

IMMIGRATION (AMENDMENT) BILL 2009

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) has been invited to give its views on the legal aspects of the Immigration (Amendment) Bill 2009.
2. The HKBA has studied the Bill. The HKBA supports the proposed amendments as regards the amendments relating to clause 3, the expansion of the definition of “valid travel document” in section 21(1) of the present Immigration Ordinance (“IO”) (Cap.115). The HKBA’s views on Clause 4 and 5 in particular are set down below.

Clause 4 and 5: Prohibition against employment

3. Clauses 4 and 5 of the Bill contain proposed amendments to the IO in respect of prohibitions against employment or taking up employment for persons who have a removal or deportation order against them, or who have landed unlawfully in Hong Kong under s. 13 of the IO. The justification for these amendments has been necessitated due to the judicial review *Iqbal Shahid & Ors v SJ* (unreported, HCAL 08/2009, 2 March 2009) where the court ruled that the unfettered recognizance granted to those who made applications for torture claims had a defence to unlawful remaining as the recognizance represented an authority from the Director of Immigration to remain, and that the Bill proposed is not in contravention of the Basic Law and provisions concerning human rights.
4. On a plain reading of Clause 5, the prohibition against employment is limited to (1) those who enter into Hong Kong unlawfully and (2) those who have had removal or deportation orders made against them.

5. The HKBA's has three main concerns regarding this amendment and would urge the Administration to clarify its position on these matters.

Working on Recognizance

6. Subsequent to the Court of Final Appeal's decision in *SJ v Prabakar* (2004) 7 HKCFAR 187, Hong Kong is obliged to examine persons who claim to have been tortured or are in fear of torture. Persons who enter Hong Kong lawfully or unlawfully have a right to have their case investigated. Such claims normally take at least a year to fully investigate and finally determine.
7. Since the decision, there is a growing population of "CAT Claimants" waiting for their case to be investigated. The HKBA understands from its members that some have been detained, some detained pending removal or deportation, some have had removal or deportation orders made against them but are on recognizance (such as the Plaintiffs in *Iqbal Shahid*) and others are on recognizance without removal orders against them.
8. It would seem that the last category of persons do not fall within the Bill. Since they have not had removal orders made against them, and recognizance is the Director's tolerance of their stay in Hong Kong pending their CAT Claim, the Bill will be ineffective in preventing this class of persons from seeking employment.
9. Rather, the HKBA is concerned that this Bill signals a shift in the Government's policy on CAT claimants in that all CAT claimants regardless of their personal circumstances or the veracity of their claims will be first detained and issued with removal orders FIRST to ensure that they are ineligible to work.
10. The Administration is invited to clarify whether it has such a policy and explain the legal basis of such a policy.

Iqbal Shahid & Ors v Secretary for Justice

11. Having studied the case in detail, the HKBA is concerned whether the implications of the case are dire as the Administration suggests with respect to illegal employment.
12. First, it is already an offence for an employer to employ persons who are not 'employable' as prescribed by the IO under s. 17I. This includes persons who breached their conditions of stay and those without valid identification documents. Second, those who are not on recognizance will not have a defence to the current 'unlawful staying' charge.
13. Therefore, the real issue does not concern at all the influx of illegal immigrants working unlawfully and without proper visas, but illegal immigrants or CAT claimants working while on recognizance issued by the Director of Immigration pursuant to s. 36(1) of the IO. This group of persons are afforded a defence against a charge of "unlawful staying" as their presence is tolerated by the Director in the form of his recognizance.
14. The crux of *Iqbal Shahid* was concerned with the legality of their stay in Hong Kong as opposed to their employment which triggered the prosecutions. See para. 49 where Wright J. held:

"49. The applicants have a straightforward contention: that by releasing them from custody on a recognizance issued pursuant to the provisions of s.36 of the Ordinance, they have been granted authority by the Director to remain in Hong Kong albeit, perhaps, only until such time as their claims for asylum have been decided. If they are correct in that submission, then they would have an arguable defence to the charge.

50. The respondent, conversely, contends that the recognizance does not amount to authority for them to remain here. If that is so, then the magistrate was correct to find that they could not successfully argue that

they derived authority to remain from the recognizance." (emphasis added)

15. The only live issue arising from the judgment is found in para. 76 where the learned judge, bound by the Court of Appeal's decision in *V v Director of Immigration* [2006] 3 HKC 362, concurred that the Director of Immigration has no power to impose conditions on a recognizance except in a 'prescribed form' pursuant to s. 36(1) of the IO. Form 8, the statutory prescribed form of recognizance limits the Director to imposing only the number and amount of sureties and reporting requirements. It does not make reference to conditions of employment. As such, the Director of Immigration cannot control those on recognizance (a select group of individuals) from employment.

16. The HKBA recognizes that the Director of Immigration has a duty to protect the public interest and control illegal immigration and illegal workers. At the same time, the HKBA is concerned that legislating a new criminal offence when the previous system has performed against illegal immigrants may be a disproportionate or inappropriate response. The issue can be simply resolved by providing the Director of Immigration in Form 8, the power to consider imposing employment conditions against an individual. The Director of Immigration can therefore consider on a case by case basis whether a CAT applicant ought to be able to work under prescribed conditions.

Dated ²³ July 2009.

The Hong Kong Bar Association