

Legislative Council

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Paper for the House Committee on 15 January 1999

Report of the Bills Committee on Immigration (Amendment) (No. 2) Bill 1998

Purpose

This paper reports on the deliberations of the Bills Committee on Immigration (Amendment) (No. 2) Bill 1998.

The Bill

2. The Bill seeks to :

- a. penalise the employment on construction site of persons not lawfully employable;
- b. extend the existing penal provisions in the principal ordinance relating to false statements, forgery of documents, and use and possession of forged documents to APEC Business Travel Card and Travel Pass.

Background

3. Under section 171 of Immigration Ordinance (Cap. 115), any person who employs an employee who is not lawfully employable commits an offence. However, prosecution of employers in the construction industry under this section has been difficult as there are several employers on the construction site under the sub-contracting system of the construction industry. In view of the difficulty in identifying the employer of an illegal worker on the construction site, section 38A was introduced in 1990 to tackle this specific problem. The existing section 38A provides that, where a person lands or remains in Hong Kong unlawfully is found on a construction site, the construction site controller of the site commits an offence and is liable to a fine of \$350,000. It is a defence in proceedings for an offence under this section for the person charged to prove that he took all practicable steps to prevent persons to whom section 38 (1) applies from being on the construction site.

4. While the existing section 38A has proven to be effective in reducing the employment of illegal immigrants on construction sites, the Administration has noted a trend of an increasing number of Two-way Permit holders (TWPH) taking illegal employment on construction sites. The existing law is found inadequate to deal with the problem of TWPH taking employment on construction sites. To plug the loophole, the Administration proposes to include other types of illegal workers under section 38A so that : -

- a. if a person who is not lawfully employable has breached a condition of stay by taking up employment on a construction site, the construction site controller commits an offence and is liable to a fine of \$350,000; and

- b. it is a defence in proceedings for the construction site controller charged to prove that he took all practicable steps to prevent persons who are not lawfully employable from taking employment on the site.

The Bill proposes adding new subsections (4), (5), (6) and (7) to section 38A to achieve this purpose.

5. The other amendment proposed in the Bill relates to Travel Pass and APEC Business Travel Card, the pilot schemes of which were introduced in 1998 following the making of Immigration (Amendment) (No. 2) Regulation 1997 (the Regulation) in December 1997. The Regulation empowers the Director of Immigration to issue Travel Pass to frequent visitors to Hong Kong, and APEC Business Travel Card to Hong Kong residents travelling to APEC economies. The Bill proposes that the documents referred to in section 42 of Immigration Ordinance concerning offences of false statements, forgery of documents, and use or possession of forged documents should also include Travel Pass and APEC Business Travel Card.

The Bills Committee

6. At the House Committee meeting on 6 November 1998, a Bills Committee was formed to study the Bill. Chaired by Hon James TO Kun-sun, the Bills Committee has held two meetings with the Administration.

7. The membership list of the Bills Committee is in Appendix I.

Deliberations of the Bills Committee

8. Several members of the Bills Committee are in support of the Bill, the principal objective of which is to tighten the control of illegal employment on construction sites. Some members have sought clarification on the provisions in the Bill, particularly the rationale and application of the two proposed subsections (4) and (5) under section 38A concerning the offence of employing on a construction site a person not lawfully employable. Discussion of the Bills Committee is summarized in the following paragraphs.

Adequacy of existing legislation

9. Some members have asked the Administration whether the existing sections 17I and 38A are already adequate to tackle the problem of employment on construction sites of persons not lawfully employable. A member has also asked whether section 41 (which enables prosecution of persons who contravene a condition of stay) provides sufficient deterrence against TWPBs taking up employment on construction sites.

10. The Administration has clarified that if there is sufficient evidence to prosecute the employer of a person not lawfully employable, section 17I will be used. However, due to the subcontracting system in the construction industry, it has been difficult to identify the employer of an illegal worker on a construction site for prosecution under section 17I. Section 38A was therefore introduced in 1990 to tackle the specific problem of employment of illegal immigrants on construction sites. Under section 38A, the construction site controller will be liable if an illegal immigrant is found on his site. This section may be used if an offence under section 17I cannot be proved. However, the existing section 38A does not deal with the problem of TWPB taking up employment on construction sites. It is therefore necessary to add proposed subsections (4), (5), (6) and (7) under section 38A to include other types of persons not lawfully employable being employed on construction sites. According to the statistics provided by the Administration, there has been a substantial increase in the number of TWPBs

arrested on construction sites since 1995. In January-August 1998, the number of TWPBs arrested on construction sites was 975 as compared to 755, 422 and 651 in 1995, 1996 and 1997 respectively.

11. The Administration has also clarified that it is Government policy to prosecute the employer of illegal workers where there is sufficient evidence. Section 41 only provides for the prosecution of an employee who has breached a condition of stay.

12. A member has expressed reservation about penalising employment of TWPBs on construction sites but not in other places of employment. The Administration has emphasized that it is easier to identify the employer of the illegal worker in other places of employment for prosecution under section 171. As the problem of TWPBs working on construction sites has become increasingly serious, and in view of the difficulties in identifying an employer on a construction site, it is proposed that section 38A should be extended to persons not lawfully employable such as TWPBs.

Proof required for prosecution under the proposed subsection (4) under section 38A

13. A member has expressed grave concern about the proof required to prosecute a construction site controller under the proposed subsection (4). His understanding is that the Administration has to prove an employer-employee relationship existed between the site controller and the illegal worker when prosecuting under the proposed subsection (4). During discussion with the Bills Committee and in a letter to Hong Kong Construction Association Ltd. dated 30 December 1998, the Administration has clarified that it will not be necessary to prove the existence of an employer-employee relationship between the site controller and the illegal worker, or to identify the employer of the illegal worker under the proposed subsection.

14. Responding to members' concern about the interpretation of the phrase 'committed an offence under section 41' for prosecution under the proposed subsection (4), the Administration has confirmed that as a matter of policy and in practice, the Administration will prosecute the illegal worker and secure a conviction under section 41 before proceeding to prosecute the construction site controller. In this connection, the Administration has also clarified that contravention of a condition of stay under section 41 includes taking employment, whether paid or unpaid, during the period of stay as a visitor. The Administration has stressed that a previous conviction under section 41 in a different court will not be used as proof for a prosecution under the proposed subsection (4).

Application of section 38A

15. Noting that section 38A deals with illegal employment on construction sites, some members have asked whether it is the policy intention to confine the application of section 38A to construction work on construction sites. The Administration has responded that while the section targeted mainly on construction work, it is not advisable to restrict its application to 'construction work' as defined in section 38A(1). The reason is that there is a great variety of work on construction sites, and some of them such as cleaning of site, removing debris, and keeping watch over construction materials may not fall within the definition of 'construction work' in section 38A(1). The Administration holds the view that the site controller is in a position to take steps to prevent illegal employment on his site irrespective of the type of work involved. To restrict application of the provision to 'construction work' will only create a loophole and undermine the effectiveness of the provision.

Definition of 'construction site controller'

16. A member has questioned the interpretation of the definition of 'construction site controller' in section 38A. He considers that ambiguity in the English text of the definition may give rise to the possible interpretation that the principal or main contractor is liable even if he is not in control of the site where the illegal worker is found. This appears to be inconsistent with the meaning of the Chinese text of the section. The member is of the opinion that prosecution of the principal or main contractor will be unfair in circumstances where the principal contractor is not physically in control of the site.

17. To address this concern, the Bills Committee has asked the Administration to confirm the interpretation of the definition of 'construction site controller'. The Administration has provided a written response on 30 December 1998 confirming that when section 38A was introduced in 1990, the definition was so drafted that the liability was placed on the principal or main contractor irrespective of whether he was physically in control of a construction site. The policy intention was to require extra vigilance on the principal contractor and ensure that he will exercise good management control over his subcontractor. The Administration has further advised that, to cater for cases where the main contractor has sublet the whole site to a subcontractor, a Committee Stage amendment was moved to include subcontractors in the definition so that subcontractors could be prosecuted.

18. With regard to the practice in enforcing the provision, the Administration has assured members that, in prosecuting a construction site controller, the Administration will satisfy itself that the person charged was actually in a position to take the practicable steps required to prevent illegal employment on his site.

Guidelines to the construction industry

19. A member has expressed concern about the requirement in the proposed subsection (5) under section 38A that the construction site controller has to take 'all practicable steps' to prevent persons who are not lawfully employable from taking employment on the construction site. He is worried that the steps taken by the site controller in preventing illegal employment may not be accepted by the court as a defence. In this connection, the Bills Committee has noted that the construction industry has, since the introduction of section 38A, adopted a set of guidelines on preventing illegal employment on construction sites, and that the Administration has given further advice on the guidelines at the request of the Hong Kong Construction Association Ltd.

Offences related to Travel Pass and APEC Business Travel Card

20. Members have agreed to the proposed extension to Travel Pass and APEC Business Travel Card the existing penal provisions in the principal ordinance relating to false statements, forgery of documents, and use and possession of forged documents. Members have noted that the security standard of Travel Pass and APEC Business Travel Card is comparable to similar documents issued by the Immigration Department of Hong Kong and that by other APEC economies participating in the pilot scheme.

Committee stage amendments

21. The Committee Stage amendments (CSA) to be moved by the Administration are given in Appendix II. The Bills Committee has not proposed any CSAs.

Recommendations

22. The Bills Committee supports the CSAs to be moved by the Administration in Appendix II, and recommends resumption of the Second Reading debate of the Bill on 27 January

1999.

Advice sought

23. Members are invited to support the recommendation of the Bills Committee at paragraph 22 above.

Legislative Council Secretariat
14 January 1999

Appendix I

Bills Committee on Immigration (Amendment) (No. 2) Bill 1998

Membership List

Hon James TO Kun-sun (Chairman)

Hon David CHU Yu-lin

Hon HO Sai-chu, JP

Hon LEE Cheuk-yan

Hon Ronald ARCULLI, JP

Hon MA Fung-kwok

Hon CHAN Yuen-han

Hon CHAN Kam-lam

Hon YEUNG Yiu-chung

Hon TAM Yiu-chung, JP

Total : 10 members

Date : 8 December 1998

IMMIGRATION (AMENDMENT) (NO. 2) BILL 1998

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
2	(a) In the new definition of "APEC business travel card", in paragraph (b) (ii), by deleting "come to" and substituting "enter".
	(b) In the new definition of "travel pass", in paragraph (b), by deleting "come to" and substituting "enter".