

PRESIDENT'S RULING

Immigration (Amendment) (No. 2) Bill 1995

Mr. LEE Cheuk-yan indicated his intention to introduce a Private Member's Bill entitled Immigration (Amendment) (No. 2) Bill 1995 and has presented me with the draft Bill requesting me to give my opinion on whether or not the said Bill has a charging effect under S.O. 23.

2. On 30 November 1995 I indicated my opinion, and I now record the reasons therefor.

3. At the outset it may be helpful if I explain what I consider to be my duty in approaching questions involving "charging effects". The phrase is a convenient shorthand expression to encompass the principle laid down in Royal Instruction XXIV(2) that—

"Every Ordinance, vote, resolution, or question, the object or effect of which may be to dispose of or charge any part of Our revenue arising within the Colony, shall be proposed only by —

- (a) the Governor;
- (b) a public officer whom the Governor has designated to make such a proposal under clause XXIB, paragraph (2); or
- (c) a member of the Legislative Council expressly authorised or permitted by the Governor to make such a proposal."

4. This principle is then reflected in the Legislative Council's Standing Order No. 23, which is applied to Bills by Standing Order No. 39(2). Standing Order No. 23 provides that —

"A motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by —

- (a) the Governor;
- (b) a public officer designated by the Governor under Standing Order No. 4B (Attendance of Public Officers); or
- (c) a Member of the Council expressly authorized or permitted by the Governor to make such a proposal."

5. Although the President's function under S.O. 23 is expressed in discretionary terms it is not a purely subjective discretion. Rather he is required to act fairly and reasonably, and to take into account all relevant considerations, then to reach his opinion having weighed all relevant considerations in an objective way.

6. There is a further important aspect of the President's function under S.O.23, which is worth repeating here because it underlines the important balancing duty which he

has to perform. S.O. 23, which reflects RIXXIV(2), is based on the constitutional principle of the "financial initiative of the Crown"; that is to say, it is for the Crown to demand public monies for public expenditure, and for the Legislature to grant. Hence if the Crown raises "charging effect" objections to a Private Member's Bill the President must give very serious consideration to the Crown's arguments in support, for it is his duty to act in accordance with the constitutional principle of the "financial initiative of the Crown". On the other hand, it is also the President's duty to preserve the constitutional principle, enshrined in RIXXIV(1) that, subject to "charging effect" considerations, any Member of the Legislative Council is entitled to propose any question for debate in the Council; and this includes the presentation to the Council of a Private Member's Bill.

7. In summary, therefore, when the Crown objects to a Private Member's Bill on "charging effect" grounds it is the President's duty to consider such objections very seriously; but not uncritically, for otherwise the constitutional "competence" of Private Members to introduce Bills will be nullified, contrary to RIXXIV(1).

8. The operative provisions in the draft Bill are contained in clause 2, which proposes to add 3 subsections to the existing section 11 dealing with permission to land and conditions of stay. Of the 3 proposed subsections, only (1B) and (1C) are relevant for present purposes. The third proposed subsection, (1D), merely provides an exclusionary definition of "domestic duties" as used in (1B) (a), upon which nothing turns in the present context.

9. Proposed subsections (1B) and (1C) in effect provide that an immigration officer/assistant shall not give permission to foreign nationals (not having a statutory right to land and remain in Hong Kong) to land or remain in Hong Kong for the purpose of employment here unless the immigration officer/assistant is satisfied that the relevant employment is either solely for domestic duties or requires some special skill, knowledge or experience which is likely to be of value to but may not be available in Hong Kong.

10. I have sought the Administration's view on (1) the Bill, (2) Mr. LEE's arguments that the Bill does not have a charging effect and can proceed without the Governor's authorisation or permission, and (3) Counsel to the Legislature's opinion on a comparison of the law as it exists and as proposed.

11. The Administration's principal stated argument for the Bill having a charging effect is concerned with 'returnees', i.e. foreign workers who make trips out of Hong Kong, returning within the period during which they are permitted to work here. The Administration argues that the present system of immigration control, being free from statutory rules limiting immigration officials' discretion, enables purely administrative arrangements to be put in place under which no individual reappraisal of a returnee is legally mandatory. It then points to the legal position under the Bill if enacted, and argues that the Bill's requirements would in effect legally oblige the staff of the Immigration Department to re-assess a foreign national's skill, knowledge or experience in relation to the current labour market situation on each and every occasion he returns to Hong Kong.

12. According to the Administration, this replacement of "a prerogative scheme" by a statutory one obliges the Government to act in a particular way with regard to immigration control for the purposes of employment, and to bear the cost.

13. Mr. LEE, on the other hand, has stated that it is neither the purpose nor the effect of the Bill to require reassessments on each and every occasion that a returnee returns. Rather, he contends, in the case of returnees, when an employment visa of one or two years is granted to a person it means that that person has satisfied statutory requirements throughout the valid period of one or two years as specified in his visa. Hence a new assessment would not be necessary on each and every occasion he enters Hong Kong. When the Bill is enacted the Director of Immigration only needs to issue an internal directive to his Department to exempt persons holding valid employment visas from being assessed again on each and every occasion they enter Hong Kong.

14. In response to Mr. LEE's comments the Administration has asserted that, regardless of his intentions as to the purpose of the Bill, the effect of it would be to require Immigration personnel to assess a person's skill upon reentry, and the Director of Immigration cannot override a statutory requirement by administrative means such as by issuing an internal directive to the staff of his Department.

15. At my request Counsel to the Legislature has given an opinion on a comparison of the law as it exists and as proposed.

16. In summary, he is of the view that although the present system of immigration control gives a large measure of discretion to immigration officials it is important to note that that discretion is not unfettered. He points out that by concentrating on the absence of statutory rules the Administration gives insufficient attention to the existence of modern common law principles governing the exercise of any statutory power. In his view these principles establish that under the Immigration Ordinance statutory power is conferred for public purposes and that, in the words of an eminent authority on administrative law, that power "is conferred as it were upon trust not absolutely - that is to say, it can be validly used only in the right and proper way which (the legislature) when conferring it is presumed to have intended".

17. Counsel to the Legislature is therefore of the opinion that when exercising powers under the Immigration Ordinance the Administration is already under a legal duty to take into account relevant considerations regarding immigration for the purposes of employment. He advises that even under current law, the Administration has a duty to inform itself, to a reasonable degree, about employment matters relevant to the question of immigration. Furthermore, under Regulation 2(4) of the Immigration Regulations, the Director of Immigration clearly must make an informed decision relevant to the particular employment for which entry is sought. This Regulation is subsidiary legislation to be read with the principal ordinance.

18. Counsel to the Legislature then points out that what the Bill requires is for Immigration personnel to be "satisfied" about certain matters, but it does not direct them as to the method of satisfaction. Hence the legal obligations upon Immigration personnel imposed by proposed subsection 11(1B) and 11(1C) can only properly be analysed in the context of the relevant provisions of the Ordinance as amended.

19. In that context the first point to note is that the subsections would operate with the existing section 11(1). Under section 11(1) immigration officials have a discretionary power to grant or refuse permission to land. The exercise of the discretion is not subject to any express statutory directions but is, as noted above, subject to the common law requirement of reasonableness. The subsections, if enacted, would impose new statutory directions on immigration officials as to exercise of their discretion in cases of foreign nationals seeking entry into Hong Kong for all types of employment except domestic work in private households.

20. Whether or not these new statutory directions would have the legal effect of imposing new functions on immigration officials, amounting to a "charging effect". depends upon the lawful methods which would be available to the officials to exercise the statutory power.

21. Under the subsections immigration officers are required to be satisfied that a foreign national's intended employment "requires some special skill, knowledge or experience which is likely to be of value to but may not be available in Hong Kong." (section 11(1C)).

22. Counsel notes that the Administration considers that the only lawful way for an immigration official to so satisfy himself is to re-assess the foreign national's skill, knowledge or experience in relation to the current labour market situation on each and every occasion he returns to Hong Kong.

23. The key question, therefore, is whether this is indeed the only lawful method available to the immigration officials upon enactment?

24. In Counsel's view the Administration's position appears to overlook the legal significance of other provisions in the Ordinance, with which section 11(1B) and 11(1C) would operate. In particular section 11(2) is not amended by the bill. Section 11(2) is legally significant in that it provides the power for immigration officials to impose limits of stay and conditions of stay. It is, therefore, an important legislative measure in the overall immigration control provisions contained in the Ordinance. Without it section 11(1B) and 11(1C) would be unworkable because the immigration official, in the absence of the section 11(2) power to fix a time dimension to "may not be available in Hong Kong", could only conclude that the permission would have to be either totally unlimited as to time or otherwise operative only for the moment of time when permission was granted. The former would be entirely contrary to the clear legislative intention to ensure orderly and reasonable control of immigration. The latter would make section 11(1B) and 11(1C) a legal nonsense.

25. The legal effect of section 11(1B) and (1C), when read together with section 11(2), is therefore, in Counsel's view, that upon first entry the immigration official is obliged to satisfy himself that the foreign national's proposed employment requires some special skill etc. which may not be available within a certain period. What that period should amount to is something for the official to decide. The period will then be reflected in the permission conditions imposed by him under section 11(2). If, after first entry, the foreign national leaves Hong Kong and then returns within the period of time covered by his original permission the legal position is as follows —

- (a) his original permission has expired (section 11(10));
- (b) the immigration officer must be satisfied in terms of section 11(1B) and 11(1C) before he grants new permission.

26. The vital question, Counsel advises, is what minimum test as to satisfaction should be applied by the immigration officer to a returnee? Would the proposed law require him to investigate the individual circumstances of each returnee, even if the returnee is returning within the period during which he was permitted to work? In Counsel's view the proper interpretation of 11(1B) and 11(1C), when examined in the context of the Ordinance and, in particular, section 11(2) is that an immigration officers could lawfully be "satisfied" for the purposes of 11(1C), without the need for a reappraisal de novo, in the case of a returnee returning within the period during which he was originally permitted to work in Hong Kong under section 11(2).

27. In response to Counsel's opinion the Administration reasserted that under existing law, immigration controls are imposed in accordance with policy guidelines which are applied administratively; that the Bill changes the present position fundamentally; and that the new obligations would oblige the Administration to incur more public expense.

28. I have carefully considered all the views presented. I am satisfied that the existing scheme of immigration control is not a mere administrative measure which may or may not be carried out by immigration officials. It is a statutory function under the Immigration Ordinance and its subsidiary legislation, and in immigration for employment purposes it is already subject to a degree of reasonableness concerning the extent of relevant matters which must be taken into account; so that the additional provisions in the Bill are not sufficient, in my opinion, to justify the Administration's assertion that the Bill imposes new and distinct functions in the context of the established Parliamentary test set out in *Ersine May* (21st Ed) at p.712. And I quote:

"In order to constitute a charge upon public funds, expenditure must be new and distinct"; and

"The comparison of provisions in a bill with the law on the subject, as it exists, may show that, while such provisions undoubtedly involve expenditure, the power to incur such expenditure is covered by general powers conferred by statute."

I consider this test to be appropriate to Hong Kong's constitutional circumstances.

29. Accordingly it is my opinion that the Bill in question does not have a charging effect for the purposes of S.O. 23.

Andrew WONG
President

5 December 1995