# 立法會
# *Legislative Council*

LC Paper No. CB(2) 638/99-00

Ref: CB2/SS/2/99

**Paper for the House Committee meeting**
**on 17 December 1999**

**Report of the Subcommittee on**
**Immigration (Amendment) Regulation 1999**

## Purpose

This paper reports on the deliberations of the Subcommittee on Immigration (Amendment) Regulation 1999.

## The Immigration (Amendment) Regulation 1999 (Amendment Regulation)

2. The Amendment Regulation amends the Immigration Regulations (Cap.115 sub. leg.) to provide for the practice and procedure to be followed in appeals to the Immigration Tribunal under section 2AD(1) or (2) of the Immigration Ordinance (Cap.115) (IO) against the decisions of the Director of Immigration (Director) not to issue certificates of entitlement (Cs of E) or certified duplicates thereof. The amendments are consequential upon the introduction of the scheme of C of E by the enactment of the Immigration (Amendment)(No.3) Ordinance 1997 (124 of 1997).

## The Subcommittee

3. At the House Committee meeting on 19 November 1999, Members agreed that a subcommittee should be formed to study the Amendment Regulation. Under the chairmanship of Hon Margaret NG, the Subcommittee held three meetings with the Administration. The membership list of the Subcommittee is in **Appendix I**.

**The deliberations of the Subcommittee**

4. The main deliberations of the Subcommittee are summarized below.

Provision to deal with appeals lodged before the Amendment Regulation takes effect

5. Sections 2AD(1) and (2) of IO provide that appeals should be lodged within 90 days from the receipt of the notice of refusal given by the Director. Section 2AD(4) provides that the Tribunal may accept an appeal not lodged within the prescribed time limit. Members suggest that a provision be added to the Amendment Regulation to deal with appeals lodged in respect of notification of refusal given by the Director before the Amendment Regulation takes effect. Members have also expressed concern that there is no requirement on the form of notification in section 2AB(6)(b)(ii).

6. The Administration has confirmed that the Director has not refused any application for a C of E or for a certified duplicate thereof since 1 July 1997, and that no notice of refusal has been given. That means the prescribed period of 90 days for lodging an appeal has not started to run in respect of any of the existing cases and no appeal has been lodged. Regarding the notice of refusal, the Administration has advised that it will formally serve a letter of refusal on each and every applicant whose application has been refused, informing him or her of the right of appeal within 90 days from the receipt of the refusal letter. In the circumstances, the Administration considers that there is no practical need for such a provision to be made.

7. Having considered the Administration's explanations and given that such a provision may not provide the necessary clarity and certainty, members agree that such a provision is not required.

Meaning of "lodging an appeal"

8. Section 2AD(3) of IO provides that no appeal against the decisions of the Director not to issue a C of E or a certified duplicate thereof shall be lodged at any time while the appellant is in Hong Kong. Members have sought clarifications on the meaning of "lodging an appeal" and whether it includes the hearing of an appeal.

9. The Administration has advised that the meaning of "no appeal shall be lodged" in section 2AD(3) refers to the action of the applicant taken under section 2AD(1) or (2). Specifically, it refers to the submission of a notice of appeal to the chief adjudicator of the Tribunal. It does not include the subsequent appeal procedure and hearing of the appeal.

Presence of applicant in Hong Kong after an appeal is lodged and right to

appear at hearings

10. On whether an applicant would be allowed to be in Hong Kong after an appeal is lodged, the Administration's position is that an appeal under section 2AD should be lodged when the applicant is outside Hong Kong as required under section 2AD(3). Once an appeal is lodged, there is nothing to prevent the applicant from entering and remaining in Hong Kong lawfully, provided that normal immigration criteria are met. The Administration has pointed out that the lodging of an appeal does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Tribunal on the appeal. Overstayers and those who enter illegally will be liable to prosecution and removal of the Director. Where the applicant is in Hong Kong and is able to appear in person before the Tribunal, the Tribunal could exercise its discretion to allow him to appear in person if the Tribunal considers that it would not be proper in all the circumstances to proceed in the absence of the applicant.

Safeguard of natural justice when an applicant is absent in the hearing

11. Members have expressed concern about how natural justice could be safeguarded in an appeal hearing where an applicant is absent. Members have pointed out that the Tribunal would hear an appeal on the facts, the applicant may have to give evidence or be cross examined, such as in giving evidence of a child and parent relationship. The presence of the applicant is required.

12. The Administration has responded that paragraph 14(1)(a), (b) and (c) of the proposed Schedule 4 provides for the only circumstances that the Tribunal may hear an appeal in the absence of the appellant. The Administration does not consider that they would violate the rules of natural justice of the right to be heard. Although the Tribunal will have to determine questions of facts, the facts to be determined relate to the parentage and place of birth of the appellant, which are not matters on which appellants can themselves give direct evidence.

13. The Administration has pointed out that the Tribunal also needs to observe the safeguard provided for in paragraph 14(1), i.e. it could only exercise this power if "it would be proper in all the circumstances to proceed in the absence of the appellant". Furthermore, the appellant may also appoint a representative under paragraph 9 of proposed Schedule 4 to appear on his behalf. That representative could either be a lawyer or his relative who is able to give detailed evidence to the Tribunal, and if necessary, to apply for an adjournment until the appellant could appear in person to give evidence himself.

Hearings in absence of appellant

14. Paragraph 14(1)(a) of proposed Schedule 4 provides that the Tribunal may hear an appeal in the absence of the appellant if the appellant is unable to appear by reason of section 2AD(3) of the IO. Members point out that since it is mandatory that no appeal shall be lodged at any time at which the appellant is in Hong Kong, the provision in proposed paragraph 14(1)(a) is not necessary. They suggest that a provision should be made to cater for the situation where the appellant, including a person making an application on behalf of another person, is not in Hong Kong or otherwise fails to appear and the Tribunal is satisfied that he will not appear, the Tribunal may hear an appeal in the absence of the appellant.

15. Having regard to members' views on the drafting and members' concerns on the rights of the appellant, the Administration agrees to repeal proposed paragraph 14(1)(a) and proposes to add a new sub-paragraph to cater for the situation where the appellant has neither refused nor declined to appear, but simply does not turn up. In such circumstances, the Tribunal has an obligation to do all enquiry as is practicable. If the Tribunal has done such an enquiry and is satisfied that the appellant will not appear, it may proceed to conduct the hearing in his absence. The Administration considers that this arrangement is, on the one hand, not prejudicial to the right of the appellant since he has been given ample opportunity to appear in person if he so wishes, and on the other hand, able to ensure that operation of the Tribunal would not be hampered by reason of the fact that the appellant is unable to come to Hong Kong. Members further suggest that "having made due enquiry as is practicable" should also apply to situations in original proposed paragraph 14(1)(b) and (c). The Administration agrees and the relevant amendments would be made. The definition of the term "appellant" would be repealed.

Notice of hearing date

16. Members agree to the Administration's proposal to amend the proposed paragraph 11 to the effect that the Tribunal will give a written notice to the parties concerned in every case stating the time and date of the hearing.

**Recommendation**

17. Apart from the amendments referred to in paragraphs 15 and 16 above, the Administration would also make technical amendments to Regulation 9A(2) and the proposed Regulation 9B(2). The proposed motion to amend the Amendment Regulation to be moved by the Administration at the Council meeting on 5 January 2000 is in **Appendix II**. The proposed motion has the support of the Subcommittee.

18. The Subcommittee recommends that subject to the amendments to be made by the Administration, the Immigration (Amendment) Regulation 1999 be supported.

**Advice sought**

19. Members are invited to note the recommendation of the Subcommittee in paragraph 18 above.

Legislative Council Secretariat
15 December 1999

**附錄 I**
**Appendix I**

# 《1999 年入境(修訂)規例》小組委員會

# Subcommittee on Immigration (Amendment) Regulation 1999

## Membership List

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|---|---|
| 吳靄儀議員(主席) | Hon Margaret NG (Chairman) |
| 朱幼麟議員 | Hon David CHU Yu-lin |
| 何秀蘭議員 | Hon Cyd HO Sau-lan |
| 呂明華議員 | Dr Hon LUI Ming-wah, JP |
| 夏佳理議員 | Hon Ronald ARCULLI, JP |
| 涂謹申議員 | Hon James TO Kun-sun |
| 程介南議員 | Hon Gary CHENG Kai-nam, JP |
| 劉慧卿議員 | Hon Emily LAU Wai-hing, JP |

合共 ： 8 位議員
Total ： 8 Members

日期 ：1999 年 12 月 8 日
Date ： 8 December 1999

DMA#15717/Allen LAI
1st draft : 02.12.99
2nd draft : 08.12.99
3rd draft : 09.12.99
4th draft : 10.12.99
5th draft : 14.12.99
6th draft : 16.12.99

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

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**RESOLUTION**

(Under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1))

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IMMIGRATION (AMENDMENT) REGULATION 1999

RESOLVED that the Immigration (Amendment) Regulation 1999, published as Legal Notice No. 273 of 1999 and laid on the table of the Legislative Council on 17 November 1999, be amended –

(a) by repealing section 1 and substituting –

"**1. Regulation substituted**

Regulation 9A of the Immigration Regulations (Cap. 115 sub. leg.) is repealed and the following substituted –

"**9A. Practice and procedure on appeals to the Tribunal under section 53A of the Ordinance**

(1) The practice and procedure on an appeal to the Tribunal under section 53A of the Ordinance shall, subject to paragraph (2), be such as the chief adjudicator may determine.

(2) Schedule 3 shall have effect for the purpose of regulating appeals to the Tribunal under section 53A of the Ordinance.".";

(b) in section 2, in the new regulation 9B(2), by adding "under section 2AD of the Ordinance" after "Tribunal";

(c) in section 3, in the new Schedule 4 –

(i) in paragraph 1, by repealing the definition of "appellant";

(ii) in paragraph 11, by repealing "Unless an appeal is to be heard in the absence of the

appellant under paragraph 14, the" and substituting "The";

(iii) by repealing paragraph 14(1) and substituting –

"(1) The Tribunal may hear an appeal in the absence of the appellant –

(a) if the appellant refuses or declines to appear when given the opportunity to do so;

(b) if the appellant fails to appear and the Tribunal is satisfied that he will not appear; or

(c) if the Tribunal is satisfied that –

(i) by reason of illness or injury the appellant cannot attend the hearing; or

(ii) if the appellant did attend the hearing he would present a threat to the health or safety of other persons at the hearing,

and having made due enquiry as is practicable, the Tribunal is satisfied that it would be proper in all the circumstances to proceed in the absence of the appellant.".