立法會
Legislative Council

LC Paper No. CB(2) 1846/01-02
(These minutes have been seen by the Administration)

Ref : CB2/PL/SE/1

LegCo Panel on Security

Minutes of special meeting
held on Thursday, 24 January 2002
at 8:30 am in the Chamber of the Legislative Council Building

Members present	:	Hon James TO Kun-sun (Chairman) Hon LAU Kong-wah (Deputy Chairman) Hon Albert HO Chun-yan Dr Hon LUI Ming-wah, JP Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-yee, JP Hon CHEUNG Man-kwong Hon WONG Yung-kan Hon IP Kwok-him, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon Andrew WONG Wang-fat, JP Hon Howard YOUNG, JP Hon Ambrose LAU Hon-chuen, GBS, JP
Public Officers attending	:	Item I Mrs Regina IP, JP Secretary for Security Mr Michael WONG Deputy Secretary for Security Ms Linda SO Principal Assistant Secretary for Security

Mr Ambrose LEE, JP
Director of Immigration

Mr K Y MAK
Assistant Director of Immigration

Mr Anthony WU
Deputy Law Officer (Civil Law)

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Raymond LAM
Senior Assistant Secretary (2)5

Action

I. Issues related to the judgment of the Court of Final Appeal delivered on 10 January 2002 in respect of appeal cases concerning the right of abode in the Hong Kong Special Administrative Region
(LC Paper Nos. CB(2) 868/01-02(01), CB(2) 869/01-02(01), CB(2) 946/01-02(01) and CB(2) 972/01-02(01))

At the invitation of the Chairman, Secretary for Security (S for S) briefed members on the Administration's paper. She stressed that no amnesty would be granted for right of abode (ROA) claimants who did not succeed in their appeals to the Court of Final Appeal (CFA) to stay in Hong Kong. She said that any amnesty would only tempt more people in the Mainland to enter illegally or overstay in Hong Kong. It would also be unfair to applicants who had returned to the Mainland or were waiting in the Mainland for One-way Permits (OWP). She further said that the Director of Immigration (D of Imm) would only exercise his discretion under the Immigration Ordinance (IO) (Cap. 115) on a case-by-case basis and where there were exceptional humanitarian and compassionate grounds. She added that after the CFA's judgment on the case of NG Siu-tung and others, the case of LI Shuk-fan and the case of SIN Hoi-chu and others delivered on 10 January 2002 (the CFA's judgment), she had received many letters from members of the public expressing the view that ROA claimants who did not succeed in their appeals should return to the Mainland.

2. S for S informed members that as at 23 January 2002, 497 ROA claimants had volunteered to return to the Mainland. Among these, 283 claimants had already returned to the Mainland.

Action

3. The Chairman asked about the Administration's response to the suggestion of allowing children aged over 18 of Hong Kong permanent residents who had other children in Hong Kong to take care of them to apply for an OWP.

4. S for S said that after reading many letters from ROA claimants who did not succeed in their appeals, it could be noted that -

(a) some of the ROA claimants were children born out of wedlock and one or both of their parents were Hong Kong permanent residents at the time of their birth. Such persons had ROA in Hong Kong and were eligible for submitting an application under the OWP Scheme. The Administration would inform these claimants about their eligibility;

(b) the parents of some ROA claimants aged over 18 had no other children in Hong Kong. These claimants were eligible for applying to take care of their parents aged 60 or above in Hong Kong under the OWP Scheme; and

(c) some ROA claimants aged over 18 were not eligible for submitting an application under the OWP Scheme, as neither of their parents were Hong Kong permanent residents at the time of their birth and their parents had other children in Hong Kong.

5. In connection with the situation in paragraph 4(c) above, S for S said that the Administration was willing to raise with the Mainland authorities the possibility of creating another channel under the OWP Scheme for these persons to apply for an OWP. The Security Bureau and the Immigration Department (ImmD) were looking into different possible arrangements before suggesting a viable arrangement to the Mainland. She stressed that even if the suggestion was adopted, the Mainland authorities would need time for drawing up the detailed arrangements. It might also be necessary for the Mainland to amend the relevant laws. Thus, there was no guarantee of a positive response from the Mainland by 31 March 2002. She also stressed that the proposal was not a quid pro quo for the return of ROA claimants to the Mainland. She added that even if such a channel was to be established, the quota to be allocated would probably be small.

6. Miss Margaret NG asked whether forced repatriation of a large scale would be carried out by the Administration after 31 March 2002. S for S responded that she was not in a position to disclose information about operations. However, minimum force would be used, should repatriation be necessary.

7. As regards cases where CFA's judgment required D of Imm to reconsider, Miss Margaret NG asked whether D of Imm would exercise his discretion in such cases only where there were exceptional humanitarian and compassionate grounds.

8. S for S responded that each of the cases would be jointly considered by D of

Action

Imm and the Administration's legal adviser. D of Imm added that for such cases, he would exercise his discretion in accordance with the CFA's judgment. Cases where the ROA claimants concerned did not succeed in their appeals would be carefully vetted and he would exercise his discretion only where there were exceptional humanitarian and compassionate grounds.

9. Miss Margaret NG expressed concern about recent media reports on D of Imm's comment that some ROA claimants had abused legal aid. She questioned why D of Imm had made such a comment.

10. D of Imm clarified that he had not said that ROA claimants had abused legal aid. He had only said that some claimants had abused judicial procedures. Although the judgment delivered by CFA on 29 January 1999 had upheld the requirement that a person who claimed ROA under Article 24(2)(3) of the Basic Law (BL) should do so while he was outside Hong Kong through application for a Certificate of Entitlement, many ROA claimants had lodged their claims while in Hong Kong. In extreme cases, it was found that the claimants lodged applications for judicial review soon after their arrival in Hong Kong with a valid Two-way Permit (TWP) when there was no removal order against them.

11. Miss Margaret NG said that any aggrieved person should have the right to seek redress from the court. If D of Imm took the view that certain ROA claimants had abused judicial procedures, he should have raised the matter with the court rather than before the media. She pointed out that it was a general principle that after a judgment was delivered on a test case, the court would have regard to the judgment in handling subsequent cases of the same nature. However, D of Imm seemed to mean that persons who were not parties to ROA litigation would not benefit from the judgment.

12. D of Imm stressed that he had no intention to restrict the right of any aggrieved person to seek redress from the court. His comments regarding abuse of judicial procedures were made on the observation that some ROA claimants sought judicial review immediately after their arrival in Hong Kong, when there was no removal order against them and there was not yet a subject for judicial review.

13. The Chairman suggested that the Panel on Administration of Justice and Legal Services might wish to follow up the implications of the CFA's judgment, such as that on judicial procedures, legal aid and the case management of the court when there was a large number of parties who might have common issues for the court to determine.

14. Mr IP Kwok-him hoped that issues related to ROA claims would come to a conclusion after the CFA's judgment was delivered. He asked whether ROA claimants who could not return to the Mainland under exceptional circumstances, such as pregnancy, would be punished when they returned to the Mainland after the expiry of the grace period.

15. D of Imm responded that as the grace period was announced by the Mainland

Action

authorities, he was not in a position to provide a response. He stressed that he would exercise his discretion under IO only in cases where there were exceptional humanitarian and compassionate grounds, but not merely for the purpose of family reunion. He added that as D of Imm, he had to enforce the law and would not encourage illegal entry or overstaying. There would not be many cases where discretion would be exercised.

16. D of Imm stressed that the grace period only applied to ROA claimants who were parties relating to ROA litigation. It did not apply to other illegal immigrants and overstayers.

17. Mr IP Kwok-him said that some OWP applicants had submitted applications at a young age but their applications were not yet approved even when they were over the age of 18. Hence, they were no longer eligible to apply for an OWP. He asked whether the Administration had discussed the issue with the Mainland authorities.

18. D of Imm responded that as referred to in paragraph 5 above, the Administration was examining the issue with a view to raising the matter with the Mainland authorities. S for S said that a points system was introduced under the OWP Scheme in June 1997 in anticipation that with the coming into force of BL, children who had ROA under BL should be given priority under the OWP Scheme. All applications were assessed in accordance with the newly introduced points system under which persons such as young children were awarded more points. At that time, many applicants complained that the change was unfair. She added that any change in immigration policy would inevitably result in some persons being disadvantaged. The points system, where objective assessment criteria were adopted, had operated without any major problems over the past few years.

19. Ms Audrey EU asked how the Administration would handle cases that were similar in nature to those involved in the CFA's judgment. D of Imm responded that under the common law, the CFA's judgment was already a part of the laws of Hong Kong. The Administration would abide by the judgment in handling cases of similar nature, even if the claimants were not parties to the cases involved in the CFA's judgment. Deputy Law Officer (Civil Law) (DLO(CL)) shared the same view.

20. Ms Audrey EU pointed out that the Administration had said that it would abide by the judgment delivered by CFA on 29 January 1999 but had subsequently failed to do so. She asked how ROA claimants could be convinced that they would not be punished when they returned to the Mainland within the grace period, especially given that the grace period was announced by the Mainland authorities.

21. S for S stressed that the Administration had not wilfully mislead ROA claimants. Any announcement or undertaking was made by the Administration genuinely having regard to the policy or decision taken at the time. However, there were times when there was a change in government policy. In respect of the judgment delivered by

Action

CFA on 29 January 1999, the Administration had tried its best to take necessary measures to implement the judgment.

22. Ms Audrey EU said that any change in policy should not affect decisions made before the change. S for S responded that the statements made by the Administration after the judgment delivered by CFA on 29 January 1999 were only about general principles. After the judgment was delivered by CFA, many ROA claimants had approached ImmD and lodged their claims for ROA in Hong Kong. ImmD had only informed them that the Administration had to study how the judgment should be implemented in accordance with the law before knowing how their respective cases should be handled.

23. As regards how ROA claimants could be assured that they would not be punished if they returned to the Mainland within the grace period, S for S said that the statement in respect of the grace period was issued in writing by the Mainland authorities on 10 January 2002. If a ROA claimant who did not succeed in his appeal was punished when he returned to the Mainland within the grace period, the Administration was willing to raise the matter with the Mainland authorities.

24. Ms Audrey EU asked whether children adopted by Hong Kong permanent residents would be repatriated even if they had no one to depend on in the Mainland. She expressed concern that there were recent media reports about the case of a pair of twin sisters where only one OWP was allocated and their parents were asked to decide which of the two sisters should be granted the OWP.

25. S for S said that legally adopted children had the same status in the Mainland as children born of their parents. Children aged 18 or below could submit applications under the OWP Scheme to join their parents in Hong Kong. The Mainland authorities had announced on 10 January 2002 that eligible children were expected to be granted an OWP within one year. Thus, ROA claimants who were close to the age of 18 were strongly advised to return to the Mainland and apply for an OWP before they became ineligible after the age of 18.

26. As regards young children who had no one to depend on when returned to the Mainland, S for S said that the Administration intended to seek the assistance of relevant Mainland authorities to provide the necessary assistance and care for these children. She added that a number of adopted children had relatives to depend on in the Mainland.

27. S for S said that in the absence of sufficient quota under the OWP Scheme, it was inevitable that the limited places had to be allocated among applicants. She added that with greatly improved transport links between Hong Kong and the Mainland, it was very convenient for people living on both sides of the boundary to visit one another. Mainland residents, including those who had applied for OWP, could come to Hong Kong on a TWP twice a year for a maximum period of three months on each visit. She added that as there were large number of applicants for

Action

family reunion, a points system under which objective criteria were adopted was needed for assessing the applications. Where there were exceptional humanitarian and compassionate grounds, D of Imm would consider exercising his discretion on a case-by-case basis.

28. Ms Audrey EU said that besides considering whether a child had other relatives to depend on in the Mainland, the Administration should also examine the relationship between the child and his relatives in the Mainland. It was undesirable for an adopted child to be taken care of by some Mainland authorities before being granted an OWP a year later. She questioned why D of Imm could not exercise his discretion, as in the case of TAM Nga-yin.

29. S for S responded that the case of TAM Nga-yin differed from others in that she had submitted an application for OWP a long time ago and she was almost ready to be granted an OWP when CFA delivered its judgment on her appeal. She reiterated that the discretion of D of Imm would be exercised only where there were exceptional compassionate and humanitarian grounds and on a case-by-case basis. She added that the seeking of the assistance of Mainland authorities to help children who had no one to depend on in the Mainland did not mean that these children would be taken care of by Mainland authorities.

30. Ms Audrey EU said that the assessment of applications for ROA in Hong Kong had for many years been processed under the OWP Scheme. She asked whether Hong Kong would, in the longer term, seek to take over the assessing of such applications.

31. S for S responded that the OWP Scheme was a Mainland scheme and the Government of the Hong Kong Special Administrative Region (HKSAR) was not in a position to take over the management or operation of the Scheme. However, there had been much input from the Hong Kong Government in the OWP Scheme, both in terms of the daily quota and the categories of persons to be awarded more points. She said that the daily quota was originally 50 persons many years ago and subsequently increased to 100 persons and 150 persons at different times. In the 1980s, the daily quota was reduced to 75 persons at the request of the Hong Kong Government. It was subsequently increased to 150 persons in anticipation that with the coming into force of BL, persons who possessed ROA in the HKSAR would be given priority to come to Hong Kong.

32. S for S stressed that any decision to change the daily quota should be taken prudently, as it might be unfair to some applicants. She said that in comparison with many other countries such as Australia, Canada, the United Kingdom and the United States (US), Hong Kong had a high percentage of quota for family reunion. She further said that in the longer term, the immigration policy on Mainland residents who came to Hong Kong for settlement might have to be reviewed having regard to the population policy in Hong Kong. However, any change in immigration policy should be effected only after detailed studies and public consultation. She informed

Action

members that the Administration had not formed any particular view on the issue.

33. Mr LAU Kong-wah said that the phenomenon of abuse of judicial procedures should be brought to the public's attention, and that the issue should be followed up by the relevant Panel. He further said that although the Administration had reiterated many times that no amnesty would be granted to ROA claimants, some associations were still urging the Administration to grant amnesty to these claimants. This would only generate false hopes for ROA claimants. He considered that returning to the Mainland was not the end of the world for ROA claimants, who could apply for visiting Hong Kong on a TWP. Besides, Hong Kong was not the only ideal place for family reunion and it was very convenient for people living in the Mainland and Hong Kong to visit one another. He added that the immigration regime would be undermined if ROA claimants who had entered Hong Kong illegally or overstayed were not repatriated.

34. Mr LAU Kong-wah said that the Administration should convey a clear message regarding its intention of suggesting to the Mainland authorities the creation of another channel under the OWP Scheme for applicants aged over 18 so that there would be no misunderstanding by ROA claimants.

35. S for S said that she had stressed that the proposal was not a quid pro quo for the return of ROA claimants to the Mainland and there was no guarantee of a positive response from the Mainland by 31 March 2002. She had also stressed that even if the proposed channel was to be established, the quota to be allocated would unlikely be large. She added that the Mainland authorities were juggling between the enforcement of law and humanitarian considerations while trying to maintain fairness.

36. Mr LAU Kong-wah asked whether the Administration could explore with the Mainland authorities the possibility of granting TWPs with multiple-entry and longer visiting period to Mainland residents.

37. S for S responded that under the existing TWP Scheme, holders of TWPs were allowed to come to Hong Kong twice a year for a period of up to three months on each visit. Where there were exceptional circumstances, consideration would be given to allowing a visitor to extend his stay in Hong Kong. Nevertheless, she could convey to the Mainland Mr LAU's suggestion.

38. Miss Margaret NG said that although a TWP holder could visit Hong Kong twice a year, the process of application for TWP would take time. She asked whether persons falling within BL24 could be issued a TWP that was valid for a longer period of time.

39. S for S said that there had been relaxation in recent years in the issuing of TWP to Mainland people who came to Hong Kong for study, business or visit purposes. She added that the issuing of TWP might be further relaxed.

Action

40. D of Imm said that the Administration was exploring with the Mainland authorities the possibility of issuing a multiple-entry TWP. However, the matter was still at a preliminary stage and issues such as possible abuse had to be addressed.

41. Mr LAU Kong-wah said that the announcement by the Mainland authorities that eligible children were expected to be granted an OWP within one year was somewhat unclear. He asked whether the Administration would suggest to the Mainland authorities to give an assurance that ROA claimants aged 18 or below who returned to the Mainland within the grace period and submitted an application under the OWP Scheme would be granted an OWP within 2002. He said that this might encourage ROA claimants to return to the Mainland.

42. S for S responded that there was not much difference between allowing a ROA claimant aged 18 or below to come to Hong Kong within one year or within 2002.

43. Mr Albert HO disagreed with Mr LAU Kong-wah's view regarding the granting of amnesty to ROA claimants. He said that a request for amnesty was reasonable. The historical development of the matter had resulted in some claimants being granted ROA and the claims of many others being rejected. He questioned why flexibility could not be exercised by D of Imm so that the problem could be resolved in a more humanitarian and harmonious way. He hoped that there would not be use of force in the repatriation of ROA claimants after the grace period expired.

44. D of Imm responded that the issue of fairness had been raised in the ROA litigation and the CFA had already expressed its views on the issue. It was therefore not constructive to reopen debate on the issue. He said that under the CFA's judgment, it was inappropriate for him to grant amnesty to all unsuccessful ROA claimants.

45. D of Imm further said that he was sympathetic to the situation of many ROA claimants. However, being a public officer responsible for the enforcement of immigration laws and control, he should not encourage illegal entry or overstaying of visitors. He had to maintain immigration control and ensure that immigration policies were enforced in a fair manner. Under this principle, he would exercise his discretion in cases where there were exceptional compassionate or humanitarian grounds. He added that ImmD was not indifferent. In the case of TAM Nga-yin, ImmD had communicated with the Mainland authorities to seek an early granting of OWP on noting that she had applied for an OWP many years ago.

46. S for S reiterated that no amnesty would be granted to ROA claimants. She said that since the interpretation of the Basic Law by the Standing Committee of the National People's Congress on 26 June 1999, about 4 000 ROA claimants had returned to the Mainland. Among these, about 2 800 had returned voluntarily and more than 1 000 had been repatriated. She added that besides the few thousand persons involved in the case of NG Siu-tung and others, the case of LI Shuk-fan and the case of SIN Hoi-chu and others, there were about another 7 000 ROA claimants who had

Action

applied for judicial review. Among these, more than 4 000 persons were still in Hong Kong. Thus, the number of ROA claimants involved was large. With the granting of amnesty to ROA claimants who did not succeed in their appeal, the points system under the OWP Scheme would become meaningless and it would be unfair to the large number of applicants under the OWP Scheme waiting in the Mainland.

47. Mr Albert HO said that many countries such as Australia, Canada and US had granted amnesty to illegal immigrants. He believed that these countries had certainly considered the problems raised by S for S. He further said that even if amnesty was not to be granted, D of Imm could still exercise his discretion under IO on the ground of the exceptional background of their cases. He hoped that the matter could be settled in a peaceful manner without repatriation by force.

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48. The Chairman requested the Administration to provide a paper explaining from a legal point of view the principles under which D of Imm should exercise his discretion under IO, whether flexibility was allowed in exercising such discretion and the relevant precedents which provided guidance on exercising such discretion. He also requested LA to provide a written advice on the issue.

LA

49. DLO (CL) agreed. He said that for the formal disposal of the appeals of all the applicants in the three appeal cases referred to in paragraph 1, the Government and the applicants' solicitors were directed by CFA to consult together to draw up draft formal orders for the CFA's approval. He added that there were many precedents which provided guidance on how the discretion of D of Imm should be exercised. The CFA's judgment had not altered the guidance under these precedents. The court had also accepted that the discretion of D of Imm should be exercised under exceptional circumstances. Miss Margaret NG said that although the CFA's judgment had not altered the rules in respect of the exercising of discretion by D of Imm, it had made some comments regarding the exercising of such discretion. She requested the Administration to take note of CFA's comments.

50. D of Imm said that he would exercise his discretion under IO only in cases where there were exceptional compassionate or humanitarian grounds and under the principle that the decision would not open up a precedent for many other cases of similar nature.

51. S for S said that consistency should be maintained when D of Imm exercised his discretion under IO so as to ensure fairness to all applicants.

52. Mr WONG Yung-kan said that many people in the agriculture and fisheries sector had said that the HKSAR Government had been too lenient in allowing ROA claimants who did not succeed in their appeals to remain in Hong Kong until 31 March 2002. As regards cases where D of Imm could not decide before 31 March 2002 whether discretion was to be exercised, he asked whether the ROA claimants concerned should return to the Mainland and wait for a reply from D of Imm.

Action

53. D of Imm responded that all ROA claimants who had not succeeded in their appeals to CFA should return to the Mainland by 31 March 2002. He stressed that ImmD would strictly enforce CFA's judgment and IO. Persons who did not have ROA in Hong Kong and on whom he would not exercise his discretion under IO would be repatriated to the Mainland after the expiry of the grace period. He said that ImmD would act in accordance with the law. For cases where litigation or judicial procedures had not been concluded, ImmD would not repatriate the ROA claimants concerned until their cases were concluded. The CFA's judgment had set out many fundamental legal principles for examining and determining ROA claims. The court was discussing with the solicitors of both sides about how the remaining few thousand ROA cases were to be handled.

54. Mr WONG Yung-kan asked whether an ROA claimant who kept engaging himself in judicial procedures would not be required to return to the Mainland.

55. S for S responded that the CFA's judgment had set out most of the fundamental legal principles for examining and determining ROA claims. Although there might be further ROA litigation, the arguments were likely to be focussed on the facts rather than basic principles and therefore there should be much less controversy. As regards some 7 000 ROA claimants whose appeals were to be processed by the court, she believed that the cases would be processed expeditiously by the court after the CFA had delivered its judgment on 10 January 2002. She was confident that the issue would be resolved.

56. Miss Margaret NG said that there were concerns that once an OWP was granted, successful applicants were required to come to Hong Kong within a short period of time and they would lost their resident status in the Mainland. S for S responded that the Administration had raised the issue with the Mainland authorities and had been informed that the cancellation of their resident status in the Mainland was necessary since the OWP holders would come to Hong Kong for settlement on a permanent basis. This would enable the Mainland authorities to gather more accurate information about its population and hence better planning for the provision of government services.

57. The Chairman asked about the statistics of persons affected by CFA's judgment. DLO(CL) responded that the actual figures were not yet available because the Government and the applicants' solicitors were directed by CFA to consult together to draw up draft formal orders. Miss Margaret NG said that the situation should be clearer when the draft formal orders were approved by CFA. She requested the Administration to provide the requested statistics, once available.

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58. Mrs Selina CHOW said that the Liberal Party considered that efforts should not be only directed at dealing with issues of ROA claimants who had sought judicial review, as this would be unfair to other eligible persons who were waiting in the Mainland. It also considered that children aged over 18 of Hong Kong permanents should be allowed to apply for OWP, as there was no limit on age in respect of ROA in

Action

BL.

59. The Chairman said that the Democratic Party considered it inappropriate from a legal point of view to grant amnesty to all ROA claimants who did not succeed in their appeals. It also considered that efforts should be made to seek for the creation of a channel under the OWP Scheme for children aged over 18 of Hong Kong permanent residents to apply for OWP.

60. The meeting ended at 10:40 am.

Council Business Division 2
Legislative Council Secretariat
7 May 2002