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Bills Committee on Immigration (Amendment) Bill 2009

**Background brief prepared by
the Legislative Council Secretariat**

Purpose

This paper provides background information on the Administration's proposal to amend the Immigration Ordinance (Cap. 115) (IO) to allow Macao permanent residents to visit Hong Kong anytime solely on the strength of their Macao Permanent Identity Cards (PICs) so as to enhance travel convenience for Macao visitors, and to make new provisions under IO to specify an offence against taking of employment by illegal immigrants (IIs) and other ineligible persons.

Background

Immigration convenience measures

2. According to information provided by the Administration for the meeting of the Panel on Security on 7 April 2009, the Hong Kong Special Administrative Region Government has reached agreement with the Macao Special Administrative Region Government on a number of immigration convenience measures which are to be implemented by the end of 2009 as announced in the Chief Executive's 2008-2009 Policy Address. One of the measures will be on allowing Macao permanent residents to enter Hong Kong solely on the strength of their Macao PICs.

3. A Macao PIC however does not meet the existing definition of a valid travel document (VTD) under IO since it does not indicate the holder's nationality. The Administration recommends that the definition of VTD be expanded to include a new category of documents to cater for documents such as Macao PIC.

4. Since the limit and conditions of stay imposed on a Macao visitor cannot be issued through making an endorsement on the card surface of his Macao PIC, the Administration proposes to make technical amendments to the requirement for visas and conditions of stay to have to be endorsed on VTDs. The proposed amendment will allow the issuance of visas and conditions of stay on a printed slip or label.

Offence of taking employment or establishing/joining in business by illegal immigrants and others

5. There is currently no offence against the taking of employment or establishing/ joining in business by IIs. The established policy has been that IIs found working illegally in Hong Kong would be prosecuted for the offence of unlawful remaining under section 38 of IO. However, the policy was recently challenged in a judicial review case (*Iqbal Shahid, Waseem Abbas & Others v Secretary for Justice*) in which the Court of First Instance (CFI) of the High Court ruled in March 2009 that recognizance granted to IIs represented an authority from the Director of Immigration for them to remain in Hong Kong. Hence, they would have a defence against the charge of unlawful remaining.

6. According to the Administration, there has been an upsurge of non-ethnic Chinese IIs (not including Vietnamese) intercepted in recent months since the handing down of the CFI's judgment : from the monthly average of 37 in January and February 2009, to 136 in March to May 2009 (representing an increase of over 260%). There is an urgent need to specify an offence for the taking of employment or establishing/ joining in business by IIs so as to prevent them from believing that there is any loophole to exploit, thus causing the problems of illegal immigration and illegal employment to deteriorate.

7. The Administration proposes that the new offence should cover persons subject to removal or deportation. The proposed penalty level of the new offence should be a fine of level five and imprisonment for three years, which are comparable to those under the offences of "unlawful remaining" and "breach of conditions of stay" respectively under sections 38(1)(b) and 41 of IO.

Discussions by the Panel on Security

8. The Administration briefed the Panel on Security on its legislative proposals at its meeting on 2 June 2009.

9. While members in general supported the proposal on immigration convenience measures for Macao visitors, some members expressed concern over the Administration's hasty decision to make new provisions under IO to specify an offence against the taking of employment by IIs. These members

took the view that the CFI's judgment on the judicial review case and its implications had to be studied carefully and construed from a wider perspective. They pointed out that the upsurge of non-ethnic Chinese IIs taking up illegal employment in Hong Kong was related to the rapid increase in the number of torture claims and refugee claims lodged in Hong Kong. The Administration should therefore speed up its review of the torture claim screening mechanism and introduce more comprehensive legislative proposals to tackle all the issues in one go, rather than dealing with the problem of employment of IIs in a piece-meal manner.

10. The Administration responded that although the law enforcement agencies had strengthened boundary control in collaboration with the Mainland counterparts, there was an upsurge in the number of non-ethnic Chinese IIs intercepted in recent months. The Administration also had difficulties in prosecuting IIs released on recognizance for undertaking illegal employment after the handing down of the CFI's judgment in March 2009. There was an urgent need for the Administration to address the problem.

11. Regarding the concern of members about the review of the torture claim screening mechanism, the Administration advised that it was studying the implementation of a legislative regime with comprehensive and effective procedures for determining refugee status and assessing torture claims made under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It would provide a framework on the subject matter for consideration by the Legislative Council (LegCo) by the end of 2009.

12. Notwithstanding the above, some members remained of the view that the Administration should come up with a view on the need for a comprehensive review and legislative exercise, before it would proceed further to make the new provisions concerning illegal employment. They requested the Administration to provide more detailed analysis on the background to the proposal to create a new offence prohibiting IIs and persons who were subject to removal or deportation orders from taking of employment or establishing/joining in any business. A member opined that the Administration should endeavour to identify the employer of the illegal workers to see if there was sufficient evidence to prosecute the employer in the first instance.

13. Some other members were concerned about the substantial increase in the number of non-ethnic Chinese IIs intercepted in recent months. They appreciated that there was an urgent need to make provisions under IO to specify an offence against the taking of employment by IIs so as to prevent them from believing that there was any loophole to exploit. Since the Administration had undertaken to study the implementation of a legislative regime for handling torture claims made under CAT and provide a framework

on the subject matter for consideration by LegCo by the end of 2009, these members considered it acceptable to tackle the specific problem of illegal employment first.

Relevant papers

14. Members are invited to access the website of the Legislative Council (<http://www.legco.gov.hk>) for details of the relevant papers and minutes of meeting.

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