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(Attn. : Mr. Allen Lai
Government Counsel)

Dear Mr. Lai,

Immigration (Amendment) Regulation 1999 (L.N. 273 of 1999)

I refer to our recent telephone discussions.

There is no doubt that any addition or amendment to the Immigration (Amendment) Regulation 1999 must not be ultra vires. Hence, I agree that it is not possible to provide in the Amendment Regulation :

- (a) that the time limit prescribed in section 2AD(1) or (2) does not apply to any appeal in respect of a decision of the Director made before the commencement of the Amendment Regulation;
- (b) that the appellant has the right to appeal out of time against a decision so made; or
- (c) that the Tribunal has to accept such an appeal even though it is not lodged within the said time limit.

I have reviewed again the enabling provisions in section 59 and 53G of the Immigration Ordinance (Cap. 115). Section 59(a) of the Ordinance empowers the Chief Executive in Council to make regulations for the purpose of providing for any matter or thing which is to be or may be prescribed under that Ordinance. Section 53G(1) provides, inter alia, that the practice and procedure on appeals under section 2AD and of the Tribunal shall be such as shall be prescribed. Although it continues to set out various matters that may be prescribed, such matters are expressed to be without prejudice to the generality of the foregoing requirement and of section 59.

I would suggest that paragraph 2 in Schedule 4 be amended by adding the following as paragraph 2(3) :

"(3) The commencement of the Immigration (Amendment) Regulation 1999 (L.N. 273 of 1999) shall not preclude the Tribunal from exercising its power under section 2AD(4) of the Ordinance to accept an appeal that is not lodged within the time limited prescribed against the decision of the Director not to issue a certificate of entitlement or a certified duplicate of a certificate of entitlement made before the date of commencement of the Amendment Regulation."

I believe that the above provision would not be ultra vires because the decision of the Tribunal to accept an appeal lodged out of time has not been affected. The necessity of the provision arises because of the time lag between the commencement of the Immigration (Amendment) (No. 3) Ordinance 1997 (124 of 1997) and that of the Amendment Regulation.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

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