended as set out in section 2.
2. **Paragraph 2 amended (declaration of unauthorized entrants)**
Paragraph 2(1)(a), before “Vietnam”—
Add
“Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan,
Somalia, Sri Lanka or”.

Clerk to the Executive Council

COUNCIL CHAMBER

2016

Explanatory Note

This Order amends the Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) (*principal Order*) to extend the scope of unauthorized entrants, in order for Part VIIA of the Immigration Ordinance (Cap. 115) to have a wider coverage.

2. Section 2 amends paragraph 2(1)(a) of the principal Order to include persons resident or formerly resident in Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia or Sri Lanka.

Part VIIA of the Immigration Ordinance, Cap.115

Chapter:	115	Title:	IMMIGRATION ORDINANCE	Gazette Number:
Part:	VIIA	Heading:	UNAUTHORIZED ENTRANTS	Version Date: 30/06/1997

Section:	37A	Heading:	Interpretation	Version Date: 30/06/1997
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In this Part-

"passage" (旅程) in relation to an unauthorized entrant includes the travel and transport of the unauthorized entrant by ship, aircraft, vehicle or any other means whatsoever; and

"unauthorized entrant" (未獲授權進境者) means a person belonging to a class or description of persons who, by an order made under section 37B, are declared to be unauthorized entrants, other than a person who under subsection (2) of that section is excepted from the declaration in such order.

Section:	37B	Heading:	Declaration of unauthorized entrants	Version Date: 01/07/1997
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Remarks:

Adaptation amendments retroactively made - see 28 of 1998 s. 2(2)

(1) The Governor in Council may by order declare any class or description of persons, other than persons who enjoy the right of abode in Hong Kong, or have the right to land in Hong Kong by virtue of section 2AAA, to be unauthorized entrants. (Amended 31 of 1987 s. 20; 88 of 1997 s. 16; 28 of 1998 s. 2(2))

(2) A declaration under subsection (1) may be made subject to such exceptions as are specified in the order.

Section:	37C	Heading:	Offence by crew etc., of ship carrying unauthorized entrants	Version Date: 30/06/1997
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(1) Subject to subsection (2), if a ship enters Hong Kong with an unauthorized entrant on board-

- (a) each member of the crew;
- (b) the owner of the ship and his agent; and
- (c) any person who participated in making arrangements to enable the voyage on which the unauthorized entrant boarded the ship or was brought to Hong Kong to take place,

commits an offence and is liable-

(i) on conviction on indictment to a fine of \$5000000 and to imprisonment for 14 years; and (Amended 82 of 1993 s. 7)

(ii) on summary conviction to a fine of \$350000 and to imprisonment for 3 years. (Amended L.N. 25 of 1996)

(2) (a) The captain or owner of a ship shall not be convicted of an offence under subsection (1) if he proves that at the time of the entry of the ship into Hong Kong he did not know, had no reason to

suspect and could not with reasonable diligence have discovered that there was on board the ship any unauthorized entrant.

(b) A person who is a member of the crew of a ship other than the captain shall not be convicted of an offence under subsection (1) if he proves that prior to the commencement of the voyage on which the unauthorized entrant was brought to Hong Kong, he did not know and had no reason to suspect that any unauthorized entrant would be carried on the ship.

(c) A person accused of an offence under subsection (1)(c) shall not be convicted of such offence if he proves that on the date or dates on which he participated in making any such arrangements as are referred to in that subsection he did not know and had no reason to suspect that any unauthorized entrant would be carried on the ship.

(d) A person who is the agent of the owner of a ship shall not be convicted of an offence under subsection (1) if he proves-

(i) that prior to the commencement of the voyage on which any unauthorized entrant was brought to Hong Kong, he did not know and had no reason to suspect that any unauthorized entrant would be carried on the ship; and

(ii) that he informed the Director at the earliest practicable opportunity of the presence on board the ship of unauthorized entrants.

Section: 37D Heading: Arranging passage to Hong Kong of unauthorized entrants Version Date: 30/06/1997

(1) Subject to subsection (2), any person who, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong-

(a) arranges or assists the passage to, or within, Hong Kong;

(b) offers to arrange or assist the passage to, or within, Hong Kong; or

(c) does or offers to do an act preparatory to or for the purpose of arranging or assisting the passage to, or within, Hong Kong,

of a person who is, or of a conveyance which carries, an unauthorized entrant, commits an offence and is liable-

(i) on conviction on indictment to a fine of \$5000000 and to imprisonment for 14 years; (Amended 82 of 1993 s. 8)

(ii) on summary conviction to a fine of \$350000 and to imprisonment for 3 years. (Amended L.N. 25 of 1996)

(2) No person shall be convicted of an offence under subsection (1) if he proves that he did not know, had no reason to suspect and could not with reasonable diligence have discovered-

(a) that the person whose carriage on a conveyance or whose passage is the subject of the charge, was an unauthorized entrant; or

(b) that the conveyance in relation to which he is charged was carrying, or would carry, any unauthorized entrant,

as the case may be.

(3) In this section "conveyance" (運輸工具) means a ship, aircraft, vehicle or any other means whatsoever of travel or transport.

Section: 37DA Heading: Assisting unauthorized entrant to remain Version Date: 30/06/1997

(1) Any person who assists an unauthorized entrant to remain in Hong Kong commits an offence and shall be liable-

(a) on conviction on indictment, to a fine of \$500000 and to imprisonment for 10 years; and

(b) on summary conviction, to a fine of \$250000 and to imprisonment for 3 years. (Amended L.N. 25 of 1996)

(2) No person shall be convicted of an offence under subsection (1) if he proves that he did not know, had no reason to suspect and could not with reasonable diligence have discovered that the person he assisted was an unauthorized entrant.

(Added 75 of 1981 s. 8)

Section: 37E Heading: Forfeiture of ships Version Date: 01/07/1997

(1) Where a ship is used in the commission of an offence under section 37C or 37D, the ship shall be liable to forfeiture whether or not any person is convicted of any such offence.

(2) With the approval in writing of the Secretary for Justice the Director may seize and detain any ship which appears to him to be liable to forfeiture under subsection (1) and within 21 days of any such seizure the Director shall serve notice of the seizure on the owner of the ship: (Amended L.N. 362 of 1997)

Provided that where there is more than one owner of a ship it shall be sufficient for the purposes of this subsection to give notice to one of the owners.

(3) A notice under subsection (2) shall be deemed to have been duly served on the owner if-

- (a) it is delivered to him, or to the person whom the Director believes to be the owner;
- (b) it is sent by registered post addressed to such person at the place of residence or business of such person, if any, known to the Director; or
- (c) where in the opinion of the Director it is not practicable to serve the notice in accordance with paragraph (a) or (b) it is published in accordance with subsection (4).

(4) Within 21 days of the seizure of any ship which appears to the Director to be liable to forfeiture under subsection (1), notice of the seizure of the ship shall be published-

- (a) in the Gazette; and
- (b) in 1 newspaper published in Hong Kong in the English language and 1 newspaper so published in the Chinese language.

(5) Any person who has a claim to a ship which has been seized (in this section and in section 37F referred to as the claimant) may, within 30 days of the publication in the Gazette of notice of the seizure, give notice in writing to the Director that he claims that the ship is not liable to forfeiture.

(6) A notice under subsection (5) shall state an address within Hong Kong at which the claimant may be served in any proceedings arising out of the claim and in any such proceedings a document addressed to the claimant and sent by post to, or delivered at, that address shall for the purposes of this Part be deemed to be duly served on the claimant.

(7) The Director may at any time prior to the expiration of the period of time specified in subsection (5), terminate the seizure of the ship by serving notice to that effect on the owner in accordance with subsection (3), or in a similar manner on the person in possession of the ship at the time it was seized; and within 14 days of so terminating the seizure of the ship, the Director shall release the ship to the owner or to such person and publish notice of the termination of the seizure in the manner provided in subsection(4).

(8) If, on the expiry of the period of time specified in subsection (5) for the giving of a notice of a claim, no such notice has been given in writing to the Director, the ship shall thereupon be deemed to be duly forfeited to the Crown.

(9) A person has a claim for the purposes of this section and section 37F if-

- (a) he is the owner of the ship, or of an interest in the ship, or is the agent of the owner; or
- (b) he was in possession of the ship at the time it was seized.

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

(1) Where a notice of claim is given under section 37E(5) and the Director does not terminate the seizure under section 37E(7), the Director shall apply for the forfeiture of the ship.

(2) An application under subsection (1) may be made to a magistrate, the District Court or to the Court of First Instance, as the Secretary for Justice thinks fit. (Amended L.N. 362 of 1997; 25 of 1998 s. 2)

(3) When an application under subsection (1) is made to a magistrate, the magistrate shall issue a summons to the claimant requiring him to appear before a magistrate on the hearing of the application and shall cause a copy of the summons to be served on the Director.

(4) When an application under subsection (1) is made to the District Court or the Court of First Instance, it shall be made and proceeded with, and may be withdrawn, in accordance with rules of court, and may be begun by motion. (Amended 25 of 1998 s. 2)

(5) If on the hearing of an application made under subsection (1)-

(a) neither the claimant nor any other person appears before the court to make a claim and the court is satisfied that notice of the date of the hearing was duly served on the claimant; or

(b) neither the claimant nor any person satisfies the court that he has a claim,

and the court is satisfied that the ship is liable to forfeiture, the court shall order that the ship be forfeited to the Crown.

(6) If, on the hearing of an application made under subsection (1) and not withdrawn, the court is satisfied that-

(a) the ship is liable to forfeiture; and

(b) a person has a claim in respect thereof,

it shall order that the ship be forfeited to the Crown unless that person satisfies the court that it is just and equitable in all the circumstances-

(i) that the ship should not be forfeited; or

(ii) that the ship should not be forfeited but that instead a sum under subsection (7) should be paid to the Crown.

(7) Where the court does not order that the ship be forfeited, it shall order that the ship be released to the owner or his agent either without payment to the Director or upon payment to the Director of-

(a) such sum, if any, as appears to the court to be sufficient to reimburse the Government for expenditure reasonably incurred or to be incurred by the Government in seizing and detaining the ship and in supplying goods and services to it and to any person on board the ship;

(b) such sum, if any, as appears to the court to be just and equitable in lieu of forfeiture of the ship, having regard to all the circumstances including the value of the ship, the degree of blameworthiness of the owner or other claimant and any other relevant factors.

(8) If any sum ordered to be paid under subsection (7) is not paid to the Director within 1 month of the date of the order, then the ship shall thereupon be deemed to be duly forfeited to the Crown without prejudice to any order for the payment of any sum under subsection (7)(a), which may be recovered as a civil debt due to the Government.

(9) Where the court orders that the ship be forfeited, it may in addition order the owner or other claimant to pay to the Director the sum specified in subsection (7)(a).

(10) On the hearing of an application made under subsection (1), a certified true copy of the record of any proceedings, including the decision of the court, in respect of an offence under section 37C or 37D shall be admissible in evidence, and for the avoidance of doubt it is declared that such application is a civil proceeding.

(11) Subject to the provisions of this Ordinance, an application to a magistrate under subsection (1) may with the leave of the magistrate be withdrawn at any time prior to the making of an order under

subsection (6) or (7), and shall be deemed for the purpose of the Magistrates Ordinance (Cap 227) to be a complaint to which section 8 of that Ordinance applies.

Section: 37G Heading: Forfeiture of property Version Date: 01/07/1997

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

An application may at any time be made by the Secretary for Justice to a magistrate in the prescribed form, or in accordance with rules of court to the District Court or the Court of First Instance by motion, for forfeiture under this section and if upon hearing such application or, where no such application is made, in the course of a prosecution for an offence under section 37C or 37D, it appears to the court that any property other than a ship- (Amended L.N. 362 of 1997; 25 of 1998 s. 2)

(a) has been, is being or is intended to be used in the commission or to procure or facilitate the commission of an offence under section 37C or 37D; or

(b) is the proceeds or represents the proceeds, directly or indirectly (as being the result of any disposal or realization of the whole or part of the proceeds) of any such offence,

the court shall, whether or not any person is convicted of any such offence, order the forfeiture of such property unless it is satisfied that it would not be just to do so or that there is other good reason why it should not do so.

Section: 37H Heading: Compensation for seizure of ship or property Version Date: 01/07/1997

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

(1) Where any ship or other property is seized under this Part and subsequently released to the owner, whether on the order of a court or otherwise, the owner or person in lawful possession may within 6 months of such release apply to the District Court or the Court of First Instance for compensation for any loss arising out of the seizure, which shall be recoverable as a civil debt due from the Government, and such application may be begun by motion. (Amended 25 of 1998 s. 2)

(2) An award of compensation under subsection (1) shall be an award of such sum, if any, as is just and equitable in all the circumstances of the case, including the conduct and comparative blameworthiness of-

(a) the owner of the ship or other property;

(b) the person in charge or control of the ship or other property at the time it was seized;

(c) the agents of the persons specified in paragraphs (a) and (b); and

(d) public officers and any other persons concerned.

Section: 37I Heading: Entry of ships with unauthorized entrants may be permitted in certain circumstances Version Date: 30/06/1997

(1) Notwithstanding anything in this Part, no offence is committed, and no ship shall be liable to forfeiture, under this Part in respect of the presence of an unauthorized entrant on board a ship-

(a) which the Governor has in his discretion on special grounds granted permission to enter Hong Kong; or

(b) whose first port of call is Hong Kong, if the unauthorized entrant was taken on board without reward pursuant to a legal obligation to go to his assistance.

(2) In any proceedings for an offence under this Part or for forfeiture arising out of such an offence, until it is proved that an unauthorized entrant was taken on board a ship-

(a) without reward;

(b) pursuant to a legal obligation to go to the assistance of the unauthorized entrant; and
(c) whose first port of call was Hong Kong,
the contrary shall be presumed.

(3) For the purposes of this section "legal obligation" (法律義務) means an obligation imposed upon the state where the ship is registered, pursuant to-

- (a) an International Convention for the Safety of Life at Sea which has been acceded to by the United Kingdom and extended to Hong Kong;
- (b) any other international convention acceded to by the United Kingdom and extended to Hong Kong; or
- (c) customary international law.

(4) For the purposes of this section Hong Kong is the first port of call of a ship if-

- (a) (i) immediately before the ship first went to the assistance of any unauthorized entrants it was in the course of a business or commercial voyage and the next port of call at which the ship was due to call was Hong Kong; and
(ii) immediately after going to the assistance of the unauthorized entrants the ship proceeded directly to Hong Kong; or
- (b) (i) it is necessary for the ship to enter Hong Kong as a port of refuge because there is a risk to the ship's safety arising from weather conditions or from the carriage of hazardous cargoes together with unauthorized entrants or because the lives of the crew or other persons on board the ship are in danger;
(ii) the captain, owner or agent informs the Director of Marine at the earliest practicable opportunity of such of the circumstances specified in subparagraph (i) as apply to the ship; and
(iii) the Secretary for Security in his discretion grants permission for the ship to enter Hong Kong.

Section:	37J	Heading:	Prosecution for acts outside Hong Kong	Version Date:	30/06/1997
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Without prejudice to any law or enactment to the like or a similar effect as that of this section, where any person is in Hong Kong, he may be charged and convicted in respect of anything which was done or which occurred wholly or partly outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong.

Section:	37K	Heading:	Proof	Version Date:	30/06/1997
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(1) If in any proceedings under this Part a person is alleged to be, and there are reasonable grounds for believing that such person may be, an unauthorized entrant, that person shall be presumed to be such in the absence of evidence to the contrary. (Replaced 48 of 1992 s. 12)

(2) Where a person is charged with an offence under this Part as being, and there are reasonable grounds for believing that such person may be-

- (a) the owner of a ship;
- (b) the agent of the owner of a ship; or
- (c) a member of the crew of a ship,

that person shall be presumed to be such owner, agent or member, as the case may be, in the absence of evidence to the contrary. (Replaced 82 of 1993 s. 9)

Section:	37L	Heading:	Secretary for Justice to consent to prosecution	Version Date:	01/07/1997
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No prosecution shall be brought under this Part without the consent of the Secretary for Justice.
(Amended L.N. 362 of 1997)

Section: 37M **Heading:** (Repealed 82 of 1993 **Version Date:** 30/06/1997
s. 10)

**Comparison of offences
between smuggling UEs and other NECIIs**

Crime	Smuggling UEs (i.e., IIs from Mainland, Macao or Vietnam)	Smuggling other NECIIs
Owner, captain, and crew of a ship carrying II	<p>Offence: s.37C of Immigration Ordinance</p> <p>Maximum penalty: 14-year imprisonment and \$5,000,000 fine.</p> <p>Applicable to: Captain, crew, owner, owner's agent and any person who participated in making arrangements to enable the voyage.</p>	<p>Offence: s.38(4) or s.39 of Immigration Ordinance</p> <p>Maximum penalty: 7-year imprisonment and \$600,000 fine.</p> <p>Applicable to: Captain (ss. 38(4) and 39), owner and owner's agent (s.38(4)).</p> <p>NOT applicable to crew or any other person who participated in making arrangements to enable the voyage.</p>
Arranging the passage of II into Hong Kong	<p>Offence: s.37D of Immigration Ordinance</p> <p>Maximum penalty: 14-year imprisonment and \$5,000,000 fine.</p> <p>Applicable to: Any person arranging, or assisting to arrange, or offering to arrange, or offering to assist, or doing or offering to do an act preparatory to or for the purpose of arranging or assisting the passage of UE to, or within, Hong Kong.</p>	<p>Offence: Aiding and abetting s.38(1)(a) of Immigration Ordinance</p> <p>Maximum penalty: 3-year imprisonment and \$25,000 fine.</p> <p>Applicable to: Any person aiding and abetting an II to land in Hong Kong.</p>
Assisting II to remain in Hong Kong	<p>Offence: s.37DA of Immigration Ordinance</p> <p>Maximum penalty: 10-year imprisonment and \$500,000 fine.</p> <p>Applicable to: Any person assisting UE to remain in Hong Kong.</p>	<p>Offence: Aiding and abetting s.38(1)(b) of Immigration Ordinance</p> <p>Maximum penalty: 3-year imprisonment and \$25,000 fine.</p> <p>Applicable to: Any person aiding and abetting an II to remain in Hong Kong without the authority of the Director of Immigration.</p>

Immigration (Unauthorized Entrants) Order, Cap.115D

Chapter:	115D	Title:	IMMIGRATION (UNAUTHORIZED ENTRANTS) ORDER	Gazette Number:	
		Heading:	Empowering section	Version Date:	30/06/1997

(Cap 115, section 37B)

[7 August 1979]

(Originally L.N. 194 of 1979)

Paragraph: 1	Heading:	Citation	Version Date: 30/06/1997
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This order may be cited as the Immigration (Unauthorized Entrants) Order.

Paragraph: 2	Heading:	Declaration of unauthorized entrants	Version Date: 14/11/2009
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(1) Subject to the exceptions specified in sub-paragraph (2), the following persons are declared to be unauthorized entrants-

- (a) all persons resident or formerly resident in Vietnam;
- (aa) all persons who leave, or seek to leave, the People's Republic of China when not in possession of documents issued in that country permitting them to do so in accordance with its laws; (L.N. 142 of 1980)
- (b) all persons resident or formerly resident in Macau;
- (c) all persons who are or have been in Macau, whether in transit or in any other circumstances whatsoever.

(2) The following persons are excepted from the declaration in subparagraph (1)-

- (a) any person holding a valid travel document-
 - (i) who is exempted from section 61(1) of the Ordinance under section 61(2) of the Ordinance; or
 - (ii) who has obtained a visa issued by or on behalf of the Director of Immigration, if the visa has not expired; and (13 of 2009 s. 7)
- (b) any person who has been granted permission to land by an immigration officer or immigration assistant. (L.N. 151 of 1986)

Expenditure on handling non-refoulement claims

Financial year	Screening claims and handling related appeal / petitions (\$Million)	Publicly-funded legal assistance (\$Million)	Humanitarian assistance (\$Million)	Total¹ (\$Million)
2010-11	126	10	151	287
2011-12	135	37	143	315
2012-13	144	58	191	393
2013-14	151	76	204	430
2014-15	188	97	254	540
2015-16 (Revised estimate)	211	112	421	745
2016-17 (Estimate)	303	178	655	1 135

¹ Individual items may not add up to total due to rounding.