

立法會
Legislative Council

LC Paper No. CB(2) 1135/99-00
(These minutes have been seen by
the Administration)

Ref : CB2/SS/2/99

**Subcommittee on
Immigration (Amendment) Regulation 1999**

**Minutes of meeting
held on Thursday, 9 December 1999 at 4:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Dr Hon LUI Ming-wah, JP
Hon Ronald ARCULLI, JP
Hon James TO Kun-sun
Hon Gary CHENG Kai-nam, JP
- Members absent** : Hon David CHU Yu-lin
Hon Cyd HO Sau-lan
Hon Emily LAU Wai-hing, JP
- Public Officers attending** : Mr K S SO
Principal Assistant Secretary for Security
- Mr Henry SIU Chung-kit
Assistant Director of Immigration
- Mr Allen LAI Kai-pang
Government Counsel
- Clerk in attendance** : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Ms Bernice WONG
Assistant Legal Adviser 1

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Meeting with the Administration

(LC Paper Nos. CB(2) 549/99-00(01), 559/99-00, 575/99-00(01) and CB(2) 594/99-00)

Members went through the Administration's response to issues raised by members at the last meeting on 29 November 1999.

Clarity of Regulation 9A(2) and proposed Regulation 9B(2)

2. Principal Assistant Secretary for Security (PAS(S)) explained the Administration's view that when proposed Regulation 9B was read in its entirety, it was very clear that Schedule 4 regulated appeals under section 2AD of the Immigration Ordinance (Cap. 115) (IO). Similarly, it was clear that Schedule 3 regulated appeals under section 53A of IO. The Administration therefore considered that no amendments to Regulation 9A(2) and proposed Regulation 9B(2) were necessary. Nevertheless, it had provided an amended version of the two Regulations for members' discussion.

3. Mr Ronald ARCULLI said that the meaning of the two provisions might be unclear to the general public. An improvement to their clarity would be desirable. At members' request, PAS(S) agreed to adopt the amended version of Regulations 9A(2) and 9B(2).

Provision to deal with appeals lodged before the Immigration (Amendment) Regulation 1999 took effect

4. As regards members' request at the last meeting for the addition of a transitional provision to deal with appeals lodged before the Immigration (Amendment) Regulation 1999 (the Amendment Regulation) took effect, PAS(S) said that the Director of Immigration (D of Imm) had not refused any application for a Certificate of Entitlement (C of E) since 1 July 1997. The prescribed period of 90 days for lodging an appeal had not started to run in respect of any of the existing cases and no appeal had been lodged. In view of these, there was no practical need for such a provision to be made. However, a draft provision on the transitional arrangements was provided for members' discussion. Assistant Legal Adviser 1 (ALA1) said that in drawing up the draft provision with the Administration, caution had been exercised to ensure that the provision would not affect the Immigration Tribunal's (the Tribunal's) power under the principal legislation.

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5. PAS(S) informed members that where an application for C of E was refused by D of Imm, the Administration would formally serve a letter of refusal on each applicant, informing him or her of the reason for the refusal, the right of appeal within 90 days from the receipt of the refusal letter, and enclose a form for lodging an appeal. Assistant Director of Immigration added that the applicant would be required to sign for his or her receipt of the letter of refusal on a reply slip. The prescribed period of 90 days would be counted from the date when the applicant signed on the reply slip. If the applicant failed to acknowledge his or her receipt on a reply slip, the Administration would contact the applicant by telephone to confirm the receipt of the letter of refusal. The prescribed period would then be counted from the date when the confirmation was made by telephone.

6. Mr Ronald ARCULLI said that there might be cases in which an applicant missed the deadline for lodging an appeal since his father who lodged an application on his behalf did not inform him of the receipt of the letter of refusal. PAS(S) responded that under such circumstances, the Administration would inform the Tribunal of the facts. A decision on whether to accept an appeal not lodged within the prescribed time limit would rest with the Tribunal.

7. Mr CHENG Kai-nam asked whether a person who made an application for C of E on behalf of the applicant could, on behalf of the applicant, decide not to lodge an appeal. PAS(S) responded that under sections 2AB(2)(b) and 2AC(2)(b) of IO, the person applying on behalf of the applicant "shall be regarded as the applicant" for the purpose of section 2AD(1) of IO. The Chairman said that there might be exceptions to the rule, such as in the case of deliberate concealment by the person who made an application on behalf of the applicant.

8. The Chairman said that the draft provision was an avoidance of doubt provision rather than a transitional provision, as the latter was usually found in the transition from an old regime to a new regime. She expressed concern that the draft provision might not provide the necessary clarity and certainty. The intent of the provision might be subject to future interpretation. Mr Ronald ARCULLI shared the same view. Members agreed that such a provision would not be added.

Hearings of appeals against removal orders heard in the absence of the appellant

9. PAS(S) informed members that between January 1997 and October 1999, there were 55 hearings of appeals against removal orders, among which four were conducted in the absence of the appellants because they failed to turn up.

Meaning of the term "appellant" in Schedule 4 and proposed amendments to paragraph 14(1) of Schedule 4

Meaning of the term "appellant"

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10. PAS(S) explained that it was unnecessary to clarify the meaning of the term "appellant" in different parts of Schedule 4 since except paragraph 14 of the Schedule, the whole Schedule 4 should apply to both the applicant and the person who made an application on behalf of the applicant. If the Subcommittee considered that further clarification was desirable, a proposed paragraph 14(4) stating that "For the purpose of subparagraph (1)(a), "appellant" does not include a person making an application on behalf of another person under section 2AB(2)(b) or 2AC(2)(b)." could be added. The definition of "appellant" in paragraph 1 of Schedule 4 would be deleted to avoid confusion.

Proposed amendments to paragraph 14(1) of Schedule 4

11. Mr James TO expressed concern that the revised version of paragraph 14(1)(a) proposed by the Administration might be inconsistent with paragraph 14(1), as the former stated that an appellant was not allowed to lodge an appeal while the latter seemed to imply that an appeal had been lodged.

12. Mr Ronald ARCULLI said that the provision might be revised along the line of "if the appellant was not in Hong Kong", as there was no need for the provision to make reference to section 2AD(3). Alternatively, paragraph 14(1)(a) might be deleted. Under such circumstances, paragraph 14(4) would not be needed. Government Counsel (GC) responded that with the deletion of paragraph 14(1)(a), paragraph 14(1) might not be sufficient for addressing all scenarios, as paragraph 14 (1)(b) only dealt with cases in which the appellant refused or declined to appear when given the opportunity to do so.

13. The Chairman said that as the original version and the proposed revised version of paragraph 14(1)(a) were both undesirable, the issue should be further examined at the next meeting.

Natural justice in an appeal hearing in which the appellant was absent

14. PAS(S) said that the Tribunal's hearing of an appeal in the absence of the appellant would not violate the rules of natural justice of the right to be heard. Although the Tribunal would have to determine questions of fact, the facts to be determined were not matters on which appellants could themselves give direct evidence. He added that the requirements for natural justice were different under different circumstances. The Administration considered that the current requirements for natural justice had already been met.

15. Mr Ronald ARCULLI expressed concern that some applicants might wish to appear before an appeal hearing but was unable to obtain a Two-way Permit to come to Hong Kong. PAS(S) responded that if an applicant claimed that he had important evidence for presentation at the hearing, the Tribunal could consider an adjournment as it could only hold the hearing in the absence of the appellant if it would be proper in all the circumstances to do so. Mr Ronald ARCULLI said that under such circumstances,

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natural justice might not necessarily guarantee that an appellant could appear at the appeal hearing.

Meaning of "lodging an appeal"

16. As regards the meaning of "no appeal shall be lodged" in section 2AD of IO, PAS(S) explained that it referred to the action of the applicant taken under section 2AD(1) or (2). It referred to the submission of a notice of appeal to the chief adjudicator of the Tribunal and did not include the subsequent appeal procedure and hearing of the appeal.

Presence of applicants in Hong Kong and right to appear at a hearing

17. PAS(S) said that if the applicant was lawfully present in Hong Kong at the time an appeal was heard, the Tribunal could exercise its discretion to permit him to appear in person if it considered that it would not be proper in all the circumstances to proceed in the absence of the applicant. The discretion would partly depend on the final form of paragraph 14(1)(a). Mr James TO and Mr Ronald ARCULLI considered that apart from the provision under paragraph 14(1)(c)(ii), the Tribunal had no power to turn down the request of an applicant who was in Hong Kong lawfully to appear in an appeal hearing. ALA1 said that an appellant's right to be heard was a natural justice. She suggested that paragraph 14(1)(a) might be revised along the line of "if the appellant was absent from Hong Kong". The Chairman considered that a provision related to a fundamental right should be set out clearly. She requested the Administration to look into the drafting of paragraph 14(1)(a).

Adm

Necessity of section 2AD(3)

18. Members noted the Administration's response in respect of the necessity of section 2AD(3) of IO.

II. Date of next meeting

19. Members agreed to schedule the next meeting for 13 December 1999 at 10:45 am to examine issues related to paragraph 14(1)(a) and impact of the judgement of the Court of Final Appeal in *Lau Kong Yung v The Director of Immigration* on the Amendment Regulation.

(*Post-meeting note* : The meeting was subsequently rescheduled for 8:30 am on 14 December 1999.)

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20. There being no other business, the meeting ended at 6:00 pm.

Legislative Council Secretariat

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