Bills Committee on Immigration (Amendment) Bill 2001

Background paper prepared by the Legislative Council Secretariat

Immigration (Amendment) Bill 2001

Purpose

This paper provides the background and a summary of the issues and concerns raised by members of the Panel on Security, the Legal Service Division and the Law Society of Hong Kong on the Administration's proposal to amend the Immigration Ordinance (IO) to exclude Mainland officials from being treated as ordinarily resident in Hong Kong during any period in which they are directed to work in Hong Kong in their official capacity.

Background

Eligibility for permanent resident status

2. Article 24(2) of the Basic Law (BL) sets out the different categories of permanent residents of the Hong Kong Special Administrative Region (HKSAR). According to BL 24(2)(2) as implemented by paragraph 2(b) of Schedule 1 to IO, a Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR is a permanent resident.

3. Section 2(4)(a) of IO excludes certain categories of persons, such as a refugee, a member of a consular post, a domestic helper and a member of the Hong Kong Garrison, etc. from being treated as ordinarily resident during the period of their stay in Hong Kong. Mainland officials directed to work in Hong Kong (except members of the Hong Kong Garrison) are currently not listed as one of the categories.

Mainland officials working in Hong Kong

4. According to the Administration, it has recently reviewed and clarified with the Mainland authorities the duties of Mainland officials and decided that

those who are posted to Hong Kong under the directive of the State in their official capacity should not be treated as ordinarily resident in Hong Kong. They include officials sent by the Central People's Government (CPG) to work in the Liaison Office, the Office of the Ministry of Foreign Affairs in Hong Kong, Chinese enterprises which have been set up in Hong Kong with the approval of the Mainland authorities and staff sent from the Mainland to the Hong Kong Garrison. As it is not intended that they enter Hong Kong for the purpose of settlement in accordance with BL 22, these officials are required by the CPG to return to the Mainland upon expiry of their working assignment in Hong Kong.

The Administration's proposal

5. The CPG has implemented with effect from 11 October 2001 a new administrative measure to clearly identify Mainland officials directed to work in Hong Kong. A special endorsement will be stamped on the Chinese Travel Permits (CTPs) (因公往來香港澳門特別行政區通行證) of the officials concerned stating that "Holder of this document is a public official of the State directed to work in the Hong Kong/Macao Special Administrative Region". ("持證人係國家公職人員，受委派在香港、澳門特別行政區工作"). To tie in with the new administrative measure implemented by the Mainland, the Administration proposes that a legislative amendment to IO be introduced to exclude Mainland officials holding CTPs with the special endorsement from being treated as ordinarily resident in Hong Kong for the purpose of the Ordinance during their stay as such holders.

Issues and concerns raised by the Panel on Security

6. At its meeting on 7 November 2001, the Panel on Security was consulted on the Administration's proposed amendments to IO. Members raised the following issues and concerns at the meeting -

(a) a member expressed doubt whether the proposed legislative amendments would have the effect of excluding Mainland officials directed to work in Hong Kong in their official capacity from being treated as ordinarily resident in Hong Kong. The member was also concerned that there seemed to be another category of persons, apart from the daily quota of 150 Mainland

residents, who would be allowed to enter Hong Kong for settlement;

(b) some members considered that the Administration was imposing restrictions on the meaning of "ordinarily resident" in BL 24 through amendments of local legislation;

(c) a member was of the view that the proposed legislative amendment would be unfair to Mainland officials who had worked in Hong Kong for more than six years but less than seven years when the legislative amendments came into force; and

(d) a member opined that if it was a Mainland policy that officials directed to work in Hong Kong should not be entitled to permanent resident status in Hong Kong, the Mainland authorities should not have allowed the officials to work in Hong Kong for more than seven years. The member considered that the problem of Mainland officials acquiring permanent resident status might be addressed if Mainland authorities avoided sending Mainland officials to work in Hong Kong for seven years or more.

7. In response to members' concerns relating to BL, the Administration explained that the Bill sought to clarify that Mainland officials who worked in Hong Kong were not to be treated as being ordinarily resident in Hong Kong for the purpose of BL 24. The Court of Final Appeal (CFA) had, in the case of Fateh Muhammad v. Commissioner of Registration, upheld the provision of section 2(4) of IO which excluded a person from being treated as ordinarily resident during the period when the person was imprisoned or detained. As the CFA had recognised, the term ordinarily resident was a term that meant different things in different places. Thus, it was necessary to look at the context, and interpret the term in accordance with its purpose in the context of BL 24. The term "ordinarily resident" as CFA had recognised should be looked at in its particular context. The Administration considered that the Bill was consistent with the meaning of the term "ordinarily resident" in the context of BL 24.

8. An extract from the minutes of the meeting of the Panel on Security on 7 November 2001 is in **Appendix I** for Members' easy reference.

9. In response to the request of members, the Administration has also provided the following additional information to the Panel -

(a) a breakdown of the category of employing organisations of the 1357 Mainland residents working in Hong Kong under official sponsorship who have acquired the right of abode in Hong Kong (**Appendix II**); and

(b) the number of Mainland residents who have worked in Hong Kong under official sponsorship for over six years but less than seven years (**Appendix III**).

Concern of the Law Society of Hong Kong

10. When the Bill was discussed by the House Committee at its meeting on 30 November 2001, a letter dated 28 November 2001 from the Law Society of Hong Kong was tabled at the meeting. The Law Society considered that the Bill introduced amendments to the Ordinance in an attempt to prevent Mainland officials from gaining right of abode in Hong Kong. The proposal was in apparent conflict with the provisions of BL 24(2)(ii). The letter from the Law Society in **Appendix IV** was referred to the Administration for consideration on 3 December 2001.

Issues raised by the Legal Service Division

11. The Legal Service Division has also raised a number of drafting and other points with the Administration. The letter dated 22 November 2001 from the Assistant Legal Adviser to the Administration, and the latter's response are in **Appendices V and VI** respectively.

Council Business Division 2
Legislative Council Secretariat
26 June 2002

Extract from minutes of meeting of Security Panel held on 7 November 2001

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I. Immigration (Amendment) Bill 2001
(LegCo Brief Ref. : SBCR 2/2071/99))

At the invitation of the Chairman, Secretary for Security (S for S) briefed Members on the proposal in the Immigration (Amendment) Bill 2001 (the Bill) to exclude Mainland officials from being treated as ordinarily resident in Hong Kong during any period for which they worked in Hong Kong in their official capacity.

2. Miss Margaret NG asked about the number of Mainland officials who had acquired permanent resident status after having worked in Hong Kong for more than seven years. She expressed concern that there seemed to be another kind of exit permit besides the One-way Permit and Two-way Permit by which Mainland residents could enter Hong Kong. She asked about the types of Mainland persons eligible for such exit permit.

3. S for S responded that there was no change in the types of permits for Mainland residents who entered Hong Kong. For Mainland residents who entered Hong Kong for private purposes, there were only two types of permits, namely, the One-way Permit and Two-way Permit. The Mainland officials entered Hong Kong for the purpose of work but not settlement. She said that there were about 1 300 Mainland officials who had become permanent residents of Hong Kong after having worked in Hong Kong for more than seven years. After a recent review and clarification with the Mainland authorities on the duties of Mainland officials, the Administration decided that those who were posted to Hong Kong under the directive of the State in their official capacity should not be treated as ordinarily resident in Hong Kong.

4. S for S added that there were not many Mainland officials working in the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region and the Office of the Ministry of Foreign Affairs in Hong Kong. However, there was a large number of Mainland officials from state organisations and enterprises who were working in Hong Kong, although the total number had decreased from about 10 000 persons before reunification to the current level of about 7 000 persons.

5. Miss Margaret NG asked about the criteria adopted by state organisations and enterprises in sending Mainland officials to work in Hong Kong and the general rank of these officials. S for S responded that many chief executives officers of state organisations and enterprises were senior officials of the Central People's Government at ministerial level. Applications for deploying officials to work in Hong Kong were processed by the State Council in accordance with stringent criteria. After reunification, the number of Mainland officials allowed to work in Hong Kong were

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kept under stringent control by the Hong Kong and Macau Affairs Office of the State Council.

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6. Miss Margaret NG requested the Administration to provide a breakdown in respect of the type of enterprises of the 1 300 Mainland officials who had become permanent residents after having worked in Hong Kong for more than seven years.

(*Post-meeting note* : The information provided by the Administration was issued to members vide LC Paper No. CB(2) 382/01-02 on 14 November 2001.)

7. The Chairman said that if it was a Mainland policy that officials directed to work in Hong Kong should not be entitled to permanent resident status in Hong Kong, the Mainland authorities should not have allowed the 1 300 Mainland officials to work in Hong Kong for more than seven years. He further said that the problem of Mainland officials acquiring permanent resident status might be addressed if Mainland authorities avoided sending Mainland officials to work in Hong Kong for seven years or more.

8. S for S responded that while she was not in a position to reply on behalf of the Mainland authorities, there were some cases where operational needs necessitated a Mainland official to work in Hong Kong for more than seven years. The proposed legislative amendments would provide Mainland authorities and state enterprises with greater flexibility in the deployment of officials to work in Hong Kong.

9. Ms Audrey EU asked whether all persons other than those referred to in paragraph 3(a) to (h) of the Legislative Council (LegCo) Brief were treated as ordinarily resident while in Hong Kong. She also asked whether Mainland residents studying or doing business in Hong Kong would be regarded as ordinarily resident in Hong Kong.

10. Law Officer (Civil Law) (LO(CL)) responded that the list of persons referred to in paragraph 3(a) to (h) of the LegCo Brief was not an exhaustive list of persons treated as not ordinarily resident while in Hong Kong. He said that a businessman who visited Hong Kong very frequently but stayed at hotels in Hong Kong and whose family was outside Hong Kong might not be regarded as ordinarily resident in Hong Kong. Although students were generally regarded as ordinarily resident in their place of study, it would be necessary to examine their respective links with Hong Kong and other places in determining whether they would be regarded as ordinarily resident in Hong Kong.

11. The Chairman asked about the types of visits where the special endorsement referred to in paragraph 7 of the LegCo Brief was not stamped on the Chinese Travel Permits (CTPs) of the Mainland officials concerned. He also asked whether Mainland officials holding such kinds of permits would be entitled to permanent resident status after remaining in Hong Kong for seven years.

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12. S for S responded that there was only one type of CTP after reunification. However, there were different types of exit endorsement, including exit endorsements for official visit, training, education and contract work. Official visits, training and education were of a short-term nature and not subject to the Bill. She said that endorsements valid for a long period of time were not granted for official visits, training or education. Besides the issue of an exit permit by the Mainland authorities, an entry permit was also issued by the Immigration Department (ImmD). Even where an exit permit granted by the Mainland authorities was valid for a long period, ImmD would not issue an entry permit valid for a long period.

13. Assistant Director of Immigration added that an entry permit for official visit would not normally exceed 30 days, while an entry permit for training would not normally exceed 12 months. An entry permit for education could be granted for up to four years to persons who studied at the eight UGC-granted tertiary institutions. CTP holders who worked in Hong Kong under the importation of labour scheme fell under paragraph 3(e) of the LegCo Brief and therefore were not regarded as ordinarily resident while in Hong Kong.

14. Miss Margaret NG expressed doubt about whether the proposed legislative amendments would have the effect of excluding Mainland officials directed to work in Hong Kong in their official capacity from being treated as ordinarily resident in Hong Kong. She opined that the Administration was imposing restrictions on the meaning of "ordinarily resident" in BL 24 through amendment of local legislation. She asked whether the 1 300 Mainland officials who had become permanent residents of Hong Kong were within the daily quota of 150 Mainland residents allowed to enter Hong Kong for settlement. She expressed concern that there seemed to be another category of persons besides the daily quota of 150 persons.

15. S for S responded that there was no change to the daily quota of 150 Mainland residents allowed to enter Hong Kong for settlement. The Mainland officials were not among the daily quota because they came to Hong Kong for the purpose of work but not settlement.

16. LO(CL) added that the Bill sought to clarify that Mainland officials who worked in Hong Kong were not to be treated as being ordinarily resident in Hong Kong for the purposes of BL 24. The Court of Final Appeal (CFA) had, in the case of Fateh Muhammad v. Commissioner of Registration, upheld the provision of section 2(4) of the Immigration Ordinance (IO) which excluded a person from being treated as ordinarily resident during the period when the person was imprisoned or detained. As the CFA had recognised, the term ordinarily resident was a term that meant different things in different places. Thus, it was necessary to look at the context, and interpret the term in accordance with its purpose in the context of BL 24. He said that the term "ordinarily resident" as CFA had recognised should be looked at in its particular context. The Administration considered that the Bill was consistent with the meaning of the term "ordinarily resident" in the context of BL 24. As regards the 1 300

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Mainland officials who had obtained permanent resident status in Hong Kong, the meaning of the term "ordinarily resident" was not certain at that time and therefore it had been construed in their favour.

17. Miss Margaret NG considered that the Bill was seeking to limit BL through the amendment of local legislation. Her view was shared by Ms Audrey EU. Ms EU said that the proposed legislative amendment would be unfair to Mainland officials who had worked in Hong Kong for more than six years but less than seven years when the legislative amendments came into force.

18. LO(CL) responded that CFA had recognised that the term "ordinarily resident" had different meanings in different contexts. The interpretation might change over time as the court adopted different interpretations over time in different contexts. CFA had said that that one had to look at a term in the context of the legislation and of BL in order to ascertain its meaning.

19. LO(CL) added that the CFA judgment referred in paragraph 15 had to some extent suggested that the previous interpretation of the term "ordinarily resident" had been too narrow. For the 1 300 people who had already become permanent residents, he considered it wrong to change their permanent resident status.

20. Ms Audrey EU requested the Administration to provide information on the number of Mainland officials who had worked in Hong Kong for over six years but less than seven years. S for S agreed. She informed Members that there were a few hundred Mainland officials who had worked in Hong Kong for over seven years but had not applied for permanent resident status. She added that the later passage of the Bill would result in more Mainland officials being entitled to permanent resident status.

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(*Post-meeting note* : The information provided by the Administration was issued to members vide LC Paper No. CB(2) 382/01-02 on 14 November 2001.)

21. Miss Margaret NG said that she had suggested on many occasions that the Administration should carry out a comprehensive review on IO, including reviews on persons who entered Hong Kong under the Admission of Mainland Professionals Scheme and Mainland residents who invested and resided in Hong Kong. She considered that the Administration should not address the issues related to IO in a piecemeal manner.

22. S for S responded that the Administration had no plan to allow Mainland residents to invest and reside in Hong Kong as there was still foreign exchange control in the Mainland. The Administration would carry out a review on its immigration policy on persons from the Mainland, a motion on which had been passed by LegCo a few months ago. However, there would not be substantial amendment to IO in the short term.

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Appendix II

Mainland Residents Working in Hong Kong under Official Sponsorship who have Acquired the Right of Abode

(July 1997 – 30 September 2001)

Category of employing organisation	**No.**
State organisations (Liaison Office, Office of the Ministry of foreign Affairs in HK)	31
Other organisations/enterprises	1326
Total	1357

Appendix III

Duration of Stay
of Mainland Residents Working in Hong Kong
under Official Sponsorship

(as at 30 September 2001)

Duration of Stay	**No.**
6 years or more but less than 7 years	249*

* For some of these 249 persons, their limitation of stay will expire before they have stayed in Hong Kong for seven years and the Central People's Government (CPG) may not extend their employment in Hong Kong. Hence they would need to return to the Mainland in accordance with the CPG's requirements. The Immigration Department does not have the statistical breakdown on this.

THE

LAW SOCIETY OF HONG KONG **Practitioners Affairs**

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28 November 2001

Clerk to Bills Committee
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Sir or Madam,

Re :　Immigration (Amendment) Bill 2001

The Law Society's Constitutional Affairs Committee has reviewed the Bill and has the following comments:-

The Immigration Bill introduces amendments to the Ordinance in an attempt to prevent Mainland public officials from gaining Right of Abode in Hong Kong. The proposal is in apparent conflict with the provisions of Article 24(2)(ii) of the Basic Law which states:

> "The permanent residents of the HKSAR shall be:
>
> > Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR."

Yours faithfully,

Joyce Wong
Director of Practitioners Affairs

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Appendix V

SBCR 2/2071/99
LS/B/5/01-02
2869 9283
2877 5029

Secretary for Security
Security Bureau
(Attn: Ms Linda SO
PAS(S)C)
Room 646, East Wing
CGO, Hong Kong

By Fax (2147 3165) & By Post

22 November 2001

Dear Madam,

Immigration (Amendment) Bill 2001

I shall be grateful for your clarification, by 27 November 2001 if practicable, on the following aspects of the Bill :-

(a) Is it sufficient simply to say that "a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong as a holder of a prescribed Central People's Government travel document", without specifying whether the document is or is not endorsed by any permission to stay granted by the Immigration Department?

(b) Are there any other travel documents held by Mainland officials posted to Hong Kong under the directive of the State in their official capacity by virtue of which a permission of stay is granted (in particular State diplomatic staff or military personnel in transit or otherwise)?

(c) Do members of the Hong Kong Garrison (now already covered by section 2(4)(a)(viii)) carry the prescribed CPG travel document. If so, should the Hong Kong Garrison as a separate category under the section be subsumed under the proposed new paragraph (ix)?

/ P. 2 ….

(d) Are provincial or other local governments in the Mainland entitled to post their officials to Hong Kong on official duties other than under the directive of the State? If so, under what travel documents or by virtue of what travel documents will they be permitted to stay?

(e) Is any condition attached to the permission to stay to ensure that the travel document holder work in the specific offices, approved Chinese enterprises and the Garrison? What are the consequences for contravention of such a condition of stay, if any?

(f) Would it be more flexible in the definition of "prescribed CPG travel document" to describe the endorsement as merely having the effect of "持证人系国家公职人员，受委派在香港特别行政区工作"?

(g) Could any Basic Law implications or absence thereof be elaborated?

Yours faithfully,

(Arthur CHEUNG)
Assistant Legal Adviser

Appendix VI

GOVERINMENT SECRE TARIAT
LOWER ALBERT ROAD
HONG KONG

OUR REF: SBCR 2/2071/99
YOUR REF:
TELEPHONE: 2810 2893
FACSIMLE: 2147 31 65

6 December 2001

Legislative Council Secretariat
Legal Service Division
Legislative Council Building ***Fax No. 2877 5029***
8 Jackson Road
Central
Hong Kong
Attn : Mr Arthur Cheung

Dear Mr Cheung,

Immigration (Amendment) Bill 2001

Thank you for your letter of 22 November 2001.

2. Our response to the questions raised, seriatim, is set out as follows -

(a) Reference to permission is not necessary. If a holder of the prescribed Central People's Government (CPG) travel permit does not have permission to land or remain in Hong Kong under section 11 (1) and (2) of the Immigration Ordinance, he will not be treated as ordinarily resident in Hong Kong under section 2(4)(a)(i).

(b) All Mainland officials posted to work in Hong Kong in their official capacity are required to travel to Hong Kong on the strength of a Chinese Travel Permit (CTP). This applies, inter alia, to State diplomatic staff deployed to the Office of the Commissioner of

the Ministry of Foreign Affairs in the HKSAR (MFAO) and Hong Kong Garrison.

(c) We understand the Mainland authorities intends to place the special endorsement on the CTPs of members of the Garrion. The Garrison is a distinctive category and under the existing section 2(4)(a)(viii), the stay of members of the Garrison in Hong Kong will not be treated as ordinarily resident in Hong Kong whether or not the special endorsement is put on their CTPs. We see merits in retaining the existing arrangement.

(d) All Mainland officials, whether of provincial or local government level, posted to work in Hong Kong in their official capacity have seek prior approval from the Hong Kong and Macao Affairs Office of the State Council, and are required to travel to Hong Kong on the strength of a CTP.

(e) Mainland officials posted to the CPG's Liaison Office in the HKSAR, MPAO or Hong Kong Garrison are subject to a limit of stay. For Mainland officials posted to work in Hong Kong for other organizations/enterprises, apart from the limit of stay they are also subject to a condition of stay that they shall only take such employment as may be approved by the Director of Immigration. In these cases, the Director’s approval will be with respect to the taking up of employment by the official concerned with a specific organization for a specific post. Hence the requirement that the official works with a specific organization for a specific post will form part of the condition.

According to section 41 of the Immigration Ordinance, any person Who contravenes a condition of stay in force in respect of him shall be guilty of an offence and liable on conviction to a fine at level 5 and imprisonment for 2 years.

(f) Since the special endorsement will be in the standard form as set out in the Bill, flexibility is not needed. Adopting the actual wording will put things beyond doubt.

(g) The proposed amendment is fully consistent with the Basic Law. This has been confirmed by Governments legal advisers. Article 24(2)(2) of the Basic Law defines a type of permanent resident based on the period of ordinary residence. The Basic Law however does not define the term “ordinarily resident”. When a term is undefined in the Basic Law it must be given its ordinary and natural meaning. But domestic legislation and the common law may assist in interpreting the term, provided such interpretation is consistent with the Basic Law.

In the context of ordinary residence under Article 24(2) of the Basic Law and Schedule 1 of the Immigration Ordinance, greater certainty can be given by expressly excluding certain classes of residence which can properly be regarded as extraordinary. The statutory exclusion of a period of imprisonment or detention was, for example, accepted as being constitutional by the Court of Final Appeal in a recent judgment delivered in July this year.

We will let you have a Chinese translation of this response shortly.

Yours faithfully.

(Winnie Ng)
for Secretary for Security