立法會
Legislative Council

LC Paper No. CB(2) 717/99-00
(These minutes have been seen by the Administration)

Ref : CB2/SS/2/99

Subcommittee on
Immigration (Amendment) Regulation 1999

Minutes of meeting
held on Monday, 29 November 1999 at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon David CHU Yu-lin Hon Ronald ARCULLI, JP
Members absent	:	Hon Cyd HO Sau-lan Dr Hon LUI Ming-wah, JP Hon Mrs Selina CHOW LIANG Shuk-yee, JP Hon James TO Kun-sun Hon Gary CHENG Kai-nam, JP 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

Action

I. Election of Chairman

Miss Margaret NG was elected Chairman of the Subcommittee.

II. Meeting with the Administration

(LegCo Brief (Ref. : SBCR 14/2091/97), LC Paper Nos. LS 29/99-00, CB(2) 449/99-00(01) and CB(2) 449/99-00(02))

2. The Chairman declared interest as one of the legal representatives of overstayers involved in cases relating to the execution of removal orders by the Director of Immigration (D of Imm) against 17 Mainland overstayers who claimed to be permanent residents of Hong Kong Special Administrative Region (HKSAR) under Article 24(2)(3) of the Basic Law (BL 24(2)(3)).

3. At the invitation of the Chairman, Principal Assistant Secretary for Security (PAS(S)) briefed members on the Immigration (Amendment) Regulation 1999 (the Amendment Regulation), which provided for the practice and procedure to be followed in appeals in respect of applications for Certificate of Entitlement (C of E) or certified duplicate of C of E to the Immigration Tribunal (the Tribunal) respectively under section 2AD(1) or (2) of the Immigration Ordinance (Cap. 115)(IO).

Issue of whether it was an appropriate time to make the Amendment Regulation

4. The Chairman sought members' views on whether there was urgency in making the Amendment Regulation. She said that as the Court of Final Appeal (CFA) had not given its ruling in respect of the cases relating to 17 Mainland overstayers who claimed to be permanent residents of HKSAR under BL24(2)(3), it would be more appropriate to wait until CFA had made its ruling. She added that even after CFA had made its ruling, some time would be needed for studying the implications of the ruling. In the cases, a fundamental issue was whether a C of E application had to be made in the Mainland. If this requirement was overturned by CFA, section 2AD of IO might have to be amended.

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5. Mr Ronald ARCULLI said that as CFA's ruling might result in amendments to IO, it was inappropriate to make the Amendment Regulation before CFA gave its ruling. However, as issues such as the definition of the term "appellant" would need to be clarified, the Subcommittee could begin its study of the Amendment Regulation.

6. PAS(S) responded that although there was no pressing need to make the Amendment Regulation, the amendments were technical in nature and therefore there should not be a need for substantial changes after CFA's ruling. He considered that regardless of the outcome of the CFA's ruling, an appeal mechanism would be needed. Whether further amendments would be required would be considered in the light of CFA's ruling. He suggested members to study the Amendment Regulation for the time being and extend the scrutiny period to 5 January 2000, and consider the way forward nearer the time when the Subcommittee had to report to the House Committee.

7. Members noted that the deadline for amendment to the Amendment Regulation was 15 December 1999. The deadline could be extended to 5 January 2000 by a resolution of the Legislative Council (LegCo). In the latter case, the Subcommittee would have to report its conclusion to the House Committee by 17 December 1999. Members agreed to begin scrutiny of the Amendment Regulation and move a motion to extend the scrutiny period to the LegCo meeting on 5 January 2000. A decision on whether to support the Amendment Regulation would be made nearer 17 December 1999 when the position in respect of CFA's ruling should be clearer.

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

8. Referring to Regulation 9A(2) and 9B(2), Assistant Legal Adviser 1 (ALA1) said that no distinction was made as to the nature of appeals to the Tribunal. She suggested that the phrase "under section 2AD of the Ordinance" might be added to the end of Regulation 9B(2). Similarly, the phrase "under section 53A of the Ordinance" might be added to the end of Regulation 9A(2).

9. Government Counsel (GC) said that if subsection (1) and (2) of Regulation 9A were read together, ambiguity would not arise as it would be very easy to distinguish the appeal to which the subsection referred. The same also applied to Regulation 9B.

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10. The Chairman considered that there was a need to improve the clarity of Regulations 9A(2) and 9B(2). She requested the Administration to look into the issue.

Issue of whether Regulation 9A(1) or (2) would prevail

11. Mr Ronald ARCULLI pointed out that under subsection (1) of Regulation 9A, the practice and procedure on an appeal to the Tribunal under section 53A of IO should be such as the chief adjudicator might determine. However, subsection (2) of the same regulation also stipulated that "Schedule 3 shall have effect for the purpose of regulating appeals to the Tribunal." He asked whether subsection (1) or (2) would prevail over the other. He added that the same problem was also found with

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Regulation 9B.

12. PAS(S) responded that under Regulation 9B(2), appeals to the Tribunal under section 2AD of IO would be regulated by Schedule 4. The Tribunal was thus subject to the provisions in Schedule 4. Where some practice or procedure was not specified in Schedule 4, the chief adjudicator might determine such practice or procedure. This was necessary since it was not possible to exhaust all possibilities in Schedule 4. The same principle also applied to Regulation 9A.

Appeals lodged against decisions of the Director of Immigration made on or after 1 July 1997 and before the Amendment Regulation was made

13. ALA1 said that the Immigration (Amendment)(No. 3) Ordinance 1997 was deemed to have come into operation on 1 July 1997. The right to appeal had existed for over 2 years before the introduction of the Amendment Regulation. Section 2AD(4) of the Ordinance provided that the Tribunal might accept an appeal not lodged within the time limit of 90 days as prescribed in section 2AD(1) or (2). The Administration had been asked how they would deal with appeals lodged in respect of notification of refusal given by the Director of Immigration (D of Imm) before the Amendment Regulation was made.

14. PAS(S) said that the problem should not arise, as no C of E application had been refused by D of Imm since 1 July 1997. Section 2AD(4) of IO had already empowered the Tribunal to accept an appeal not lodged within the prescribed time limit of 90 days.

15. In response to the Chairman, GC said that to address the issue raised by ALA1, IO could be amended to require that all notification of refusal should be in a prescribed form and the time limit would apply to such prescribed form of notification. However, the Administration considered this unnecessary. ALA1 said that granting the Tribunal the discretion to accept appeals lodged beyond the prescribed time limit was not equivalent to granting applicants with the right to lodge appeals on notifications given before the Amendment Regulation was made.

16. The Chairman considered that a transitional provision was needed to deal with appeals lodged in respect of decisions made before the Amendment Regulation took effect. She said that from a legal point of view, legislation should be drafted in such a way as to deal with all possibilities. There was no requirement on the form of notification in section 2AB(6)(b)(ii). A correspondence from D of Imm advising that a person was not entitled to C of E might already constitute a notification of refusal. Mr Ronald ARCULLI shared the same view. He said that it was difficult to envisage all the possible scenarios under which an appeal would be lodged. All possibilities should be dealt with in the Regulation. Members requested the Administration to look into the issue.

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Definition of the term "appellant"

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17. ALA1 drew members' attention that the term "appellant" in paragraph 14(1)(a) referred to the applicant only, while the same term in paragraph 14(1)(b) and 14(1)(c) included the applicant as well as the parent, legal guardian or any person who made an application on behalf of the applicant. There might be a need to clarify the meaning of the term "appellant" in different parts of Schedule 4.

18. Mr Ronald ARCULLI pointed out that the term "appellant" in Schedule 4 included the applicant and any person making an application on behalf of the applicant, whereas the term "appellant" under section 2AD(3) did not include the person who made an application on behalf of the applicant. He considered that if the definition of "appellant" in different parts of Schedule 4 were unclear, the parent, legal guardian or any person representing the applicant might be prohibited from appearing before the Tribunal on behalf of the applicant. He believed it was the Administration's intention that no appeal should be lodged in Hong Kong by the applicant. Such appeal could however be lodged in Hong Kong by the parent, legal guardian or any person representing the applicant. The drafting of the Amendment Regulation did not spell out these requirements. It seemed to require that if the applicant was in Hong Kong when the appeal was made, the Tribunal should not accept the appeal.

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19. Members requested the Administration to look into the issue.

Meaning of "lodging an appeal"

20. Members noted that section 2AD(9) stipulated that the lodging of an appeal would not give the appellant the right of abode, right to land or remain in Hong Kong pending the decision of the Tribunal on the appeal.

21. The Chairman said that if "lodging an appeal" meant the whole appeal process and included the hearing of an appeal, the applicant could not be in Hong Kong during the whole process.

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22. PAS(S) responded that the "lodging" of an appeal was different from "making" an appeal. The Chairman requested the Administration to provide a written response on the meaning of "lodging an appeal", whether the term was different from "making an appeal", and whether it included the hearing of an appeal.

Issue of whether an applicant could be in Hong Kong after an appeal was lodged

23. The Chairman asked whether an applicant would be allowed to be in Hong Kong after an appeal was lodged. PAS(S) responded that if the applicant subsequently entered in Hong Kong lawfully, such as with a Two-way Permit, he would not be prevented from attending the hearing. If he entered Hong Kong unlawfully, D of Imm had the right to repatriate him. However, D of Imm could, having regard to the circumstances of each individual case, exercise his discretion to allow the applicant to remain in Hong Kong until the appeal hearing was finished. In such case, the applicant would be allowed to attend the appeal hearing. Paragraph 14(1)(a) sought to ensure that no one could challenge the Tribunal's decision for the reason of being

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absent from the appeal hearing.

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24. The Chairman requested the Administration to explain whether an applicant had the right to appear at an appeal hearing if he was physically in Hong Kong. It should also explain the legal basis on which an applicant was prohibited from appearing in person in an appeal hearing when he was in Hong Kong.

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

25. The Chairman questioned how natural justice would be safeguarded in an appeal hearing in which the applicant was deliberately excluded. PAS(S) said that the Administration had no intention to exclude the applicant from the hearing. After lodging an appeal outside Hong Kong under section 2AD(3), an applicant could subsequently enter Hong Kong lawfully and attend the hearing. If the applicant was unable to attend the appeal hearing, he could appoint a representative to attend the hearing under paragraph 9 of Schedule 4. The Tribunal could hear an appeal in the absence of the appellant under the circumstances stated in paragraph 14(1) of Schedule 4 only.

26. The Chairman expressed concern that a presumption of section 2AD(3) was that the applicant was outside Hong Kong. This would allow the Tribunal to hear massive appeals in the absence of the applicant. Mr Ronald ARCULLI asked how the rights of a middle-aged applicant who had no parent, relative or any person to represent him in the appeal hearing could be protected. PAS(S) responded that an applicant without parents and relatives in Hong Kong could apply for entering Hong Kong with a Two-way Permit and attend the hearing. Alternatively, he could also appoint a legal representative to attend the hearing. In most hearings, applicants would be represented by their parents, relatives or legal representatives.

27. The Chairman said that there was no other legislation which required a person to lodge an appeal outside Hong Kong. She said that as the Tribunal would hear an appeal on the facts, the applicant might have to give evidence or be cross examined. These required the presence of the applicant. His representative might not be in a position to provide the factual evidence, such as in giving evidence of a child and parent relationship. PAS(S) said that there had been examples in which appeals on removal orders had been heard in the absence of the appellant. Paragraph 12 of Schedule 3 provided circumstances under which the Tribunal might hear an appeal in the absence of the appellant. The Chairman requested the Administration to provide information on appeals heard in the absence of a person about to be removed.

Adm

28. Mr Ronald ARCULLI said that the situation under Schedule 3 was different since under section 53C of IO, the Tribunal could dismiss an appeal in respect of a removal order without a hearing. Such a provision was not found in section 2AD. He considered that under the law, all parties concerned should be entitled to appear before Tribunals to present their case. If paragraph 14(1)(a) was only intended for the applicant, it could simply spell out that the Tribunal might hear an appeal in the absence of an applicant by reason of his absence from Hong Kong.

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29. Mr Ronald ARCULLI said that paragraph 6 of Schedule 4 required the appeal to be heard in private. However, "in private" generally included the presence of the applicant. He considered that caution should be exercised to avoid excluding in Schedule 4 the right of an applicant who was in Hong Kong after an appeal was lodged to be present at an appeal hearing, especially if an applicant who subsequently entered Hong Kong lawfully would be allowed to attend an appeal hearing.

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30. The Chairman requested the Administration to provide a written response on how it could ensure that natural justice would be observed in an appeal hearing in which the applicant was absent and that the fundamental right of the applicant was safeguarded.

Other issue

31. Mr David CHU said that the Administration should reconsider whether section 2AD(3) of IO was necessary given that an applicant would be out of Hong Kong in most cases. The Chairman requested the Administration to look into the issue.

Adm

III. Date of next meeting

32. Members agreed that the next meeting would be held on 9 December 1999 at 4:30 pm to continue discussion with the Administration. They also agreed that a motion be moved by the Chairman to extend the scrutiny period of the Amendment Regulation to 5 January 2000.

33. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat
17 December 1999