Speech by Secretary for Security for moving motion for the resolution for amending Schedule 1 to the Immigration Ordinance on 14 July 1999

President,

I move the motion standing in my name on the Order Paper.

This Council's approval by resolution is sought under section 59A of the Immigration Ordinance to amend Schedule 1 to the Immigration Ordinance.

Following the interpretation by the Standing Committee of the National People's Congress (NPCSC) of the true legislative intent of Article 24(2)(3) of the Basic Law (BL), amendments to Schedule 1 to the Immigration Ordinance are necessary to put beyond doubt the text of the Schedule. The NPCSC interpretation has clarified that a person of Chinese nationality born outside Hong Kong is eligible for ROA under BL 24(2)(3) only if, at the time of his birth, at least one of his parents has satisfied BL 24(2)(1) or 24(2)(2). The amendments to Schedule 1 also seek to reflect the Court of Final Appeal's (CFA) decision that persons born out of wedlock may derive the right of abode (ROA) from either parent.

On 29 January 1999, the CFA delivered judgments on two cases involving the acquisition of the ROA. It ruled that under BL 24(2)(3), for a person of Chinese nationality born outside Hong Kong to be eligible for the ROA, neither parent needed to have satisfied either BL 24(2)(1) or 24(2)(2) at the time of the birth of the person provided either of his parents subsequently satisfied BL 24(2)(2). The Court also ruled that the requirement to seek the exit approval of the Central

People's Government under BL 22(4) did not apply to Mainland residents who enjoy the ROA in the Hong Kong Special Administrative Region. The consequences were that a much larger number of Mainland residents became eligible for the ROA in Hong Kong, and we could not require a Mainland resident who had been issued with a Certificate of Entitlement (C of E) to have it affixed to a One-way Permit before recognising his ROA.

The Court also ruled that persons born out of wedlock may derive their status as Hong Kong permanent residents under BL 24(2) from their natural father as well as their mother.

As Members are fully aware, the CFA's judgments in these cases have in the past five months aroused considerable controversy in our community as to the categories of Mainland residents who qualify for ROA in Hong Kong and the mechanism for regulating their entry into Hong Kong. So much has been said on this subject both within and outside this Chamber that I do not think I need to repeat the arguments, whether for and against. But it is certainly our sincere hope that, following the NPCSC's interpretation of the two key provisions in the BL relating to the ROA, certainty and clarity will return to this important area of law and the controversy which has arisen will recede, as the positive effects of the NPCSC's interpretation become progressively clear. As part of this process, a very important task which is immediately before us is to make amendments to our local laws to implement the CFA's judgment (on children born out of wedlock), and to

remove any doubt as to the text of the Immigration Ordinance following the CFA judgment and the NPCSC's interpretation.

By its interpretation on 26 June 1999, the NPCSC has made very clear that -

(a) under BL 22(4), the phrase "people from other parts of China" means people from various provinces, autonomous regions and municipalities directly under the Central Government, including persons of Chinese nationality born in the Mainland of Hong Kong permanent residents; and that they need to apply for the necessary approval from the relevant Mainland authorities for entry into Hong Kong for whatever purposes; and

(b) under BL 24(2)(3), persons of Chinese nationality born outside Hong Kong of permanent residents are eligible for the ROA only if, at the time of their birth, at least one of their parents belong to the categories listed in BL 24(2)(1) or 24(2)(2).

The NPCSC also said that the interpretation will not, however, affect the ROA acquired by the parties concerned in the cases adjudicated by the CFA on 29 January 1999.

The NPCSC's interpretation has the same legal force and validity as the BL. The BL is both a national law and a law of the

HKSAR. The NPCSC's interpretation has thus already become part of our domestic law. No legislative amendments are therefore necessary to give effect to the NPCSC's interpretation. However, the CFA in its judgment on 29 January has declared unconstitutional certain parts of the Immigration Ordinance, its Schedule 1, Form 12 in the Immigration Regulations, and the gazette notice issued by the Director of Immigration for application procedures for C of E. We consider it desirable to amend these instruments to remove any doubt as to their text, in the light of the CFA's judgment and the NPCSC's interpretation. This is the main purpose of this resolution.

I would also take this opportunity to introduce a technical amendment to correct an inadvertent error in Schedule 1 to the Immigration Ordinance. As the CFA has pointed out in its judgment, there is an error in paragraph 2(c) of Schedule 1 in referring to the term 'right of abode', given that the term was only introduced into the Immigration Ordinance on 1 July 1987. Reference to the term "right of abode" in this sub-paragraph therefore produced the inadvertent effect that persons born before 1 July 1987 could not have acquired the ROA. The same error was in fact made in paragraph 2(a) of the Schedule. We fully agree with the CFA and wish to rectify this drafting error by replacing the term 'right of abode' with a more accurate formulation to ensure that persons born before 1 July 1987 are able to acquire the ROA.

We have therefore drafted the resolution to achieve the following effect -

a) to implement the CFA's decision in respect of persons born out of wedlock;

b) to remove any doubt as to the text of the Immigration Ordinance in respect of the categories of persons who have the ROA, following the CFA's judgment and the NPCSC's interpretation; and

c) to correct the inadvertent error relating to the use of the term 'right of abode' in Schedule 1 which I have just described.

Subsequent to Members' approval of the resolution, the Director of Immigration will issue a new Gazette notice on 16 July to promulgate the procedure for applying for C of Es. Discussions about the detailed procedures are still continuing but the Bureau of Exit-Entry Administration of the Public Security Ministry has agreed to continue to be appointed as the Director's agent in the Mainland to receive C of E applications.

After the resolution has been approved by the Council (assuming that Members are so willing), other legislative work to implement the CFA's judgment and the NPCSC's interpretation remains to be done.

As I have mentioned earlier in my speech, the CFA has declared some parts of the Immigration Ordinance and of Form 12 in the Immigration Regulations to be unconstitutional. These parts relate to the linkage of the C of E Scheme and the One-way Permit Scheme, and provide that, for the purpose of entry into Hong Kong to exercise the ROA, C of Es have to be affixed to One-way Permits. To put beyond doubt the fact that, in accordance with the NPCSC's interpretation, the text of the Immigration Ordinance and the Immigration Regulations requires such a linkage, we intend to introduce legislative amendments to the Immigration Ordinance and the Immigration Regulations. We also intend to introduce other amendments to specify the verification procedures likely to be required in the case of children born out of wedlock, and other related matters.

In view of the time required for us to work out these amendments and for Members to study our bill, we intend to introduce the amendment bill as soon as possible in the next legislative session. We do not envisage that this time gap will pose any serious problem to processing applications for ROA or to maintaining effective immigration control. Mainland residents will be able to apply for C of Es in accordance with the specified procedure as soon as the Director of Immigration has by Gazette notice promulgated the application procedure. In addition, the NPCSC has made it very clear that Mainland residents need to obtain the necessary approval from the relevant Mainland authorities for entering Hong Kong for whatever purposes.

Madam President, this Council's approval of the Resolution will enable the Director of Immigration to promulgate the application procedure for C of Es as soon as possible. As Members well know, there has not been a procedure for applying for C of Es since 29 January 1999 for Mainland residents and thousands of them, and their families in Hong Kong, are waiting for us to promulgate a revised procedure. The resolution before Members today is a very important step towards resolving the ROA controversy. It is of paramount importance that it be approved as early as possible and I urge Members to do so.

I beg to move the motion.

House Committee of the

Legislative Council

Interpretation of Articles 22(4) and 24(2)(3) of the Basic Law by

The Standing Committee of the National People's Congress

Introduction

The paper informs Members of the interpretation given by the Standing Committee of the National People's Congress (NPCSC) on 26 June 1999, under the relevant provisions of the Constitution and the Basic Law (BL), of Articles 22(4) and 24(2)(3) of the Basic Law. This paper also sets out the Administration's position on who benefit from the principle that judgments previously rendered will not be affected.

Background

2. After the Court of Final Appeal (CFA) delivered judgments on right of abode (ROA) issues on 29 January 1999, this Council has been briefed on the Administration's assessment of the implications of the judgments and the reasons for seeking an NPCSC's interpretation of BL 22(4) and 24(2)(3) according to their true legislative intent. The State Council accepted on 10 June the Chief Executive's request on seeking an NPCSC's interpretation and approached the NPCSC accordingly. After consulting its Committee for the Basic Law, the NPCSC gave an interpretation of the two BL provisions on 26 June. The Chinese text of the interpretation has been sent to Members on that day. The bilingual text has been promulgated in the Gazette today and is now attached.

NPCSC Interpretation

3. The gist of the NPCSC's interpretation is -

(a) under BL 22(4), the phrase "people from other parts of China" means people from various provinces, autonomous regions and municipalities directly under the Central Government, including persons of Chinese nationality in the Mainland born of Hong Kong permanent residents. This confirms that Mainland exit procedures, including the One-way Permit quota arrangement for settlement in Hong Kong, apply to all such Mainland residents; and

(b) the NPCSC clarifies that under BL 24(2)(3), persons of Chinese nationality born outside Hong Kong are eligible for right of abode only if, at the time of their birth, at least one of their parents belongs to the category listed in BL 24(2)(1) or 24(2)(2).

In the interpretation, NPCSC also states that parties concerned in the litigation in respect of which the CFA delivered a judgment on 29 January 1999 shall not be affected by the interpretation.

The Administration's Decision

Categories of persons affected by the interpretation

4. The Administration considers that there are two periods by reference to which persons can be categorized for deciding who can

benefit from the principle that judgments previously rendered will not be affected -

(A) 1 July to 10 July 1997

(B) 11 July 1997 to 29 January 1999

5. These periods refer to the date on which the persons were present in Hong Kong and lodged ROA claims with the Director of Immigration.

6. For persons in category (A), the CFA has ruled that those who were in Hong Kong in the period between 1 July and 10 July 1997 are not subject to the C of E Scheme because the Immigration (Amendment) (No.3) Ordinance enacted on 11 July 1997 does not have retrospective effect. They do not have to return to the Mainland to have their status verified. Provided they satisfy the criteria for ROA under either CFA judgment, they will retain that status despite the interpretation.

7. Category (B) includes persons who approached the Immigration Department between 11 July 1997 and 29 January 1999 to claim ROA. Their removal was delayed up to 29 January 1999 pending the CFA's judgment and, thereafter, pending the outcome of the subsequent judicial review brought by 17 Mainland overstayers against the Director of Immigration's removal orders against them.

Considerations

8. The CFA's judgment on retrospectivity has not been affected by the NPCSC's interpretation. We consider that there is no question of the right of abode of persons in Category (A) being affected by the NPCSC's interpretation.

9. As for persons in category (B), they comprise the following groups -

(1) the litigants themselves in respect of the two cases on which the CFA ruled on 29 January 1999 (other than those in Category (A)); and

(2) those who were indirectly parties to those proceedings by virtue of undertakings. These undertakings were made by the Director of Immigration to the effect that, if they did not bring proceedings on these same issues, they would nevertheless be treated the same way as the litigants themselves.

10. We consider all persons in category (A) and (B), i.e. those who were in Hong Kong and who, between 1 July 1997 and 29 January 1999 (inclusive of both dates), made a claim to the Director of Immigration to the effect that they were entitled to the right of abode, be regarded by the Director as being parties involved in the CFA judgment. This is because, had they brought proceedings, they would have been parties to the CFA judgment and would be unaffected by the NPCSC interpretation.

11. The Director of Immigration's record shows that there are 3700 persons in category (A) and (B). The ROA claims by some of them have already been verified. Those whose ROA has been established have been so informed. Their number is 964. Of the other persons (totalling about 2 700) whose claims will fall to be processed in accordance with the CFA judgment-

(a) about 900 of them are currently in Hong Kong. They will not need to return to the Mainland before their claims are processed and results made known; and

(b) the remaining 1 800 have returned to the Mainland. The Director of Immigration will discuss with the Mainland authorities to arrange for their entry when their claims for ROA have been established.

12. We do not consider that other persons can benefit from the principle that judgments previously rendered shall not be affected, including those who made their claims after 29 January 1999. They cannot claim to be parties to the CFA judgment. The NPCSC interpretation has expressly stated that only the parties concerned in the relevant litigation on which the CFA delivered a judgment on 29 January 1999 shall be unaffected by the interpretation. All other ROA claims must be processed by reference to the provisions of the NPCSC interpretation.

Legislative Amendments

13. The interpretation automatically applies as law in Hong Kong, just as the Basic Law applies here. However, in order to remove any doubt that may have arisen, following the CFA ruling and the NPCSC interpretation, as to the current text of the Immigration Ordinance, we will introduce legislative amendments to the Immigration Ordinance, its Schedule 1 and Form 12 in the Immigration Regulations. Consequential changes to the gazette notice issued by the Director of Immigration on 11 July 1997 will also be made. With regard to the amendments to Schedule 1 to the Immigration Ordinance, we are giving on 28 June a notice to this Council of our intention to move a resolution making the amendments at the sitting of the Council on 14 July. As to other amendments to the Immigration Ordinance and the Immigration Regulations, we will introduce an amendment bill to this Council as soon as possible in the next legislative session.

Security Bureau

28 June 1999