立法會
Legislative Council

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(These minutes have been seen by the Administration)

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Subcommittee on
resolution under the Immigration Ordinance

Minutes of meeting
held on Wednesday, 30 June 1999, at 10:45 am
in the Chamber of the Legislative Council Building

Members present	**:**	Hon Ambrose LAU Hon-chuen, JP (Chairman) Hon David CHU Yu-lin Hon HO Sai-chu, JP Hon Cyd HO Sau-lan Hon NG Leung-sing Hon Maragret NG Hon James TO Kun-sun Hon HUI Cheung-ching Hon CHAN Kam-lam Hon Jasper TSANG Yok-sing, JP Hon Howard YOUNG, JP Hon CHOY So-yuk
Members absent	**:**	Hon Albert HO Chun-yan Hon Mrs Selina CHOW LIANG Shuk-yee, JP Hon Ambrose CHEUNG Wing-sum, JP Hon Mrs Miriam LAU Kin-yee, JP Hon Emily LAU Wai-hing, JP
Public Officers attending	**:**	Mrs Regina IP, JP Secretary for Security

Mr Timothy TONG
Deputy Secretary for Security

Mr Andy CHAN
Assistant Secretary for Security

Mr Ian WINGFIELD, JP
Law Officer (Civil Law)

Mr Gilbert MO
Deputy Law Draftsman

Mr T K LAI
Assistant Director of Immigration

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

Staff in attendance : Mr Jimmy MA, JP
Legal Adviser

Mrs Justina LAM
Assistant Secretary General 2

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I Election of Chairman

Mr Ambrose LAU was elected Chairman of the Subcommittee.

II Late membership

2. Members noted that Mr CHAN Kam-lam's reply slip for joining the Subcommittee was received after the deadline. They agreed to accept the late membership of Mr CHAN Kam-lam under House Rule 23(b).

III Meeting with the Administration

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(LC Paper Nos. CB(2) 2442/98-99(02), CB(2) 2442/98-99(03), CB(3) 1829/98-99, LS 238/98-99 and CB(2) 2474/98-99)

3. Miss Margaret NG declared interest as one of the legal representatives of overstayers involved in cases relating to the execution of removal orders by the Director of Immigration (D of Imm) against 17 Mainland overstayers who claimed to be permanent residents of Hong Kong Special Administrative Region (HKSAR) under Article 24(2)(3) of the Basic Law (BL 24(2)(3)).

4. At the invitation of the Chairman, Secretary for Security (S for S) briefed members on the proposed resolution, which sought to -

(a) implement the Court of Final Appeal's (CFA's) decision in respect of persons born out of wedlock;

(b) remove any doubt as to the text of the Immigration Ordinance (Cap. 115) (IO) in respect of the categories of persons who had the right of abode (ROA), following CFA's judgment and the interpretation of the Standing Committee of the National People's Congress (NPCSC), in HKSAR; and

(c) correct an inadvertent error relating to the use of the term "right of abode" in Schedule 1 to IO.

5. S for S explained that following the interpretation of NPCSC, the Administration would propose amendments to IO, Schedule 1 to IO and Form No. 12 in the Immigration Regulation; and also promulgate the application procedure for Certificates of Entitlement (C of Es). Although it would be desirable to introduce all the legislative proposals at the same time, this would involve a more lengthy process which might not be completed within this legislative session. Hence, the most urgent amendments, i.e. the resolution, was introduced first, and an amendment bill would be introduced into the LegCo as soon as possible in the next legislative session.

6. Assistant Director of Immigration (AD of Imm) said that with the amendment to Schedule 1, there would be clarity and certainty in local legislation in determining a person's ROA status under BL24(2)(3). A person born in Hong Kong before 1 July 1987 would satisfy the requirement under paragraph 2(a)(i). If a person was born on or after 1 July 1987, it would be necessary to examine the status of his parents. Since the coming into effect of the British Nationality Act 1981 on 1 January 1983, the Immigration Department (ImmD) had already started to verify the status of parents of persons born in Hong Kong in dealing with births registration of persons. The verification of the status of parents should not be a problem.

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7. In response to Mr James TO's question on why the wording of BL24(2)(1) was not adopted in paragraph 2(a) of Schedule 1, S for S said that there was litigation relating to the existing wording. The existing version of paragraph 2(a) aimed to ensure that if a child was born of an illegal immigrant, a Two-way permit holder, or a person who was staying in Hong Kong on a temporary basis was, he could not have ROA. Otherwise, serious population control problems would arise. Mr James TO expressed concern that proposed paragraph 2(a) might have the effect of narrowing the scope of BL24(2)(1). In this respect, S for S said that proposed paragraph 2(a) were more generous than the existing version so far as those who were born before 1 July 1987 were concerned. In response to Mr TO, Legal Adviser (LA) confirmed that CFA had not made any comments on paragraph 2(a) of Schedule 1.

Gazette notice to promulgate the application procedure for Certificates of Entitlement

8. Referring to the statement in S for S's speech to be made at the Council meeting of 14 July 1999 that D of Imm would issue a new gazette notice on 16 July 1999 to promulgate the application procedure for C of Es, Miss Margaret NG requested the Administration to provide members with a copy of the gazette notice. She added that the Administration should consider whether the gazette notice should be subsidiary legislation, and not a general notice.

9. Citing the judgment of Mr Justice P CHAN in the case of LAU Kong-yung v The Director of Immigration, Mr James TO said that the legal effect of the gazette notice had been questioned by a judge. He suggested that the Administration should consider making the procedure as subsidiary legislation so as to avoid future challenge against the legal basis of the gazette notice. In his view, the Administration was avoiding LegCo's scrutiny of the procedure. He also expressed doubt about the urgency to pass the resolution. As Schedule 1 related to other parts of IO, he suggested deferring the moving of the resolution to August so that it could be scrutinized together with other legislative amendments to IO as well as the procedure for applying for C of Es.

10. S for S explained that the gazette notice would only contain administrative procedures. As it was noted at the time when the relevant provision of IO was enacted that such administrative procedure might sometimes need to be changed, it was decided that the procedure should be promulgated by D of Imm by way of gazette notice. She added that such an arrangement had worked well without any problem for about two years. She stressed that D of Imm was empowered to promulgate the application procedure for C of Es. There had been no procedure for the application for C of Es since 29 January 1999. With the NPCSC's interpretation, the detailed procedures, which were still being discussed with the Public Security Bureau of the Mainland, could now be drawn up. She hoped that the procedure could be promulgated as soon as

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possible.

11. Law Officer (Civil Law) (LO(CL)) said that the resolution sought to amend Schedule 1 which dealt with the substantive rights of persons to permanent resident status and ROA in HKSAR. It would enable potential applicants to know without any doubt whether they fell within those terms following the CFA judgment and the interpretation of NPCSC. The Administration therefore considered that the text of Schedule 1 should reflect the CFA judgment and NPCSC's interpretation as soon as possible. Questions relating to whether the procedure should be made as subsidiary legislation should be considered in the context of IO. It could be considered by LegCo when the Administration introduced an amendment bill. He added that section 2AB(2)(a) of IO stipulated that an application for a C of E should be made in such manner as D of Imm might specify in the Gazette.

12. In response to Miss Margaret NG, LO(CL) said that although it was not mandatory to amend Schedule 1 before gazetting the procedure, it would be confusing for potential applicants if the text of IO was not accurately set out.

13. In response to members, AD of Imm said that the proposed procedure would be similar to the procedure before 29 January 1999. In short, it would involve the appointment of the Bureau of Exit-Entry Administration (BEEA) of the Public Security Ministry as D of Imm's agent in the Mainland to receive C of E applications. After BEEA had verified the relationship between the applicant and his parents, ImmD would proceed to assess his eligibility for ROA in accordance with BL 24(2)(3). A C of E would be issued if an applicant's eligibility was confirmed.

14. Deputy Law Draftsman (DLD) said that there were many examples in the laws of HKSAR that empowered the Administration to promulgate administrative procedure by way of gazette notice. A piece of legislation would be unnecessarily complicated if administrative procedure was also set out in the legislation.

15. Miss Margaret NG said that as the whole verification process involved other parts of IO, merely promulgating the application procedure for C of Es would not provide a clear picture of the whole process. The gazette notice had to be looked at together with Form No. 12. DLD responded that Form No. 12 was only a prescribed form of C of E. Amendment to Form No. 12 was not a pre-requisite of amendment to Schedule 1. As the provisions of existing Schedule 1 were not reflecting the actual situation and the technical error in respect of the use of the term "right of abode" in paragraph 2(a) and 2(c) in Schedule 1 might affect who had the right to make an application, there was a need to amend Schedule 1.

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16. Mr James TO requested the Administration to provide the draft gazette notice before 14 July 1999. Miss Margaret NG added that the Administration should not gazette the notice until the draft was provided to members.

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17. S for S agreed to provide a paper explaining the procedure for applying for C of Es. She however expressed concern that the presentation of more discussion papers might result in having more meetings, hence delay the passing of the resolution. She added that the procedure in existence before 29 January 1999 had operated without problems for the past two years. The gazette notice was not relevant to the amendments to Schedule 1. As discussions on the detailed procedures were still continuing with the Mainland authorities, she could not undertake to provide the draft gazette notice before 14 July 1999. But once discussion was completed, she would consider giving a draft of the gazette notice to members. She reiterated that Schedule 1 and the gazette notice were two separate issues. D of Imm was empowered to gazette the administrative procedure at any time. Nevertheless, the Administration considered it more appropriate for the gazettal to be made after the amendments to Schedule 1 had been passed. She added that if the passing of the resolution was delayed, more applicants would have to wait longer and thus giving rise to more litigations.

18. While noting that the Administration was empowered to gazette the procedure, Miss Margaret NG said that constitutionally, the Administration should consult LegCo on the administrative procedure.

19. Mr HO Sai-chu considered that the resolution and the gazette were two separate issues. While he hoped that the Administration would provide the draft gazette notice before 16 July 1999, he considered that the amendments to Schedule 1 should not be delayed by the studying of the gazette notice. Mr CHAN Kam-lam shared the same view. He considered it unnecessary to study the gazette notice in conjunction with Schedule 1. He added that the Democratic Alliance for the Betterment of Hong Kong was in support of the resolution. Mr HUI Cheung-ching supported studying Schedule 1 and the gazette notice separately. He said that while the Administration had the right to gazette the notice, he hoped that the draft notice could be provided to members before 16 July 1999.

20. In response to Mr CHAN Kam-lam, LA said that it was not a legal requirement for the gazettal of an administrative procedure to be synchronized with the coming in force of the relevant subsidiary legislation. Mr James TO said that the Administration was inconsistent in this respect. In the studying of the Firearms and Ammunition (Amendment) Bill 1999, the Administration requested the Bills Committee to also study the proposed subsidiary legislation to be made.

21. Miss Cyd HO opined that the application procedure for C of Es was

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important and therefore should be examined by members. She considered that the Administration was bypassing scrutiny of LegCo by way of a gazette notice. She added that under the Estate Agents Ordinance (Cap. 511), all forms were subsidiary legislation. She considered that all the forms under IO should also be made as subsidiary legislation.

Requirement for an application for C of E to be made in the Mainland

22. Miss Margaret NG said that there was no requirement in IO for the application for a C of E to be made in the Mainland. It only stated that an application for C of E should be made in such manner as D of Imm might specify by notice in the gazette. In response, LO(CL) stated that the Chief Justice had said in the judgment on 29 January 1999 that apart from the requirement of the One-way permit, the scheme was constitutional in requiring a claimant to apply for and obtain a C of E from D of Imm. The provisions of the scheme whereby the applicant must stay in the Mainland whilst applying for a C of E or appealing against any refusal of D of Imm to issue a C of E were also constitutional.

23. Miss Margaret NG opined that the Administration was using an administrative arrangement to restrict a core right. The NPCSC's interpretation was not clear in respect of the linkage between One-way permit and C of E. S for S responded that it was clear from the interpretation that people from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, must apply to the relevant authorities of their residential districts in accordance with the relevant national laws and administrative regulations for approval to enter HKSAR. An application by an eligible person for a One-way permit would be regarded as an application for a C of E.

24. S for S said that the NPCSC's interpretation had explained the legal basis for the requirement of affixing the C of E onto the One-way permit. LO(CL) added that in CFA's view, people from other parts of China, including among them persons entering for settlement referred to in Article 22(4), did not include permanent residents of HKSAR on whom the BL conferred ROA. On that basis, it said that the requirement of affixing the C of E onto the One-way permit was unconstitutional. With the NPCSC's interpretation, the requirement must be regarded as constitutional. The requirement, which was derived from IO, was not part of BL. The NPCSC's interpretation had confirmed that the provisions of IO to that effect were not inconsistent with the BL and not unconstitutional.

25. In response to Mr James TO's question on whether a person who failed to follow the application procedure was in breach of the laws of Hong Kong or the laws of Mainland, LO(CL) said that it would be in conflict with BL if approval was not sought. There was no offence provision in BL and therefore

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the person would not commit an offence under BL. However, the person might commit an offence under the Mainland laws. The CFA judgment said that the Mainland laws requiring exit approval for Mainland residents coming to Hong Kong were and would remain fully enforceable in the Mainland. No sanction was however provided in BL22(4) except insofar as they were provided for in IO. Mr James TO expressed concern that the Administration was imposing additional requirements in the exercise of the rights under BL24. He questioned whether a person who was in breach of BL22(4) would also lose his rights under BL24(2)(3). In this connection, LO(CL) said that a person who was in breach of IO would commit an offence under IO. The status under BL24 was not affected. However, the status had to be verified in accordance with the law. It might delay consideration of the status which might have been verified at an earlier time if verification had been sought in the proper way. Miss Margaret NG requested LO(CL) to set out the Administration's response in writing.

26. In response to Mr James TO's comment that BL 22(4) made no reference to people with right of abode, S for S said that the provisions of BL22(4) applied to all categories of persons in the Mainland.

Report of the Legal Service Division on the resolution

27. LA briefed members on the Legal Service Division's Report tabled at the meeting. He highlighted the following points -

(a) under the resolution, paragraph 1(2)(a) and (b) of Schedule 1 would be repealed and replaced while no amendment would be made to paragraph 1(2)(c). However, the wording of the interpretation might implied that it was necessary for the parent to have the status of a natural parent;

(b) paragraph 2(a) referred to two alternative conditions, i.e. either the parent "was settled" or "had the right of abode" in Hong Kong at the time of the birth of the person or at any later time. If the "right of abode" was not applicable in some cases, the condition "was settled" would come into play. Therefore, there might not be any justification on the ground of inadvertent error to amend paragraph 2(a); and

(c) the absence of "was settled" from the proposed paragraph 2(a)(i) would in effect widen the scope of the present provision and hence a change in the policy.

28. LA added that while paragraph 2(a) sought to implement BL24(2)(1), the provision in BL24(2)(1) was much wider than paragraph 2(a). However, according to the opinions of the Preparatory Committee for HKSAR on the

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Implementation of BL24(2), Chinese citizens born in Hong Kong as provided in BL24(2)(1) referred to people who were born during which either one or both of their parents were lawfully resided in Hong Kong, but excluding those who were born to illegal immigrants, overstayers or people residing temporarily in Hong Kong.

29. At the invitation of the Chairman, the Administration made a preliminary response to the points raised in the Legal Service Division's Report. S for S said that no amendment was proposed to paragraph 1(2)(c) since the issue of adopted child was involved in a court case on which the Administration would appeal against a ruling of the Court of First Instance.

30. DLD said that the term "right of abode" was only introduced into IO on 1 July 1987. Schedule 1 would lack clarity if no reference to the date of 1 July 1987 was made.

31. On the absence of the "was settled" element from proposed paragraph 2(a)(i), AD of Imm said that a parent "was settled" in Hong Kong if either the father or mother was ordinarily resided in Hong Kong, and their period of remaining in Hong Kong was not subject to any restriction under IO. There might be some cases in which the father and mother had the right of abode but were not ordinarily residing in Hong Kong and the mother gave birth to the child during her temporary stay in Hong Kong. The drafting was intended to ensure that the child had the right of abode in such circumstances.

32. LO(CL) explained that a time reference was introduced in proposed paragraph 2(a) since the term "right of abode" was only introduced in the Immigration Ordinance on 1 July 1987. Before 1 July 1987, the right to land was determined under IO and the British Nationality Act 1981. The Act came into force on 1 January 1983. On 1 January 1983, any person previously born in Hong Kong was a British Dependent Territories citizen and had the right to land in Hong Kong. Against this background, it was proposed that there would be no requirement on the parents of persons born before 1 July 1987. For a person falling within paragraph 2(c), the status of his parents would also need to be verified against paragraph 2(a). Nevertheless, persons born after 1 July 1987 were unlikely to have children yet. He added that the requirements proposed in paragraph 2(a)(ii) would apply on the date of birth to a person born outside Hong Kong and seeking ROA under paragraph 2(a).

33. Mr James TO commented that the status of a person born in Hong Kong might be in question if his parents were refugees at the time of his birth. LO(CL) responded that the time reference in proposed paragraph 2(a) was introduced to address such a question.

Adm

34. Members requested the Administration to provide a written response to

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the points raised in the Legal Service Division's Report.

Legal basis for amendments to Schedule 1

Adm

35. Miss Margaret NG requested the Administration to provide a paper explaining the legal basis for the amendments to Schedule 1. She considered that the application procedure for C of Es involved policy issues on which LegCo had the right to give views.

Adm

36. Mr James TO suggested the Administration to provide a paper elaborating paragraph 1 of the NPCSC's interpretation.

IV Dates of subsequent meetings

37. Members agreed that further meetings of the Subcommittee be scheduled for 3 July 1999 at 9:00 am and 6 July 1999 at 4:30 pm to continue discussion on the resolution. They noted that the deadline for giving notice for amendments to the resolution was 7 July 1999.

38. The meeting ended at 12:50 pm.

Legislative Council Secretariat
16 August 1999