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Our Ref PA0005/00/41578
Your Ref
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22 August, 2000

Mrs. Percy Ma
Clerk to the Panel
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Mrs. Ma,

Re: Panel on Administration of Justice and Legal Services
Right of Access to the Court

In January of this year, the Panel sought the views of the Law Society on the Right of Access to the Courts in Removal cases. The Law Society subsequently sent brief submissions dated 18 January.

The Law Society's Constitutional Affairs Committee continued to discuss the problems raised by the Lin Qiao Ying case and has prepared a paper entitled "*Toward a Refined Immigration Appeal Mechanism in Hong Kong*". The Law Society has endorsed the proposals set forth in the discussion paper. Please can you place this document on the next agenda of the Panel once the new council commences business.

Yours sincerely,

Joyce Wong

Joyce Wong
Director of Practitioners Affairs
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cc Secretary for Justice

Toward A Refined Immigration Appeal Mechanism In Hong Kong

I. Current Framework

A. Immigration Department

The Immigration Department ("Immigration") controls the movement of people into and out of the SAR. Among its tasks are the detection and prosecution of immigration law offenders and the removal of illegal immigrants. It also devises policies to maintain an acceptable level of population growth brought about by immigration; to control the entry of foreign workers; to prevent the entry of undesirable persons and to deport persons wanted for criminal offences.

B. Immigration Tribunal

- Pursuant to section 53F of the Immigration Ordinance, the Immigration Tribunal ("Tribunal") is established to hear appeals against removal orders made by the Director or Deputy Director of Immigration ("Director") and its decisions are ***final***.[1]

- Appeals are to be heard by 2 adjudicators and can be allowed if either adjudicator considers it to be so.[2] The Tribunal is headed by a Chief Adjudicator and a Deputy Chief Adjudicator. Both are appointed by the Chief Executive.[3]

- The Tribunal may, in the discharge of its function, consult legal advisors from the Department of Justice.[4]

- The present system is predicated ***in part*** on the UK system. It was proposed during the Legco proceedings on the bill[5] that -

> *'there shall be a panel of **lay assessors** who will consider appeals against removal made on specified statutory grounds. The Tribunal will consist of persons known and respected in the community, **with full-time occupations**, who will be called upon from time to time to consider appeals as the numbers demand. They will work in pairs, which will be an added safeguard: if they fail to agree, the appellant will be given the benefit of the doubt, and the appeal will be allowed... Their work will be coordinated and guided by a Chief Adjudicator, assisted by a member of the Legal Department to provide legal advice when necessary.'*

1 s 53D(2), Immigration Ordinance
2 Para 3, Third Schedule, Immigration Ordinance
3 s 53F, Immigration Ordinance
4 s 53G(2), Immigration Ordinance
5 *Legco Proc 1980-81* 109 (23 Oct. 1980; The Chief Secretary)

- In short, removal orders are made against illegal immigrants or persons who have no right to land in or stay in HK.[6]

- Where a removal order is made, a written notice shall be served as soon as practicable on the person subject to such order. Such notice should inform the person of the ground on which the order is made and that any appeal must be by written notice of the grounds of appeal and the facts upon which he relies, to be given within 24 hours.[7]

- As soon as practicable after such notice of appeal is given, the Director is required to give to the Tribunal and the appellant a written summary of the facts of the case and the reasons for which the removal order was granted, unless he is of the opinion that it is not practicable to do so having regard to the time available before the hearing of the appeal, in which case an oral statement of the facts and of the reasons for the removal order must be given at the appeal hearing.

- At such hearing, both the appellant and the Director may be legally represented if the Tribunal thinks fit to allow so.[8]

- One important characteristic of the system is that there might not be any hearing of the appeal at all. In this regard, section 53C provides:

> '*Where the Tribunal, upon an examination of the written grounds of appeal on which a person appealing under section 53A seeks to rely, is satisfied that the facts or matters on which the appellant is seeking to rely -*
>
> *(a) would not entitle the appellant to succeed in the appeal; or*
> *(b) are the same or substantially the same facts or matters on which the appellant sought to rely on an unsuccessful appeal under section 53A,*
>
> *it may* ***dismiss the appeal without a hearing***[9] *and in any case it shall cause written notice of such dismissal to be given to the appellant and to the Director of Immigration.*'

- Section 53D provides how the Tribunal should determine an appeal and on what matters would entitle the appellant to succeed in the appeal. The Tribunal shall dismiss the appeal if it determines on the facts of the case that the appellant does not have the right to land in HK and etc.

- In any other case the Tribunal shall allow the appeal and rescind the removal order.

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6 s 19, Immigration Ordinance

7 Nevertheless, according to s 53A(2), the appellant may also raise and rely upon other facts not mentioned in the notice of appeal; See also Para 5, Third Schedule, Immigration Regulations.

8 Para 7, Third Schedule, Immigration Regulations

9 This includes hearing in writing, i.e., the Director of Immigration does not have to give his or her response, either in writing or orally.

- Despite the finality of its decision, it is well established that the finality provision (r.e. s 53D(2)) only bars any right to appeal to a court and therefore the Tribunal's decisions are subject to Judicial Review.

- Appeals concerning the granting of a certificate of entitlement is specifically dealt with by ss. 2AD and 2AE. The procedure is basically the same as that of removal orders.

- The detailed procedure of the Tribunal is stipulated in Third Schedule to the Immigration Regulations.

II. Critique of the Status Quo

A. "Illusory Immigration Appeal System"?

- Although the HK system is based in part on the UK system, no similar general power to dismiss appeals without a hearing exists in the UK.[10]

- One bizarre implication of this "without hearing" provision is that the appellant is denied of the opportunity for a ***single*** hearing even if he choose to have it - an idea foreign to the US system and the UK system.[11]

- The Tribunal is not required to give reasons for the dismissal of the appeal without a hearing in the notice of dismissal. Therefore, any error made by the Tribunal in determining matters in subsection (a) or (b) of s 53C may not appear in the notice of dismissal, thereby making the Appellants' job in spotting the Tribunal's error difficult. This arrangement appears to frustrate some of the basic principles in having an appeal system: transparency, accountability, check against arbitrariness.

- Even if all the appeals which come before the Tribunal are to be heard, it would, ***at most***, amount to a ***"hearing of the First Instance" or "the First Tier"*** in the US and UK sense.[12] If judged by these common standards, hearings conducted by the Tribunal are not really an "appeal".

B. Narrow Jurisdiction[13]

10 *See* Immigration Appeals (Procedure) Rules 1972, SI 1972 No. 1684, r 12; r 20. *See* also Appendix

11 For example, although the US Board of Immigration Appeal, out of a fear of creating an incentive for an alien to appeal solely to delay removal, has the power to "summarily dismiss" an appeal if it "lacks an arguable basis in law or fact" or for certain other reasons, the alien at least has been given a hearing at the Immigration Judge stage. For details, see Appendix.

12 That is to say, US Immigration Judge and UK Adjudicator/Special Adjudicator

13 This is relative to a much wider jurisdiction that its UK and US counterparts seem to enjoy. For an overview of the jurisdiction they enjoy, see Appendix.

- Only covers removal orders and certificates of entitlement - other Immigration decisions such as refusal to grant visas, deportation[14] and etc. would not be subject to any administrative adjudication system.

- This claim is made relative to, firstly, the powers of the Immigration Department which are not appealable. Among others, they are:

  - Imposition of a *limit of stay* and *conditions of stay* to a person who is given permission to land or remain in HK (s. 11(2), Immigration Ordinance)

  - Curtailment of a limit of stay (s 11(6), Immigration Ordinance)

  - Variation of a condition of stay (s11(7), Immigration Ordinance)

- Secondly, unlike the UK system, which ours claimed to be based on, decisions such as exclusion at ports, refusal to grant entry certificates or visas, refusal to vary conditions in a manner favourable to the immigrant, variation of conditions in a manner unfavourable to the immigrant, decisions to deport and refusal to revoke deportation orders are not appealable here through the Tribunal. (My earlier report on the UK system refers)

- Not entitled to review the exercise of discretion by immigration officers by, e.g., reassessing relevant humanitarian considerations.[15] In this regard, the Former Chief Justice said:

  > '*It is not for the Tribunal to enquire as to whether or not there are humanitarian grounds, which the Director should consider, nor to make any recommendations to the Director in that regard. Whether or not a person is ultimately to be repatriated is a matter within the discretion of the Director who, no doubt,* ***in practice****, takes into account such humanitarian grounds as he considers merit consideration.*'[16]

- Often we should beware of the "in practice" part of Roberts C.J.'s quote. That is why an appeal tribunal vested with such power is so valuable ***in practice***.

- It is also worth noting that section 12 of the Bill of Rights Ordinance (BORO) provides that *'Art. 9 (of BORO) does not confer a right of review in respect of a decision to deport a person not having the* ***right of abode*** *in HK or a right to be represented for this purpose before the competent authority.*'[17]

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14 *See* later discussion on the Bill of Rights Ordinance

15 *Cf.* UK system, under which the appellate authorities can review the exercise of discretion by immigration authorities.

16 Roberts C.J., in *Yip Chi-lin v. The Director of Immigration* (4 February 1986), Civ. App. No. 144 of 1985 (C.A.)

17 Art. 9 reads: 'A person who ***does not have the right of abode*** in Hong Kong but who is lawfully in Hong Kong may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against this expulsion and ***to have his case reviewed*** by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

- Ironically, the claim that the deportee does not have the right of abode in HK itself would not be subject to appeal under the Immigration Ordinance, thereby in a way rendering this qualification (under s. 12) illusory. It therefore appears that section 12 does not provide a right of review for deportees, given Immigration Ordinance itself does not provide such a right.

C. Standard of Adjudication

In general, adjudication standard is a function of:

1) ***Quality of Adjudicators*** - present Adjudicators are mostly laymen who sit part-time.[18] Given the specialized nature of immigration law, it appears that Adjudicators should follow the US and UK model and be full-time and legally qualified.

2) ***Supporting resources*** - given that most administrative "courts" in HK (e.g. Equal Opportunities Commission, Privacy Commissioner's Office, Ombudsman) have their own legal support team, it is illogical that the Tribunal does not have its own legal team.

3) ***Availability of self-checking device*** - The publication of precedents by the Tribunal. At present, the Tribunal '*shall keep a summary or record of proceedings in every appeal which comes before it in such form as the Chief Adjudicator may determine*.'[19] Besides, an appeal is heard in private[20] and brief judgement will be handed to the parties to the appeal and may be available upon public request, subject to the permission of the Chief Adjudicator.[21] In addition, section 53C(b) seems to suggest a precedential system, but for such a system to operate, precedents should be elaborated, edited and published to facilitate access.

III. Preliminary Recommendations

1. Appellants should be given at least one chance to be heard.[22]

2. The present "Single-tiered" system should be transformed to a "2-tiered" system, in which the first tier is the Adjudicator level with a hearing before a legally qualified Adjudicator. The second tier would be the Tribunal. These two tiers could be grouped under an Immigration Review Office ("IRO").

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18 At present, the Immigration Tribunal has 61 Adjudicators, Chief and Deputy Adjudicators being included. Out of the total, 8 had legal training, including the Chief who is a retired High Court Judge <Interview with Executive Officer, Miss H Tong, of the Immigration Tribunal dated 19 May 2000>.

19 Para 13, Third Schedule, Immigration Ordinance

20 Para 4, Third Schedule, Immigration Ordinance

21 Interview with Executive Officer, Miss H Tong, of the Immigration Tribunal dated 12 April 2000.

22 *See* Part II.A

3. Expand the new IRO jurisdiction to include review of any decisions by Immigration that substantially affect the fundamental rights of aliens and the exercise of discretion by the Immigration Department.

4. To avoid abuse of the system, procedural safeguards such as those employed in the US can be introduced.[23]

5. Full-time legally qualified adjudicators

6. Legally trained staff

7. Publication of precedents - judgments should be elaborated, arranged, edited, published and designated as precedential in appropriate cases.

23 In the US, the vast majority of aliens simply give up their opportunities of being heard by Immigration Judges and go home. One of the reasons might be that some might want to avoid a formal removal order, which would bar future admission for up to 5 years (longer for second removals and aggravated felons). INA s. 212(a)(9)(A). The Attorney General (and therefore the INS) has the discretion to permit such aliens to withdraw their applications for admission and thus immediate deportation. INA s. 235(a)(4). *See* also supra note 10.

Appendix: Overview of US and UK Immigration Appeal Mechanism

I United States: a two-tier system

Major characteristics:

- legally trained immigration judges;
- virtually independent appeal venue;
- panel system;
- publication of precedents;
- perception of justice: procedural safeguards to check for arbitrariness

A. Immigration Judges

Generally speaking, a person potentially subject to removal or deportation order imposed by an Immigration and Naturalization Service ("INS") officer, is given a removal or deportation hearing before an Immigration Judge ("IJ"). Previously part of the INS, IJs fall under the auspices of another Justice Department agency called the Executive Office for Immigration Review ("EOIR"). All the IJs are lawyers, and their only responsibility is adjudication of immigration cases. They conduct relatively formal, evidentiary and adversarial hearings.

B. Board of Immigration Appeal

- The Immigration and Naturalization Act ("INA") permits either party, the alien or the INS, to appeal to the Attorney-General from an adverse decision of the IJ in removal and deportation proceedings. The Attorney-General has delegated that appellate authority to the Board of Immigration Appeals ("BIA"). The BIA is part of the Attorney General's EOIR

- Unlike the IJs, with representatives throughout the US, the BIA sits in a single location, Falls Church, Virginia. It consists of a Chair and fourteen other permanent members, all appointed by the Attorney-General. The Director of EOIR may designate IJs to serve as temporary additional members. A sizable legal support staff assists the BIA members in their work.

- BIA procedure is fairly straightforward. The appellant (whether the alien or the INS) must file with the IJ, no later than thirty days after service of the decision, a notice of appeal summarizing the grounds for the appeal. The filing of that notice automatically stays execution of the IJ's decision. Eventually the appellant (and then the respondent) will file a detailed brief, according to a schedule established after the transcript of the hearing becomes available. Both parties can file various

motions with the BIA. It also has the discretion to permit oral argument, though **in practice oral argument is the exception rather than the norm.**

- Although the BIA review is confined to the Record, its decisions require an independent substitution of judgment. In theory this is true even on questions of witness credibility, but in practice the BIA normally defers to the credibility determination of the IJ, who was able to observe the demeanor of the witnesses.

- At one time, although three-member panels of the BIA would hear oral argument, all of the then five members would participate in every decision. After extensive study, the Administrative Conference of the US recommended in 1985 that the BIA move to a system in which cases are decided by three-member panels. Throughout the study, the Justice Department had vigorously resisted the proposed change. In 1988, however, the Department accepted that the increased BIA caseload and the inefficiency in deciding all cases en banc justified a switch to a panel system. The regulations issued that year provided for the creation of two three-member panels, each composed of permanent BIA members serving with designated IJs appointed temporarily for that purpose. Today, **panel consideration** is the norm.

- The BIA process culminates in a written opinion that is served on the parties. The decision is binding on all IJs and on the INS in the particular case; if designated as **precedential,** it is binding in similar cases as well.

- The lengthy process, combined with the automatic stay of removal while the appeal is pending, can create an incentive for an alien to appeal solely to delay deportation. The regulations therefore empower the BIA to "summarily dismiss" an appeal if it "lacks an arguable basis in law or fact" or for certain other reasons. When summary dismissal is invoked, the BIA in effect affirms the IJ decision without waiting for a transcript or briefs and without hearing oral arguments.

- The Attorney-General has reserved the power to review BIA decisions. This power is typically exercised only when a case raises exceptionally important questions of law or policy. Nevertheless, this power is rarely exercised, thereby making BIA decisions practically administratively final, subject of course to judicial review by the US Court of Appeal.

C. Recent Developments

- Notwithstanding the above, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIR) of 1996 (which is still in force) eliminates or restricts the power of the Federal courts and of IJs to review many types of enforcement decisions; mandates the detention, perhaps indefinitely, of many aliens pending removal;

- The IIRIR thoroughly revamps the enforcement process in ways that even many INS officials find arbitrary, unfair, and unadministrable. Among others, it has made the following changes:

(i) Requires the INS to exclude aliens at the border summarily and without judicial review if they seem to lack proper documentation.

(ii) Makes asylum claims more difficult and bars the INS from granting discretionary relief from deportation to many aliens even for compelling humanitarian reasons which previous law permitted.

(iii) Mandates the detention of many removable aliens - perhaps forever if they come from a country like Vietnam that refuses to take them back.

(iv) Equates the rights of aliens who entered illegally and live in the US with those of aliens with no ties in the US. It limits the rights of illegal aliens to re-enter legally.

(v) Further expands the category of "aggravated felon" aliens, who can be deported summarily even if they have been long-term residents of the country. (The definition of "aggravated felony" is so broad that it includes almost all drug, weapons, and other "non-petty" offences; it can even cover subway fare evasion.).

(vi) Bars judicial review of INS decisions to deport them.

II. United Kingdom: two-tier system with participation from non-lawyers

A. Two-Tiered System

- Comprises an Immigration Appeal Tribunal at one level and a number of single Adjudicators at the lower level. These appellate authorities will hear appeals against the following:

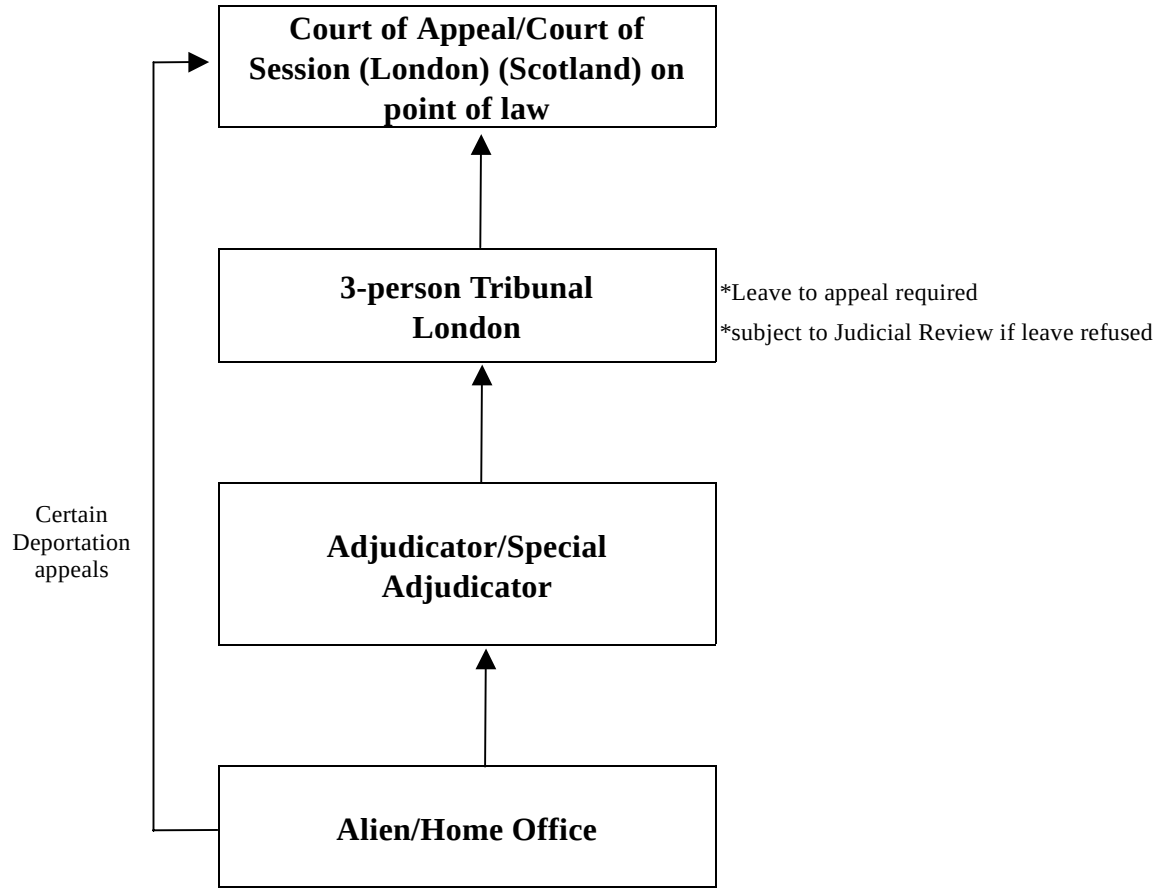
  - exclusion at ports;
  - refusal to grant entry certificates or visas;
  - refusal to withdraw a standing instruction for a person's removal;
  - refusal to vary conditions in a manner favourable to the immigrant;
  - variation of conditions in a manner unfavourable to the immigrant;
  - decisions to deport or remove;
  - refusal to revoke deportation orders.

- The appeal system was not, however, intended to deal with appeals against deportation or other restrictive action 'on grounds which are primarily of a political nature'.

B. Structure

- Most appeals go first to an Adjudicator or Special Adjudicator, sitting at Thanet House in London or at one of five regional centres located in West London, Birmingham, Leeds, Manchester and Glasgow, with periodic sittings in Cardiff, Belfast and Edinburgh. There is a further appeal to a three-person Tribunal which usually sits in London. Generally, leave to appeal to the Tribunal is required, with the possibility of judicial review if leave is refused. In certain deportation cases appeals are direct to the Tribunal.[24] Where there has been a final decision there is a right of appeal to the Court of Appeal in England or Court of Session in Scotland on a point of law if leave is granted (cases decided in Scotland go to the Court of Session and all others to the Court of Appeal). Finally, the Secretary of State has discretion to refer cases back to the Adjudicator or Tribunal where the first appeal has been dismissed. The above procedure can be summarized in the following diagram (P.T.O.):

24 Section 15(7), Immigration Act 1971, where the ground of the decision is public good under s3(5)(b) or family membership under s3(5)(c). If one of the grounds of appeal is an asylum claim falling within s8 of Asylum and Immigration Appeals Act 1993, it will be a mixed appeal and will go to a Special Adjudicator.



"↑" = Appeals to the various Tribunals/Courts

C. Adjudicators

- Adjudicators are appointed by the Lord Chancellor, and are usually, but not necessarily, barrister, advocates, or solicitors of several years' standing. Full-time Adjudicators work until the age of 65, while part-time Adjudicators are appointed on one-year renewable contracts.

- Special Adjudicators are adjudicators designated by the Lord Chancellor to hear asylum appeals.

- The Chief Adjudicator is responsible for the allocation of cases to Adjudicators and other administrative matters and also hears appeals. During 1995, the establishment for immigration appeals was one Chief Adjudicator, one Deputy

Chief Adjudicator, 23 full-timers and approximately 88 part-timers who are expected to serve a minimum of 50 days per annum. This marks a considerable increase in the establishment since 1990, when there were 13 full-time and 70 part-time appointees.

D. Immigration Appeal Tribunal

- Members of the Immigration Appeal Tribunal are appointed by the Lord Chancellor, with a President and as many members as the Lord Chancellor determines. Some are lay members, but the rest are barristers, advocates or solicitors at least seven yeas' standing, so that at every sitting of the Tribunal a lawyer is present, who may preside over the sitting.

- Hearings usually take place before a three-person Tribunal, of which the Chairman is a lawyer. The Tribunal can dispose of an appeal without a hearing. In asylum appeals this can only be done if the appeal has been abandoned or the decision appealed against has been withdrawn or reversed, but in other cases it can be done if:

  (i) No party to the appeal has requested a hearing on grounds of impracticability;
  (ii) If the lay appellant is outside the UK and has no UK representative;
  (iii) There is no warrant for a hearing in cases where leave must be granted under the Immigration Act of 1971 ("Immigration Act").

- If an Adjudicator has allowed an appeal and given directions for giving effect to the determination, these are suspended so long as an appeal to the Tribunal is pending. If the Tribunal affirms the Adjudicator's determination allowing the appeal, they can alter or add to the directions and recommendations already given or replace them with their own directions and recommendation. Such directions must be complied with by the Secretary of State or any officer to whom they are given. Where an appeal is dismissed by an Adjudicator but allowed by the Tribunal, the Tribunal can give directions and make recommendations in the same way as an Adjudicator.

- In an appropriate case the Tribunal may remit the matter for further determination to an Adjudicator or, in asylum appeals to the Special Adjudicator. The power may (since 1984) be exercised by the President of the Tribunal or one of its chairmen acting alone. The Adjudicator may be the same or different from the one who heard the original appeal. On remission the Adjudicator can hear further evidence.

- In making its determination, the Tribunal, like Adjudicators, must give sufficient and adequate reasons for its determination.

III. Overall Attributes of the US and UK system

1. Collegial decision-making
2. Greater prestige and appearance of impartiality: a high degree of independence, binding precedents
3. Legally qualified adjudicators (not totally true for UK)
4. Legally trained staff
5. Publication of precedents
6. In theory, less policymaking responsibility (not for US in practice)
7. Higher quality results
8. Perception of justice: appeal system initiated to dispel belief of injustice and provide reassurance to immigrants
9. Ability to have uniform application of the law
10. In theory, more independence from political officials (not for US in practice)

IV. Major Drawback

- The provision of such a service is costly.

The Law Society of Hong Kong
22 August 2000

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