

LEGISLATIVE COUNCIL BRIEF

IMMIGRATION (AMENDMENT) REGULATION 1999

INTRODUCTION

A At the meeting of the Executive Council on 2 November 1999, the Council ADVISED and the Chief Executive ORDERED that the Immigration (Amendment) Regulation 1999, at Annex A, should be made under section 59 of the Immigration Ordinance, to introduce a Schedule dealing specifically with section 2AD appeals.

BACKGROUND AND ARGUMENT

General Background

B 2. Prior to the introduction of the certificate of entitlement scheme in 1997, the jurisdiction of the Immigration Tribunal (the Tribunal) was solely to determine appeals made under section 53A of the Immigration Ordinance against removal orders made by the Director of Immigration, the Deputy Director of Immigration and any Assistant Director of Immigration. The practice and procedure on an appeal to the Tribunal under section 53A is regulated by regulation 9A of the Immigration Regulations and Schedule 3 to which the regulation refers. An extract of the regulation and the Schedule is at Annex B.

3. When the Immigration (Amendment) (No. 3) Ordinance 1997 (124 of 1997) was enacted in July 1997 to introduce the certificate of entitlement scheme, no consequential amendment was made to the Immigration Regulations to include appeals under section 2AD. As a consequence, regulation 9A and Schedule 3, as they now stand, do not apply to section 2AD appeals. As the practice and procedure for appeals under section 2AD differ from those prescribed for section 53A appeals, it is necessary to amend the

Immigration Regulations to provide for section 2AD appeals.

THE REGULATION

4. Section 59 of the Immigration Ordinance confers on the Chief Executive in Council the power to make regulations for the purposes of, among others, providing for any matter or thing which is to be or may be prescribed under the Ordinance. Section 53G of the same Ordinance provides that the practice and procedure on appeals under section 2AD or 53A and of the Tribunal shall be such as prescribed and provided for under section 59. The Immigration Regulations relating to the practice and procedure of the Immigration Tribunal on appeals under section 2AD are therefore to be made under section 59. An extract of the relevant provisions is at Annex C.

C

5. Section 2 of the Immigration (Amendment) Regulation 1999 adds a new regulation 9B which is similar to regulation 9A and refers to a new Schedule 4 (section 3). The new Schedule is similar to Schedule 3 with changes to take account of the different circumstances of appeals under section 2AD.

PUBLIC CONSULTATION

6. As the amendment is technical in nature, public consultation is considered unnecessary.

HUMAN RIGHTS IMPLICATIONS

7. The Department of Justice advises that the Regulation is consistent with the human rights provisions of the Basic Law.

FINANCIAL AND STAFFING IMPLICATIONS

8. The Immigration Department estimates that there will be about 370 appeal cases per annum in connection with the certificate of entitlement scheme. Additional resources have been provided to the Department to create

12 additional posts at an annual staff cost of \$9.7 million to handle the additional workload arising from implementation of the Amendment Regulation.

LEGISLATIVE TIMETABLE

9. The legislative timetable approved by the Chief Executive in Council is:

Publication in the Gazette	12 November 1999
Tabling at the Legislative Council	17 November 1999

PUBLICITY

10. As approved by the Chief Executive in Council, no press release is necessary since the amendment is only technical in nature.

ENQUIRIES

11. For any enquiries on the Regulation, please contact Mr K S So, Principal Assistant Secretary (Security) at 2810 2506.

Security Bureau
10 November 1999

IMMIGRATION (AMENDMENT) REGULATION 1999

- Annex A - Immigration (Amendment) Regulation 1999

- Annex B - An extract from Immigration Regulations (Cap. 115), regulation 9A - Practice and procedure on appeals to the Tribunal and Schedule 3

- Annex C - An extract from Immigration Ordinance (Cap. 115), section 59 - Power to make regulations

IMMIGRATION (AMENDMENT) REGULATION 1999

(Made by the Chief Executive in Council under section 59 of the
Immigration Ordinance (Cap. 115))

1. Regulation substituted

Regulation 9A of the Immigration Regulations (Cap. 115 sub. leg.) is amended by repealing the Chinese text and substituting -

“9A. 向審裁處提出的上訴的常規及程序

(1) 除第(2)款另有規定外，根據本條例第 53A 條向審裁處提出的上訴的常規及程序，由總審裁員決定。

(2) 附表 3 就規管向審裁處提出的上訴而言具有效力。”

2. Regulation added

The following is added -

"9B. Practice and procedure on appeals to the Tribunal under section 2AD of the Ordinance

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

(2) Schedule 4 shall have effect for the purpose of regulating appeals to the Tribunal."

3. Schedule added

The following is added -

"SCHEDULE 4

[reg. 9B]

1. Interpretation

In this Schedule, unless the context otherwise requires -

"appellant"(上訴人) includes a person who has made an application on behalf of another person under section 2AB(2) (b) or 2AC(2) (b) of the Ordinance;

"notice of appeal" (上訴通知書) means the form specified by the Director under section 2AD(1) or (2) of the Ordinance for the purpose of lodging an appeal under that section.

2. Notice of appeal to Tribunal

(1) The Director shall, at the time of informing an applicant of the right of appeal to the Tribunal under section 2AB(6) (b) (iii) or 2AC(6) (b) (iii) of the Ordinance, provide him with a notice of appeal.

(2) An applicant who wishes to appeal to the Tribunal shall lodge with the chief adjudicator a notice of appeal stating his grounds of appeal and the facts upon which he relies, and a copy of such documentary evidence (if any) in support of the appeal.

3. Duty of Tribunal in respect of notice of appeal and documentary evidence

The Tribunal shall, as soon as practicable, cause a copy of every notice of appeal and a copy of any such documentary evidence (if any) in support of the appeal that it has received from the applicant to be given to the Director.

4. Expediting appeals

The Tribunal shall deal with an appeal as expeditiously as is practicable, and for that purpose may sit at any time.

5. Appeals to be heard by 2 adjudicators

(1) Subject to subparagraph (2), an appeal to the Tribunal shall be heard and determined by 2 adjudicators sitting together.

(2) The Tribunal shall allow an appeal if either adjudicator hearing the appeal considers that the appeal should be allowed under section 2AD(5) (a) or (6) (a) of the Ordinance.

6. Hearings to be in private except in special circumstances

(1) Subject to subparagraph (2), an appeal shall be heard in private.

(2) Where the Tribunal hearing an appeal, after consulting the parties to the appeal, is satisfied that it is desirable for a hearing or part of a hearing to take place in public, it may by order give such direction and directions as to the persons who may be present.

7. Tribunal not confined to grounds set out in notice of appeal

The Tribunal may consider any matter which appears to it to be relevant to any ground of appeal permitted by the Ordinance notwithstanding the omission of any reference to such matter in the notice of appeal, and may receive and consider any evidence which appears to it to be relevant to the issues before it notwithstanding that the evidence would not be admissible in a court of law.

8. Respondent on an appeal

The Director shall be the respondent to an appeal and may be represented by an immigration officer.

9. Representation of appellant

(1) An appellant may be represented at the hearing -

- (a) by counsel or a solicitor who is authorized by the appellant to appear as his representative; or
- (b) by such other representative authorized by the appellant as may be approved by the Tribunal.

(2) Where the appellant is represented by counsel or a solicitor, the Director may also be represented by counsel or a solicitor.

10. Director to prepare facts for Tribunal

(1) The Director shall, as soon as practicable after having received a copy of any notice of appeal given to him under paragraph 3, cause -

- (a) a written summary of the facts of the case in relation to the notice of appeal and of the reasons for the decision not to issue a certificate of entitlement or a certified duplicate thereof to be prepared and to be given to the Tribunal; and
- (b) a copy of that written summary to be given to the appellant.

(2) Unless an appeal is to be heard in the absence of the appellant under paragraph 14, it shall not be necessary for the

Director to comply with subparagraph (1) if he is of the opinion that it is not practicable to do so having regard to the time available before the hearing of the appeal; but in any such case an oral statement of the facts of the case and of the reasons for the decision not to issue a certificate of entitlement or a certified duplicate thereof shall be given at the hearing of the appeal.

11. Notice of hearing date

Unless an appeal is to be heard in the absence of the appellant under paragraph 14, the Tribunal shall cause notice in writing to be given as soon as is practicable to -

- (a) the Director; and
- (b) the appellant,

stating the time and place of the hearing.,

12. Witnesses and evidence

(1) The Tribunal may, on its own motion, or on the application of the appellant or of the Director, by summons require any person to attend as a witness at the hearing of an appeal at such time and place as may be specified in the summons, and at the hearing to answer any question or produce any document in his possession, custody or power which relate to any issue in the appeal.

- (2) (a) Notwithstanding subparagraph (1), no person shall be compelled to give any evidence or produce any document which he could not be compelled to give or produce in proceedings in a court of law.

- (b) Nothing in this subparagraph shall entitle any person to refuse to give any evidence or produce any document on the ground only that such evidence or document would not be admissible in a court of law and that accordingly he could not be compelled to give or produce it.

(3) The Tribunal may require any witness to give evidence on oath or affirmation.

(4) For the purpose of this paragraph, the Tribunal and any adjudicator shall have the same powers in relation to witnesses as a magistrate would have under sections 21 and 22 of the Magistrates Ordinance (Cap. 227) in proceedings under Part II of that Ordinance, and a summons to a witness shall be in such form as the chief adjudicator may determine.

- (5) (a) The Tribunal may, on the application of a witness who attends at the hearing of an appeal to give evidence (including professional or expert evidence), allow in respect of him a professional witness allowance, expert witness allowance or loss allowance, as the case may be, not exceeding the professional witness allowance, expert witness allowance or loss allowance that a magistrate may allow under the Criminal Procedure (Witnesses' Allowances) Rules (Cap. 221 sub. leg.) in respect of a witness who attends to give evidence in criminal proceedings.

- (b) Any sum allowed under sub-subparagraph (a) shall cease to be payable unless claimed by or on behalf

of the witness who made the application to the Tribunal in that behalf within 3 months from the date on which it was allowed.

13. Transfer of hearing to other adjudicators

(1) Where an appeal has not been disposed of by the adjudicators hearing it, the chief adjudicator shall make arrangements, if he is of the opinion that it is not practicable for the appeal to be determined by those adjudicators, or determined without undue delay by those adjudicators, for the appeal to be dealt with by one of those adjudicators and another adjudicator or 2 other adjudicators; and the appeal may be dealt with accordingly.

(2) Where the adjudicators hearing an appeal consider that the appeal should, for any reason, be dealt, with by one of them and another adjudicator, or by 2 other adjudicators, they may make arrangements for the appeal to be so dealt with; and the appeal may be dealt with accordingly.

14. Hearings in absence of appellant

- (1) The Tribunal may hear an appeal in the absence of the appellant -
- (a) if the appellant is unable to appear in person by reason of section 2AD(3) of the Ordinance;
 - (b) if the appellant refuses or declines to appear when given the opportunity to do so; or
 - (c) if 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 that it would be proper in all the circumstances to proceed in the absence of the appellant.

(2) The Tribunal may, if it hears an appeal in the absence of an appellant under subparagraph (1), determine the appeal without an oral hearing on the basis of such written submissions which may have been submitted (if any) to the Tribunal.

(3) Nothing in this paragraph shall be taken to prevent the appellant from being represented at the hearing by any person by whom he is able to be so represented under paragraph 9.

15. Record of proceedings

The Tribunal shall keep a summary or record of proceedings in every appeal which comes before it in such form as the chief adjudicator may determine."

Clerk to the Executive Council

COUNCIL CHAMBER

Explanatory Note

This Regulation amends the Immigration Regulations (Cap. 115 sub. leg.) so as to make provision 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) against the decision of the Director of Immigration not to issue certificates of entitlement or certified duplicates thereof.