

POLICY AND PRACTICE ON

THE REMOVAL OF ILLEGAL IMMIGRANTS

Bar Association's Views

1. The Legco Panel on the Administration of Justice and Legal Services has asked the Bar Association to offer its views on the captioned topic.

Removal/Deportation

2. Removal orders and deportation orders are commonly confused. Broadly speaking, the power to deport arises when a person who is lawfully within Hong Kong commits an offence punishable with not less than 2 years imprisonment and the Chief Executive deems it to be in the public good to order him to be deported. Deportation can be for a fixed period or for life. See *s.20 Immigration Ordinance, Cap. 115*.
3. Removal orders are, on the other hand, generally made in respect of those persons who have no right to be, or remain in Hong Kong, or are in defiance of conditions of stay. The purpose of removal in these circumstances is to restore the person to the place from whence he came to maintain the integrity of immigration control and relevant policies governing entry into, and stay in, a country. A person who has been removed is not prohibited from returning on another occasion.

The Power to Remove

4. The main provision respecting the making of a removal order arises under *s. 19(1) Immigration Ordinance, Cap. 115*. There are five separate grounds for removal under this provision. In the first [*s.19 (1)(a)*], the power is reserved to the Chief Executive who can order the removal of someone who has lived here for less than 3 years if it appears that he is *an undesirable immigrant*. In the other four cases under *s.19(1)(b)* the power is reserved to the Director of Immigration¹ who can make a removal order, *if it appears to him that that person:*
- a. might have been removed from Hong Kong under *s.18 (1)* [refusal of permission to land] if the time limited for removal under *s.18 (2)* (2 months) had not passed.
 - b. has landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay.
 - c. not being a person who enjoys the right of abode has contravened *s.42* (offences relating to forged, unlawfully obtained travel documents).
 - d. being a person requiring the permission of an immigration officer to remain in Hong Kong, remains in Hong Kong without such permission.
5. Two of the five grounds are unusual grounds for making a removal order (as opposed to a deportation order). The first is the Chief Executive's power to order a person to be removed on the grounds of a pure value judgment that *it*

¹ Defined in *s.19 (6)* so as to include Deputy Directors.

appears to him that he is *an undesirable immigrant*. The second is the Director's power exercisable where *it appears to him* that an offence under *s.42* has been committed. In both cases persons may be removed from Hong Kong without being in defiance of any immigration restrictions.

Statutory Review and Appeal

6. If the Director makes a removal order under *s.19(1)(b)*, there is no right of review of that decision to the Chief Executive in Council under *s.53(1)*: see *s. 53(8)(b)*. As regards the power vested in the Chief Executive under *s.19(1)(a)* it appears that a right of review lies under *s.53(1)* to the Chief Executive-in-Council.
7. There is, however, a right to appeal under *s. 53D(1)* to the Immigration Tribunal in all *s.19(1)(b)* cases but the Tribunal has only a limited appellate jurisdiction. It can only allow an appeal if *on the facts of the case as it finds them* the appellant enjoys the right of abode or had, at the time the removal order was made, permission to remain in Hong Kong. See *s. 53A(1)*.
8. Where a removal order is made the Director must inform the subject of his right of appeal to the Immigration Tribunal: *s.19 (5)*.

Judicial Review and Habeas Corpus

9. The Court of First Instance (CFI) exercises a supervisory jurisdiction over all inferior courts and statutory bodies with powers to make decisions affecting rights and obligations.

10. A person who enjoys the right of abode and is therefore a permanent resident as defined in *s. 2A Immigration Ordinance, Cap. 115* cannot have a removal order made against him². On a *habeas corpus* application the court may examine the facts said to give rise to the making of the removal order and conclude that the subject does in fact enjoy the right of abode and order that person's release.
11. On an application for judicial review the court can examine not only facts going to jurisdiction but the decision-making process itself. For instance, the power of the Director to make a removal order where *it appears to him* that a person has contravened *s.42* could be impeached on the grounds that the materials relied on by the Director could not possibly permit him to draw that conclusion. Similarly, if the hearing before the Immigration Tribunal was procedurally flawed then its decision could be quashed.

The Right of Access to the Courts

12. *Article 35 Basic Law* guarantees Hong Kong residents the right of access to the courts. This probably encompasses, but does not supersede, the common law right of access to courts which was described as a "constitutional right" in R v. Lord Chancellor, ex p. Witham [1998] 575 where a court fees structure prescribed by the Lord Chacellor removed the right of poor persons in receipt of income support from issuing process for free.

² The definition draws the distinction between having the right of abode and being able to enjoy it as regards one class of permanent residents, namely those born outside Hong Kong to a Hong Kong permanent resident father or mother. People in this group need a certificate of eligibility in order to enjoy the right of abode.

Facilitating the Right of Access

13. A right is not much use if you are ignorant of it or are, by circumstances beyond your control, such as being in custody, not able to make use it.
14. One way of facilitating the right of access to the courts in removal cases is for the Immigration Department to advise persons against whom removal orders have been made that they *may* be eligible for Legal Aid. Another way step is making sure that those who want to at least see if they have grounds for challenging the order are able to make contact with the Department of Legal Aid or with lawyers of their choice.
15. If this is done at an early stage then the Immigration Department would not find itself accused of impeding rights of access to courts, at least not in this regard.

Executing a Removal Order when Court Proceedings are Imminent

16. The *Habeas Corpus Act 1679* drew together in statutory form a number of common law principles governing the circumstances when the writ would issue.
17. *S. 4* of the 1679 Act made provision to stop prisoners being moved from gaol to gaol without proper authority and to stop their gaolers from taking them to places beyond the reach of the writ. These actions were characterized as serious offences punishable as a *praemunire*.³

³ A *praemunire* was a serious offence against the king and his government but was not a capital offence 4 Bl. Comm. 103-117.

18. The common law respecting *habeas corpus* has been preserved by the provisions of *s.22A (14) High Court Ordinance, Cap. 4*
19. It would be of interest to know whether the legal advisers to the Director of Immigration take the view that the principle contained in *s.4 Habeas Corpus Act 1679* respecting removing prisoners to places where the writ would not reach is preserved by *s.22A(14)* of the *High Court Ordinance, Cap.4*. If they believe that this protection has not survived 30.6.1997, it would be of interest to know what legal policy objections there could possibly be to amending *s.22A* to restore it.

Rationale for Including s.19(1)(a) and s. 19(1) (b)(iia) in s.19

20. It is difficult to see the policy justification for including these two grounds for removal in *s.19*. In both cases the subject of the removal order may be lawfully within Hong Kong and not in breach of any immigration restrictions.
21. As regards the first power exercised by the Chief Executive there are problems arising under *Article 13 ICCPR (Article 9 Bill of Rights Ordinance)*. This guarantees persons not having the right of abode and who are subject to an order of expulsion the right to have their cases heard and reviewed by the competent authority and to have legal representation before that body. A reservation has been entered against *Article 19* respecting the right to a hearing but only as regards a decision to deport and not the making of a removal order. (For the text of the reservation see *s. 12 Bill of Rights Ordinance*.)
22. The same problem arises under *s.19(1)(b)(iia)*. A person who has contravened *s. 42 Immigration Ordinance* is likely to be someone who is apprehended on entry at a control point and never lands with permission. However, it is

conceivable that a person could contravene *s.42* in other circumstances and be here lawfully at the time of making a removal order.⁴

23. It would be interesting to know if, as regards the two categories of persons identified, whether the Director of Immigration considers that the wording of the reservation means that, there may be problems respecting *Article 13 ICCPR*.

⁴ A strange feature of making a removal order under *s.19(1)(b)(iia)* against a person who has permission to be in Hong Kong at the time is that his appeal under *s.53A* must be allowed because having permission to remain at the date of the making of the order is one of the two grounds which requires the Immigration Tribunal to allow the appeal: see *s.53D(1)*. It would be interesting to know whether the Director gets round this obstacle by asking the Chief Executive to make a deportation order under *s.20* in cases where the person has permission to be here and where there has been a conviction.