

By Fax: 2877 8024

CB2/SS/2/99

13 December 1999

Clerk to Subcommittee,
Subcommittee on Immigration
(Amendment) Regulation 1999,
Legislative Council.
(Attn: Mrs Sharon Tong)

Dear Mrs Tong,

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

Meeting on 14 December 1999

I refer to your letter of 10 December 1999 and attach a draft Resolution taking into consideration views expressed by the Subcommittee.

The proposed amendments to paragraph 14(1) of Schedule 4

At the meeting on 9 December 1999, members of the subcommittee requested the Administration to review paragraph 14(1)(a) of Schedule 4.

The Administration's view is that where the appellant has no right to apply for a certificate of entitlement in Hong Kong, it is consistent with the policy of the scheme of certificate of entitlement to provide that the Tribunal may conduct a hearing in the absence of the appellant. Otherwise the operation of the Tribunal will be seriously hampered since the relevant case may need to be adjourned indefinitely. The Administration's view on the issue of natural justice has already been explained in our letter dated 8 December 1999 to the subcommittee. The Administration is also aware

of the subcommittee's concern on the rights of the appellant. In order to strike a balance, the following version of paragraph 14(1) is proposed -

“(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 after it has made all due enquiry as is practicable; 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 that it would be proper in all the circumstances to proceed in the absence of the appellant.”

The new sub-subparagraph (b) is mainly designed 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” (which might include, for example, to contact the relatives of the appellant if the Tribunal has such information). 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 amply opportunity to appear in person if he so wishes, and on the other hand, able to ensure that the operation of the Tribunal would not be hampered by reason of the fact that the appellant is unable to come to Hong Kong.

Impact of Court of Final Appeal's decision in Ng Ka Ling v. Director of Immigration [1999] 1 HKLRD 315 on the proposed certificate of entitlement appeal rules

The impact of the Court of Final Appeal's decision on the proposed appeal rules is mainly on the fact that the appellant may be outside Hong Kong during the appeal proceedings. The Administration considers that the proposed appeal rules should be considered as part of the policy of the certificate of entitlement scheme which requires persons claiming the right of abode to remain outside Hong Kong during all stage of the relevant procedures. The Administration considers that it is constitutional to allow the Immigration Tribunal to conduct a hearing in the absence of the appellant where he could not come to Hong Kong to make the application for the certificate in the first place under the scheme.

The provisions of the scheme have been held by the Court of Final Appeal to be constitutional. At p.348E of the judgment, it is stated that -

“ the provision of the scheme whereby [a claimant] must stay in the Mainland while applying for [a certificate of entitlement] and whilst appealing against any refusal of the Director to issue a certificate are also constitutional.”

I hope the above would facilitate the Subcommittee's discussion. Please note that the same officers will attend the next Subcommittee meeting to be held on 14 December 1999.

Yours sincerely,

(K S SO)
for Secretary for Security