

LegCo Panel on Administration of Justice and Legal Services
Policy and Practice on Removal of Illegal Immigrants

Introduction

This paper informs Members of the Administration's policy and practice on removal of illegal immigrants.

Policy and Practice on the Removal of Illegal Immigrants

2. Illegal entry into Hong Kong is an offence under S.38 of the Immigration Ordinance (the Ordinance) Cap.115. Illegal immigrants are liable to removal. There are provisions under S.26 and S.32 of the Ordinance for illegal immigrants to be detained in connection with their removal.

3. Since the abolition of the 'touch base' policy in October 1980, the Government's policy on illegal immigrants has been, and continues to be, repatriation in accordance with established procedures. This policy is the same before and after the reunification.

4. In removal of illegal immigrants, our objective is to ensure that a right balance between protection of civil liberty and immigration control is maintained. With this in view, the principles guiding our removal of illegal immigrants including those who are legal aid applicants are as follows –

- (a) the Director of Immigration will suspend a removal if court proceedings have commenced, or if he knows that court proceedings are about to commence;
- (b) the Director of Immigration will notify the Director of Legal Aid if a detainee who has applied for legal aid, but has not been granted it, is about to be removed;
- (c) a removal will be temporarily withheld once legal aid is granted to the detainee; but
- (d) an application for legal aid does not constitute a reason for a scheduled removal to be withheld.

These principles are observed as Immigration Department's normal practice. This is notwithstanding that the Director of Immigration has the legal powers to proceed with a removal irrespective of whether the subject has been granted legal aid; and that the Director is under no legal obligation to inform the DLA of an impending removal where the subject has applied for legal aid but not yet granted it.

The Removal Incident

5. A paper on the incident was submitted to the Home Affairs Panel for discussion at its meeting held on 12 October 1999 . Very briefly, two Mainland residents Mr. LUI Kwan-chung and Mr. CHAN Fung illegally entered Hong Kong on 17 July 1999 to claim right of abode. They were arrested by the police same day. Pending removal,

they were detained in the Victoria Immigration Centre (VIC). They were removed in the afternoon of 21 July in accordance with normal procedure. They were sent back to the Mainland at around 3 p.m., i.e. the time when handover of illegal immigrants at the border was routinely made. In the course of the day, a series of events took place within a matter of hours. These primarily included Immigration Department notifying LAD of the impending removal; LAD interviewing the two illegal immigrants; granting of legal aid; removal of the two illegal immigrants; and commencement of court proceedings. Shortly after the removal action was completed, the solicitors acting for LUI and CHAN appeared before the Court and injunction against their removal was obtained.

6. A review was conducted by the Administration after this incident (see paragraph 13).

Assurance Given to Legislative Council in 1997

7. The Supreme Court (Amendment) Bill 1997 (“the Bill”) was part of the Localisation of Laws exercise and aimed to re-enact, in an updated form, those provisions of the English Habeas Corpus Acts 1679 and 1816 which applied in Hong Kong before the Reunification.

8. The Bill provided for applications to the High Court alleging that a named person is being detained without lawful justification and requesting the issue of a writ of habeas corpus in respect of that person. Proposed section 22A(11)(b) of the Bill prohibited the removal from Hong Kong of a person in respect of whom an application

had been made or a writ issued, except under the authority of an enactment or of the High Court.

9. The Chairman of the Bills Committee originally put forward a Committee stage amendment which sought to remove the exception under section 22A(11)(b), but the Committee agreed to withdraw the amendment on the Attorney General moving his own amendment to provide that once a writ of habeas corpus has been issued the Director of Immigration may not remove the person concerned until the writ is discharged or the proceedings are concluded.

10. Concerns were also expressed that a person should not be removed without his legal representative's knowledge before the writ of habeas corpus could be issued.

11. To allay those fears, the Attorney General, before moving the Committee stage amendments, asked Members to note that –

“as a matter of practice, once an application of habeas corpus has been made and solicitors are acting for the applicant, the applicant will not be removed from the jurisdiction without prior notification to the solicitors.”

12. Having regard to the above, the 1997 assurance cannot be considered relevant to the removal incident taken place on 21 July 1999, since there was no application for habeas corpus and there were no solicitors acting for the two illegal immigrants. Nevertheless, Immigration Department, acting under the four principles outlined in

paragraph 4 above, gave notice to the LAD of the proposed removal. The removal was also completed before court proceedings commenced. As a matter of both law and practice, an application for legal aid does not constitute a reason for a scheduled removal to be withheld.

Way Forward

13. This was an unfortunate incident, yet a single incident in that the Administration is not aware of any similar case in the past. Subsequently, we have carried out a review. Arrangements are now in place to ensure that the LAD will have sufficient time to consider applications of the same kind before removal is carried out. In return, the LAD will notify Immigration Department of any request it may have for such removal to be suspended, while allowing sufficient time for the action to be physically withheld.

Security Bureau/Department of Justice
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