

立法會

Legislative Council

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Paper for the House Committee meeting on 23 October 2009

Report of the Bills Committee on Immigration (Amendment) Bill 2009

Purpose

This paper reports on the deliberations of the Bills Committee on Immigration (Amendment) Bill 2009 (the Bill).

Background

Immigration convenience measures

2. The Hong Kong Special Administrative Region (HKSAR) Government has reached agreement with the Macao Special Administrative Region Government on a number of immigration convenience measures which are to be implemented by end of 2009. One of the measures is for Macao permanent residents to enter Hong Kong solely on the strength of their Macao permanent identity cards (PICs). Since Macao PIC does not show the holder's nationality, it does not meet the existing definition of a "valid travel document" (VTD) under the Immigration Ordinance (Cap. 115) (IO). The Administration recommends that a new category of documents be included in the relevant definition to cover documents such as Macao PIC. The Administration also proposes to make technical amendments to the requirement for visas, if applicable, and conditions of stay to have to be endorsed on VTDs. The proposed amendment would allow the issuance of visas and conditions of stay, which cannot be physically endorsed on a card-face document such as the Macao PIC, to be made on a printed slip or label.

New offence against taking employment by illegal immigrants and others

3. There is currently no offence against the taking of employment or establishing/joining in of business by illegal immigrants (IIs). The Administration has been prosecuting IIs found working illegally in Hong Kong

for the offence of "unlawful remaining" under section 38 of IO. In March 2009, the Court of First Instance (CFI) of the High Court ruled in a judicial review case (*Iqbal Shahid, Waseem Abbas & Others v Secretary for Justice*) that recognizance granted to the IIs represented an authority from the Director of Immigration (D of Imm) for them to remain in Hong Kong. Hence they would have a defence against the charge of "unlawful remaining". The ruling is being appealed.

4. According to the Administration, although the law enforcement agencies have strengthened boundary control in collaboration with the Mainland counterparts, the number of foreign IIs continues to surge since the handing down of CFI's judgment. The monthly average rose from 37 for January and February 2009, to 136 for March to May 2009, and 152 for June to August 2009. There is an urgent need to specify as an offence for the taking of employment or establishing/joining in business by IIs and other ineligible persons, so as to deter those who intend to smuggle to Hong Kong, thus preventing the situation from deteriorating. The new offence would also cover persons subject to removal or deportation orders as these orders would invalidate the conditions of stay of the person concerned, including one barring the taking of employment.

5. The proposed penalty for the new offence is a fine at level 5 (\$50,000) and imprisonment for three years, which are comparable to those for the offences of "unlawful remaining" and "breach of conditions of stay" under sections 38(1)(b) and 41 of IO respectively.

The Bill

6. The objects of the Bill are -
- (a) to expand the scope of, and allow the issue of visa other than by endorsement on, valid travel documents; and
 - (b) to prohibit IIs and persons subject to removal or deportation orders from taking employment or engaging in business.

The Bills Committee

7. At the House Committee meeting on 26 June 2009, Members decided that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

8. Under the Chairmanship of Hon Miriam LAU, the Bills Committee has held three meetings with the Administration, and received views of deputations at one of the meetings. A list of deputations who have submitted views to the Bills Committee is in **Appendix II**.

Main deliberations of the Bills Committee

Immigration convenience measures

9. Clause 3 of the Bill expands the definition of VTD in section (2)(1) of IO by including a new category of documents so as to allow Macao permanent residents to visit Hong Kong solely on the strength of their Macao PICs. Clauses 6 and 7 of the Bill amend section 61(1) of IO and the Immigration (Unauthorized Entrants) Order (Cap.115 sub. leg. D) to provide that a visa may be issued in a manner other than an endorsement on a VTD. This would allow the issuance of visas, where applicable, and conditions of stay on a printed slip or label for holders of card-type documents such as Macao visitors. According to the Administration, the amendments will facilitate the implementation of similar convenience measures for visitors from other places in future.

10. The Legal Adviser to the Bills Committee has sought clarification from the Administration as to whether it has identified any countries or places, other than Macao, whose residents may enter Hong Kong by virtue of the new definition of VTD proposed in section 2(1)(b) of IO.

11. The Administration has advised that a VTD as defined in the new section of IO covers a document issued by or on behalf of a competent authority of any country or territory to its holder for the purpose of identification or travel, and which complies with section 61 of IO (among other criteria). Hence the holder of a VTD so defined will be subject to the relevant visa requirement for Hong Kong pursuant to section 61. As regards whether the proposed new provision will apply to places other than Macao, the Administration has further advised that it will consider extending immigration convenience measures between Hong Kong and other places from time to time, and will inform the public of such measures when ready.

12. Members in general are supportive of the proposals. They also note that to maintain effective immigration control, the new class of VTD should fulfill a number of requirements, one of which is for it to be able to establish to the satisfaction of an immigration officer/assistant the identity of its holder and his/her domicile or place of permanent residence, as stipulated in the proposed amendment.

Prohibition from taking employment or establishing/joining in business by illegal immigrants and others

13. Clause 5 of the Bill adds a new section 38AA to IO to create a new offence prohibiting IIs and persons who are subject to removal or deportation orders from taking employment, whether paid or unpaid, or establishing or joining in any business. As confirmed by the Administration, these IIs include those released on recognizance.

14. Upon members' request, the Administration has advised that as at September 2009, there were some 2 650 IIs who had made torture claims under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 97.5% of whom were granted recognizance.

New offence against unlawful employment

15. Members note the background for the Administration's proposal to specify the taking of employment by IIs and others as an offence as set out in paragraphs 3 and 4, and in general appreciate the need for expeditious action to tackle the problem of unlawful employment by IIs. Some members, however, have expressed concern over the appropriateness for the Administration to introduce the new offence when the outcome of its review on the torture claim screening mechanism is still pending.

16. Dr Margaret NG has expressed disappointment over the Administration's hasty decision to specify the new offence for IIs. She considers that the Administration should speed up its review on the torture claim screening mechanism and introduce more comprehensive legislative proposals to tackle all the issues, including the problem of employment of IIs, in one go. In her view, the issue would become less controversial should the Government have expedited the review on the torture claim screening mechanism and hence shortened the waiting time for these claims.

17. Ms Emily LAU opines that the Administration should put in place an effective torture claim screening mechanism with a view to ensuring procedural fairness and preventing abuse, before considering whether and how to prohibit torture claimants from taking employment. Mr James TO stresses the need for the Administration to handle the problem of torture claimants taking up illegal employment in the context of a comprehensive policy review before the introduction of the Bill. He considers that the Administration should endeavour to identify the employer of the illegal workers to see if there is sufficient evidence to prosecute the employer in the first instance.

18. The Hong Kong Society for Community Organization has raised concern about the wide scope of application under the proposed new section and the appropriateness to specify an offence against the taking of employment to cover all IIs while CFI had ruled that recognizance granted to IIs represented an authority for these people to remain in Hong Kong.

19. Members including Mr LAU Kong-wah, Ms LI Fung-ying and Mr WONG Kwok-kin, Mr Paul TSE and Mr WONG Yung-kan share the concerns of some labour groups about the persistently high unemployment rate in recent years and the negative impact of illegal employment on the local workforce. These members consider that there is an urgent need to make provisions under IO to specify an offence against 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 IIs and illegal employment to deteriorate. Moreover, they consider that the Administration should also expedite its review on the implementation of a legislative regime for handling torture claims made under CAT at the same time.

20. The Chairman considers that issues relating to the review of the torture claim screening mechanism are outside the scope of the Bill and should be followed up by the Panel on Security, which has been closely monitoring the issue. Regarding the proposed offence against unlawful employment, she holds the view that any person taking up unlawful employment should be prosecuted, irrespective of whether the person concerned is a refugee, asylum seeker or torture claimant.

21. In response to members' concern, the Administration has advised that given the background highlighted in paragraphs 3 and 4, it sees an urgent need to specify the proposed offence. The Administration stresses that the object of the Bill is to tackle the problem of IIs and other ineligible persons engaging in illegal employment, irrespective of whether the persons concerned are refugees, asylum seekers or torture claimants. The proposal is consistent with the spirit of IO that IIs and other ineligible persons (including refugees, asylum seekers and torture claimants) are not lawfully employable. The Administration also assures members that a person being a torture claimant, asylum seeker or refugee would not in itself lead to that person's prosecution or detention in Hong Kong, unless the person concerned has breached the laws of Hong Kong, such as undertaking illegal employment or overstaying.

22. Regarding the review on torture claim screening mechanism, the Administration has explained that it has been reviewing such a mechanism with a view to achieving effective screening, ensuring procedural fairness and preventing abuse. To deal with the backlog of torture claims, the Administration aims to implement the enhanced screening procedures in October 2009. It also plans to introduce a legislative regime with comprehensive and effective procedures for assessing torture claims. Issues on the treatment of screened-in claimants will be further considered in that context. The Administration has undertaken to brief the Panel on Security on the relevant legislative proposals by the end of 2009, with a view to introducing a bill into the Legislative Council within the 2009-2010 legislative session.

Prohibition from work as a recognizance condition

23. As an alternative to the proposed offence under the Bill, some members have enquired about the feasibility of making "prohibition from work" a recognizance condition to be prescribed to IIs. The Administration has advised that recognizance normally involve reporting conditions and if other conditions are to be introduced, the administrative decisions involved may be subject to judicial challenge.

24. Mr James TO is unconvinced of the Administration's explanation. He opines that making "prohibition from work" a recognizance condition should allow more flexibility in handling the problem of unlawful employment by torture claimants, and suggests that the Administration should consider implementing recognizance granted to IIs under a new statutory regime, with a view to providing a legal basis for the authorities concerned to make "prohibition from work" a recognizance condition on a case-by-case basis, and the violation of the condition an offence. He has also requested the Administration to provide information on whether there had been judicial review cases from persons released on recognizance/bail who tried to challenge the court's decisions with regard to the conditions of recognizance imposed on them, and to further explain why it is not appropriate for a recognizance condition of "prohibition from work" to be prescribed to IIs.

25. The Hong Kong Human Rights Monitor has expressed concern about the Government's piecemeal and short-sighted approach in choosing to create a new offence in the proposed Bill, and suggested that the Administration should amend section 36 of IO to empower D of Imm to impose "prohibition from work" as a recognizance condition.

26. The Administration's response to Mr James TO's request in paragraph 24 was circulated to members of the Bills Committee vide LC Paper No. CB(2)46/09-10(01) on 15 October 2009. The Administration maintains the view that it is more appropriate to specify as an offence the taking of employment (or establishing/joining in business) by IIs. The Administration has explained that recognizance is an alternative to detention under section 36 of IO. Under the existing legislation, the only permissible condition that may be imposed on granting recognizance is the payment of a sum of money if the subject has breached the reporting condition stipulated in Form No. 8 in Schedule 1 to the Immigration Regulations (Cap. 115 sub. leg. A). Where there is a breach of the reporting condition, the specified amount is payable and the subject is liable to detention. The Administration does not think that the consequence of breaching a recognizance will produce a sufficient effect to deter IIs from taking unlawful employment.

27. The Administration has further advised that other persons (e.g. visitors) taking unlawful employment are subject to prosecution and penal consequence under IO (e.g. section 41). It does not consider that the sanctions for IIs taking unlawful employment should be lesser than other persons not lawfully employable. Moreover, if conditions and sanctions other than those in the relevant prescribed forms are allowed through legislative amendments, the administrative decisions involved in imposing additional conditions to different individuals may attract judicial challenges and add uncertainty to the implementation of such sanctions.

28. As regards judicial review cases on conditions of recognizance, the Administration has advised that the power of D of Imm to impose recognizance conditions was challenged in a judicial review case heard in October 2005 (*V v Director of Immigration*, HCAL 60/2005). CFI held that D of Imm did not have power under section 36(1) of IO to impose conditions not prescribed in the form (Form No. 8, Schedule 1 to the Immigration Regulations). The CFI's decision was affirmed by the Court of Appeal.

Work arrangements for torture claimants/refugees/asylum seekers

29. Referring to the work arrangements for torture claimants/refugees/asylum seekers in the United States, Canada, Australia and the United Kingdom, Mr James TO considers that it is a deviation from the international norm/practice for the Administration to prohibit torture claimants from working indiscriminately. While acknowledging the need to deter abuse of the torture claim system, Mr TO believes that the Administration should give some thoughts to allow work arrangements for individual screened-in cases which merit special consideration. Some human rights groups opine that D of Imm should exercise discretionary power to allow mandated refugees and torture claimants whose claims have been established to take up employment in Hong Kong and devise a comprehensive policy to take care of the basic needs of refugees.

30. The Administration has advised that the 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention) is applicable to countries like the United States and Canada, which allow asylum applicants and refugee claimants to work so as to fulfill their obligations in accordance with the Refugee Convention. The Refugee Convention, however, does not apply to the HKSAR. The HKSAR Government does not have any obligation to admit persons seeking refugee status or to handle refugee status determination.

31. In considering whether or not to allow torture claimants to work in Hong Kong, the Administration has taken into account a number of factors. Under CAT, the Administration will not remove a person to another country if he will face torture on return. However, this does not mean that the persons

concerned are entitled to the right to work in Hong Kong. While reference may be made to practices in overseas countries, it should also be noted that they have circumstances different from Hong Kong and that they have different asylum policies. Considering the unique circumstances of Hong Kong and to prevent an abuse of the immigration regime, the Administration has no plan to change the present policy of not allowing the employment of torture claimants and refugees/asylum seekers.

Humanitarian assistance for torture claimants, refugees and asylum seekers

32. Members in general have expressed concern as to whether the existing humanitarian assistance provided for torture claimants, in particular food assistance, is adequate. Dr Margaret NG holds the view that apart from accommodation and food, humanitarian assistance should include the right to work, which gives an individual a sense of dignity. Ms Cyd HO has also enquired about access to education for minors of asylum seekers/torture claimants.

33. The Administration has advised that on humanitarian grounds, it works in collaboration with non-governmental organisations and on a case-by-case basis, offers in kind assistance to torture claimants and asylum seekers who cannot meet their basic needs while their claims are being processed. The Government's aim is to provide support which is considered sufficient to prevent a person from becoming destitute while at the same time not to create a magnet effect which would have serious implications on the sustainability of the system. The assistance offered includes temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, counselling and medical services. As at end of August 2009, 4 234 persons were receiving such assistance. In 2008-2009, the direct expenditure of the Government in this area amounted to \$56 million; the provision for the financial year 2009-2010 will be \$159 million. The provision of the assistance is arranged by the International Social Service Hong Kong Branch (ISS-HK) under a service project commissioned by the Social Welfare Department.

34. Regarding food assistance for individual adult and child asylum seekers/torture claimants, the Administration has explained that the persons concerned are provided with a variety of food items, including vegetables, fruit and meat as well as baby/children food where applicable. Nutritious, cultural, religious and other specific needs are catered for as appropriate. ISS-HK will make reference to the healthy eating principles recommended by the Department of Health to ensure that appropriate food is provided to meet the users' nutritious needs. As for access to education, the Administration has advised that it has been providing assistance to minors of asylum seekers/torture claimants in terms of school placement and student financial assistance to cover education-related expenses on a case-by-case basis, if they will likely remain in Hong Kong for a period of time. In arranging placement, the Education Bureau will consider the education needs of the children.

35. The Administration believes that the basic needs of the above groups of persons are catered for by humanitarian assistance. There is no need for them to take employment to earn a living.

Paid and unpaid employment

36. Mr LAU Kong-wah has asked the Administration to clarify the definition of "employment, whether pay or unpaid" proposed in section 38AA(1) of IO, in particular the meaning of "unpaid employment". The Administration has explained that the key issue referred to in the phrase is the existence of an employment relationship and hence "employment" is the most crucial term therein. The Administration has further advised that the phrase "employment, whether paid or unpaid" is used for the purpose of maintaining consistency with relevant provisions under the Immigration Regulations to provide for the condition for visitors not to take paid or unpaid employment. The Administration's intention is to cover all scenarios, including payment-in-kind employment, for the avoidance of doubt in the implementation of the proposed section.

37. The Chairman and Mr LAU Kong-wah have asked whether the Administration would consider rewording the term "有薪或無薪的僱傭工作" in the Chinese version of the section 38AA(1) as "有薪酬或無薪酬的僱傭工作" to enable a broader interpretation of the term. In response, the Administration has advised that the term "有薪或無薪的僱傭工作" is used in consistent with other relevant provisions in IO and the meaning of the term in the English text should be sufficiently clear to cover payment-in-kind employment.

38. Given "employment" is the key concern in the phrase "employment, whether paid or unpaid", Mr LAU Kong-wah suggests that the Administration should include in IO an express meaning of the term to avoid confusion. The Administration has advised that the ordinary dictionary meaning of the term (viz. an act or condition of employing or a person's work or profession) will be adopted in the context of IO. In deciding whether there is an employment relationship, consideration will be given to the facts and circumstances of individual cases, but as a general rule, whether or not an obligation is imposed on a person to perform the work is one of the factors.

39. In response to Mr LAU Kong-wah's enquiry as to whether participation in voluntary work would fall within the meaning of "unpaid employment", the Administration has explained that the decision would depend on individual circumstances in each case, but as a general rule, whether the person concerned has a contract of employment with the employer would be a key consideration. Mr LAU does not consider it acceptable for voluntary work to be regarded as a form of unpaid employment and has requested the Administration to give due consideration to this issue.

40. Mr Paul TSE considers that the drafting of the new section 38AA(1) is sufficiently clear. Noting that IIs taking up employment are subject to prosecution under the current provisions of IO for unlawful remaining (excluding those released on recognizance), Mr TSE has asked the Administration to clarify whether the new section 38AA would be used to prosecute IIs for both unlawful employment and unlawful remaining in future. The Administration has confirmed that these IIs may be subject to the proposed offence in the new section 38AA(1) and/or the existing offence under section 38(1)(b) of IO should they take up employment in Hong Kong, depending on the facts and circumstances of individual cases. In response to Mr TSE's further enquiry about the penalty level for the offences concerned, the Administration has advised that the proposed penalty level for contravening the offence in the new section 38AA is a fine at level 5 and imprisonment for 3 years, and the maximum penalty level for contravening the existing offences of "unlawful remaining" under sections 38(1)(b) will be a fine at level 4 and imprisonment for 3 years. The Administration has also advised that the prosecution policy relating to the application of the respective offences and penalties will be subject to further legal advice.

Committee Stage amendments

41. The Bills Committee will not move any Committee Stage amendments.

Resumption of Second Reading debate on the Bill

42. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 11 November 2009.

Advice sought

43. Members are invited to note the deliberation of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
22 October 2009

Bills Committee on Immigration (Amendment) Bill 2009

Membership list

Chairman Hon Miriam LAU Kin-yee, GBS, JP

Members Dr Hon Margaret NG
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon WONG Yung-kan, SBS, JP
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, JP
Hon LI Fung-ying, BBS, JP
Hon CHIM Pui-chung
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun

(Total : 13 Members)

Clerk Ms Betty FONG

Legal Adviser Mr Stephen LAM

Date 8 July 2009

Appendix II

Bills Committee on Immigration (Amendment) Bill 2009

List of organisations and individuals which have given views to the Bills Committee

A. Organisations which have given oral representation to the Bills Committee on 27 July 2009

1. Asylum Seekers' and Refugees' Voice
2. Hong Kong Construction Industry Employees General Union
3. Hong Kong Federation of Trade Unions
4. Hong Kong Human Rights Commission
5. Hong Kong Human Rights Monitor
6. Hong Kong Society for Community Organization
7. The Federation of Hong Kong and Kowloon Labour Unions
8. The Lion Rock Institute

B. Organisations which have provided written submissions only

1. Hong Kong & Kowloon Trades Union Council
2. Hong Kong Bar Association
3. The Law Society of Hong Kong