香港人權監察的信頭
Letterhead of HONG KONG HUMAN RIGHTS MONITOR

November 1999

Ms. Margaret Ng,
Chairperson
LegCo Panel on the Administration of Justice and Legal Services

Dear Ms Ng

Re: Supplementary Paper for Tomorrow's Panel Meeting

We have just learnt that the meeting of the LegCo Panel on the Administration of Justice and Legal Services to be held tomorrow, 16 November 1999, will discuss Government "policy and practice on removal of illegal immigrants" in item VI.

2. The Hong Kong Human Rights Monitor has compiled a report "Review of Immigration Law and Pratice Regarding Persons Without the Right of Abode in Hong Kong" in September 1996. Many parts of our report, in particular, paragraphs 34 to 36 may be relevant for the discussion of the subject.

3. I therefore submit it to you for circulation to Members of Legislative Council who may attend the meeting in the hope that the report will be of assistance to your consideration of the subject. We would be grateful if LegCo Members could follow up the recommendations raised in it.

4. I would like to highlight here one additional thing which was not raised in the report. The Government has so far refused to inform those aggrieved by the Director of Immigration's decision of their limited right to administrative appeal to the Chief Executive provided for by Section 53 of the Immigration Ordinance. This is a serious deliberate effort to perpetuate maladministration in immigration control and to deny justice to those aggrieved.

Please let us know if we can be of further assistance. Thank you for your attention.

Yours sincerely,

LAW Yuk Kai
Director, HKHRM

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HONG KONG HUMAN RIGHTS MONITOR

Review of Immigration Law and Practice Regarding Persons Without the Right of Abode in Hong Kong

September 1996

Review of Immigration Law and Practice
Regarding Persons
Without the Right of Abode in Hong Kong

Executive Summary

1. Nearly a million people live and work in Hong Kong without having the right of permanent abode here. Hundreds of thousands more are directly concerned about the way in which people without the right of abode are treated because they are married to them, or otherwise related to them, or because they employ them or are employed by them. The system of immigration control in use in Hong Kong directly or indirectly affects the lives of most people in the territory.

2. The immigration control system contained in the Immigration Ordinance and in unpublished Departmental guidelines has grown up in a piecemeal manner in response to particular problems or issues. Parts of the system are similar to the United Kingdom system of immigration control, but important safeguards which exist in the United Kingdom to ensure that the system operates fairly and reasonably have not been reproduced in Hong Kong. The most important of these are published immigration rules and an appeal system, and the review recommends that both these safeguards should now be introduced.

3. The review, prepared by legal experts who are members of the Monitor, considers in detail the areas of Hong Kong's immigration law where the lack of reasons and or the lack of an appeal system are likely to result in particular unfairness. The first of these is deportation. British citizens have an appeal on the merits against a decision to deport them. Everyone else can only appeal on the basis that the deportation was outside the wide legal powers of the Government. The Monitor recommends that the right of appeal on the merits now available to British people only should be allowed to everyone. The present pro-British discrimination is an anachronism, and the effects of a deportation on a person's life are so serious that it is right that they should have the chance of an appeal.

4. A second area where the current system is unsatisfactory is treatment of refugees. At present refugees who are not from Vietnam, Laos or Cambodia have no rights at all under Hong Kong immigration law. Some are let in, but it is a matter of administrative grace and favour. Hong Kong is out of step with most of the world in this respect. The Monitor calls for the law relating to refugees to be put on a proper modern footing and for conditions relating to eligibility for refugee status to be published.

5. The review also calls for conditions relating to different categories of visitors to be published, and for a limited right of appeal for a visitor refused entry. It calls for the present unpublished policies to be turned into rules, so that where they are not followed without a lawful reason the applicant can see that the rules have been breached. The review also for introduction of a right of appeal against the making of removal orders.

6. At present some appeals can be made to the Governor or to the Governor-in-Council. This means that in effect the same officials are considering the appeal who made the original decision. The review calls for an independent adjudicator on appeals to be set up so that the system is seen to be fair.

7. With a new Director of Immigration in post, and with extensive changes to the Immigration Ordinance now in prospect because of the transfer of sovereignty, the Monitor believes that this is the right time for a thorough overhaul and rationalization of immigration law with the aim of improving the safeguards to ensure that all applicants receive fair treatment.

HUMAN RIGHTS MONITOR

REVIEW OF IMMIGRATION LAW AND PRACTICE REGARDING PERSONS WITHOUT THE RIGHT OF ABODE IN HONG KONG

Introduction

1. If you are a Hong Kong permanent resident you have the right of abode in Hong Kong which means the right to land in Hong Kong, the right not to have any conditions of stay imposed, the right not to be deported and the right not to have a removal order made against you.[1] Unless you belong to a very small class of persons with close associations to the United Kingdom or you work for an airline as a member of the crew of an aircraft[2] you have none of these rights and your entry and stay in Hong Kong is governed entirely by the provisions of the *Immigration Ordinance, Cap. 115* and the current policies of the Hong Kong Government regarding persons who do not have the right of abode.[3]

2. At the end of 1995, the population of Hong Kong was some 6.3 million people.[4] The Director of Immigration does not have a record of how many people are Hong Kong permanent residents. It is thought that about 5.5 million are Hong Kong permanent residents but many of them may not be living in Hong Kong.[5] In the circumstances it seems fair to assume that perhaps nearly 1 million people living in Hong Kong do not have the right of abode.

3. The *Immigration Ordinance* will have to be brought into line with the requirements of *Article 24 Basic Law* which creates a new class of permanent residents enjoying the right of abode in the HKSAR.[6] Uncertainties[7] about how different classes of persons under *Article 24* will be identified, particularly persons who are not of Chinese nationality or are not Chinese citizens, has led the Monitor to focus its attention on the *Immigration Ordinance* because it is highly likely that many persons who currently enjoy the right of abode or the right to land without any conditions being imposed upon them now will lose that benefit on 1.7.1997. From that date they may have to look to the sympathetic exercise of an administrative

discretion in order to enter and live in Hong Kong rather than rely on the legally enforceable right of abode in the territory.[8]

4. This Review examines how the *Immigration Ordinance*[9] and policies made under it deal with persons not having the right of abode in the territory. The guiding principle has been the notion of fair play. The Monitor believes that just because a person who lives and works in Hong Kong does not have the right of abode they should not be treated unfairly by the immigration authorities. The Monitor notes that many people with the right of abode in Hong Kong have family living in nearby countries and territories who come to Hong Kong to visit and stay with them. Some of these family members may have plans to live and work in Hong Kong one day. The Monitor believes that most permanent residents with family living overseas would agree with the Monitor's view that immigration decisions should be fair and seen to be fair even if the only reason for saying so was the fact of those close family ties and the fear that one day an immigration decision may be taken which is adverse to those family ties.

5. The Monitor believes that many businesses have a vested interest in Hong Kong's immigration laws being fair and reasonable. It is a fact that many companies need to recruit labour overseas.[10] The workers might be skilled, semi-skilled or unskilled but all of them have one thing in common which is that they require the permission of the Director of Immigration to enter and remain in Hong Kong. If a decision of the Director of Immigration may affect adversely a valued employee who is difficult to replace then the employer has an economic interest in that decision. In addition, immigration policies designed to recruit certain kinds of labour may be used to advance economic policies[11] and businessmen and trade unions[12] have an interest in the future of the economy.

6. The Monitor believes that fair play means that in most cases where an immigration decision is made which has adverse consequences for an individual he should be able to seek a review or appeal of that decision and in such a review or appeal require the decision maker to explain the decision by reference to the law relied upon and to published immigration policy guidelines which have been approved by the Legislative Council, if such guidelines are relevant to the decision. The Monitor therefore **recommends** the

establishment of a system whereby independent tribunals and/or adjudicators are empowered to review most (not all) immigration decisions for their legality and, where appropriate, on the merits but having regard to stated policy.[13]

7. **The Review seeks to show that the present immigration** arrangements are, in may ways, inefficient and unfair in the way that they deal with persons who do not have the right of abode in the territory. It entails a study of:

a) Hong Kong's existing international obligations. These arise as a result of treaties entered into by the United Kingdom on behalf of the territory. Some of these obligations arguably limit some of the discretionary powers to exclude and remove aliens who are already in the territory. On the other hand, the United Kingdom has, in one major treaty, expressly reserved the right to apply policies and laws which fall below internationally accepted minimum human rights standards as regards persons not having the right of abode in Hong Kong. These treaties affect the structure of the *Immigration Ordinance* in important respects.

b) The *Immigration Ordinance*. This ordinance sets out the various discretionary powers of the Director of Immigration and confers on individuals certain limited rights of appeal and review in respect of a number of decisions made by the Director and his staff. The hallmark of most of the powers and functions conferred on the Director of Immigration and his staff is that discretionary powers are cast in very broad terms and there is nothing in the ordinance to say how these discretionary powers should be exercised.

c) Immigration Policies. The Director of Immigration and his staff do not exercise their powers in an administrative vacuum. In *Hong Kong 1996*, the entry on the Immigration Department says *Policies are framed to limit permanent population growth brought about by immigration into Hong Kong to a level with which the territory can cope, and to control the entry of foreign workers. Every effort is made to streamline immigration procedures for Hong Kong residents, tourists and businessmen. At the same time, the department aims to prevent the entry of undesirable persons*

and the departure of persons wanted for criminal offences.[14] Given the potential of immigration legislation for affecting careers if work permits are not granted or renewed and for it to disrupt families if members are "split" by immigration decisions or of its effect on individuals if the Director of Immigration takes the view that someone is an *undesirable person* the Monitor is concerned about how these policies are formulated and implemented. If the policies are not generally known how can the public be sure that they are efficient and fair? The Monitor believes that there is a strong case for greater transparency in this area which can only result in a more efficient and fair system of immigration control. The Monitor believes that there would be strong public support for its proposals.

International Obligations

Deportation

8. There are only a few international treaties which confer rights on persons who do not have the right of abode as regards immigration decisions.[15] One of them is the *United Nations International Covenant on Civil and Political Rights ("ICCPR")*. The *ICCPR* is a treaty obligation of the United Kingdom which it entered into in 1976. In 1984 China agreed with the United Kingdom Government that the provisions of this treaty *as applied to Hong Kong shall remain in force.*[16] This commitment has been reproduced in *Article 39 Basic Law* with the rider that restrictions on rights and freedoms on Hong Kong residents shall not be inconsistent with the guaranteed rights contained in the *ICCPR* as applied to Hong Kong.[17]

9. *Article 13 ICCPR* states that

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against his expulsion and have his case reviewed by, and be represented for the purpose before, the

competent authority or a person or persons especially designated by the competent authority.

10. Upon ratifying the *ICCPR* the United Kingdom limited the extent of its obligations under *Article 13* by making entering a reservation[18] in the following terms:

The Government of the United Kingdom reserves the right not to apply article 13 in Hong Kong in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority.

11. The reason for this reservation was probably that the Governor and Governor-in-Council had always represented the highest level of immigration decision-making so that there could be no review of such a decision and also that it was felt inappropriate that the business of the Governor and Governor-in-Council be interrupted by individuals seeking to exercise the right to be heard. For reasons explained in this Review the Monitor believes that there is no need for the Governor and Governor-in-Council to perform any immigration decision-making functions save perhaps in very exceptional cases relating to the security of Hong Kong.[19]

12. The reservation is reflected in the *Immigration Ordinance* provisions dealing with deportation.[20] *S. 20(1)(a) Immigration Ordinance* provides that the Governor may make a deportation order against an immigrant[21] if he has been found guilty of an offence punishable with imprisonment for more than 2 years. *S. 20(1)(b)* provides that if the Governor deems deportation of an immigrant would be *conducive to the public good* then an order for deportation may be made irrespective of whether he has been convicted of an offence. There is no appeal from such a decision.[22]

13. British citizens and United Kingdom belongers enjoy a special safeguard against deportation on the basis of their having committed a crime. A deportation order may be made by the Governor only if a court has first recommended that a deportation order should be made against them. A recommendation for deportation is treated as a sentence for the purpose of an appeal.[23]

14. The Governor and the Governor-in-Council made 1509 deportation orders against immigrants between 1993 and 1995 using the powers conferred under *s. 20(1) Immigration Ordinance.*[24]

15. The Monitor considers that it is not desirable that decisions to make deportation orders be made by the Governor (or by his delegate) with no right of appeal. A deportation order can have a catastrophic impact on a person and his family. The number of deportation orders made in the period 1993-1995 suggests that there is no in-depth examination of the merits of individual cases and that decisions to deport are made as a matter of routine.[25] The Monitor **recommends** that the decision to deport be made at a lower level by someone (probably a Security Branch official) who is not in any way involved in detecting or apprehending the immigrant who will have the time to make a full inquiry into the case and that there be a **right of appeal** against such decision to the Immigration Tribunal.[26] Such right of appeal might be restricted to a review of the legality of a decision to deport where an immigrant has lived in Hong Kong for only a short period of time but in cases where the immigrant has lived in Hong Kong for a substantial period of time (say a minimum of 5 years) the right of appeal should carry with it a right of review of the merits of the decision to deport.[27] The appeal tribunal should consider such cases using published guidelines to ensure fairness and consistency of treatment.[28]

16. The right of appeal is particularly important where a decision to make a deportation order is made under *s. 20(1)(b)* on the sole ground that deportation is *conducive to the public good.*[29] The Governor is required to make a very broad value judgement. Some fear that the breadth of the discretion would enable him to deport individuals for political reasons. The Monitor **recommends** that in addition to providing a right of appeal in such cases that the power be qualified further so the Governor would have to be satisfied that deportation would be *conducive to the public good* on specific grounds relating to the security of Hong Kong. The Monitor **recommends** that there should also be a right of appeal in such cases to an appeal body.[30] This is the existing requirement in the case of deportation of a resident British citizen or United Kingdom belonger under *s. 20(4)* of the *Immigration Ordinance*.

17. The Monitor also **recommends** that the Governor should not have the power to order deportation where a person has committed a criminal offence punishable with imprisonment for more than 2 years on the sole ground that he has committed an offence unless a court has first made a recommendation that a deportation order should be made.

18. As already noted, British citizens and United Kingdom belongers already enjoy this valuable safeguard which is bound to come to an end in 1997. In the United Kingdom all aliens are entitled to this protection.[31] Guidelines have been established by the courts to ensure that in considering whether to make an order recommending deportation that judges focus on two key issues which are (a) the offender's criminal record and the seriousness of the offence and (b) the potential detriment to the country of the offender remaining.[32] The Governor would not be bound to implement the recommendation of the court because other factors, not necessarily relevant to the court's decision, may militate against it.

19. The Monitor also **recommends** that in every case where an order for deportation is made under *s. 20 Immigration Ordinance* there should be a **right of appeal** against the choice of destination made by the Director of Immigration under *s. 25 Immigration Ordinance* which enables him to give directions to the captains of ships and aircraft about removing a deportee from the territory. Although the *UN Convention relating to the Status of Refugees* and the *1967 Protocol* to the Convention do not presently apply to Hong Kong because of an express reservation made by the United Kingdom some deportees may face persecution in destination countries and sending someone to such a country might also constitute a breach of *Article 7 ICCPR* and *Article 3 Bill of Rights Ordinance* if his treatment there was likely to amount to *cruel, inhuman or degrading treatment or punishment*.[33] In these circumstances a right of appeal is very important because a flawed decision under *s. 25(1)* could result in the torture and death of the deportee in the country of destination.[34]

The United Kingdom's General Reservation under the *ICCPR* about Immigration Laws

20. When the United Kingdom ratified the *ICCPR* it entered a major reservation concerning every provision in the Covenant as regards persons not having the right to enter and remain in the United Kingdom and each of its dependent territories.[35] The background too the reservation was mass immigration to the United Kingdom by Commonwealth citizens (mainly from East Africa) claiming the right to enter the United Kingdom on the grounds of citizenship. The reservation was directed principally at the provisions of *Article 12(4) ICCPR* which guarantees citizens the right of entry to their own country. However, the reservation is much broader and purports to cover all the other provisions of the Covenant and all British Dependent territories.

21. As part of the Government's policy of having a bill of rights which faithfully reproduced the *ICCPR* as applied to Hong Kong this reservation is now embedded in the domestic law of the territory as *s. 11 Hong Kong Bill of Rights Ordinance, Cap. 383*.[36] It is arguable that the reservation comes into play under the *Basic Law* by virtue of *Article 39* which guarantees implementation of the *ICCPR* as applied to Hong Kong through the laws of Hong Kong which would include any limitations on the rights and freedoms so guaranteed.

22. In theory, notwithstanding the historical origins of the reservation, it and/or *s.9 Hong Kong Bill of Rights Ordinance* might be relied upon by the Government to justify wide-ranging immigration legislation which was below *ICCPR* standards affecting everyone, irrespective of nationality, who did not have the right of abode in the territory. An example of such legislation would be a law which expressly took away the right of an immigrant detained pending removal to another country to apply for *habeas corpus* on the grounds that his detention was unlawful because it was overlong or because there was no realistic prospect of him being removed.[37]

23. The Monitor does not see the need for the reservation. The United Kingdom's *British Nationality Act 1981* effectively sorted out its problems with Commonwealth immigration by creating different classes of British citizen with different legal rights as regards entry

and stay in the United Kingdom. It is also arguable that the reservation cannot apply to Hong Kong after 1997 because it addresses specific citizenship problems which are, or were, the concern of the United Kingdom alone and simply cannot apply in Hong Kong after 1997. The Monitor however also accepts that it is unlikely that the United Kingdom would formally remove the reservation now.

24. The Monitor therefore **invites** the Administration to state whether, in its view, the reservation applies after 1997 and if so how it will apply.

Refugees

25. It has already been noted that the United Kingdom has not extended the *UN Convention relating to the Status of Refugees* and the *1967 Protocol.* These agreements oblige signatories to provide protection to a refugee by guaranteeing that he will not be expelled to the frontiers of a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[38] The *Convention* and *Protocol* apply to Vietnamese asylum seekers.[39] This class of persons is also recognised in the *Immigration Ordinance* which empowers the Director of Immigration to determine that a resident or former resident of Vietnam is a refugee and grant him permission to remain in Hong Kong pending resettlement elsewhere.[40]

26. Apart from residents and former residents of Vietnam a person claiming that he is a refugee has no right to have such claim recognised under the *Immigration Ordinance*. In the case of Madam Lee Bun and anr. V Director of Immigration [1990] 2 HKLR 467 the Court of Appeal rejected a claim by two applicants who had come to Hong Kong from China that they were entitled to make any special claim to be treated as refugees by the Director of Immigration. Sir Derek Cons, Vice-President said on behalf of the court that *we can only conclude that the legislative authority in Hong Kong intends that, apart from Vietnamese refugees, those claiming political persecution shall not be accorded any special rights and that the general discretion [to permit someone to*

remain in Hong Kong] given to the Director shall remain unfettered by rules.[41]

27. It is common knowledge, that the Director of Immigration has entertained claims from individuals claiming refugee status on account of a fear of persecution in China. The Director has told the Monitor that he has dealt with asylum claims outside the *Convention* and *Protocol.*[42]

28. It seems undesirable to the Monitor that if an asylum seeker comes to Hong Kong from whatever country and asks to be recognised as a refugee the decision whether to entertain the claim should be treated as a matter of pure administrative discretion on the assumption that the Legislative Council has no interest in the matter. The Monitor **invites** the Government to publish details of its policy towards people (other than former residents of Vietnam) coming to Hong Kong who make claims for asylum. If the Government has a policy on this class of asylum seekers then the Monitor **recommends** that it be embodied in legislation so that it is publicly known and is plainly justiciable so that an asylum seeker can go to court in respect of such a claim. (Given the fact that the PRC has acceded to the *Convention* and the *Protocol*[43] there would appear to be no legal policy objections to legislation which incorporates these international instruments unless the PRC does not wish to incur international obligations in Hong Kong in this respect.[44])

The Scheme of Control under the *Immigration Ordinance*

29. The *Immigration Ordinance* makes provision for regulating entry into, stay in, and departure from Hong Kong. The review focuses only on the provisions regulating entry and stay because forced departures come about as a direct consequence of a refusal of permission to land or on account of a refusal to extend a condition of stay or because of a breach of condition of stay.

Entry into Hong Kong

30. The basic tool of immigration control under the ordinance is *s. 7(1)* which states that no one may land[45] in Hong Kong without the

permission of an immigration officer or immigration assistant unless he is a member of one of the classes of persons who do not need permission to land.[46] It is a criminal offence under *s. 38(1)* of the ordinance to land without such permission or to remain in Hong Kong without the authority of the Director of Immigration.[47]

31. Before a decision is made under *s. 7(1)* a visitor may be required to submit to examination under *s. 4(1)(a)*.[48] After such examination entry to the territory may be refused under *s. 11(1)*. If permission to land is granted, a limit of stay may be imposed as well as *such other conditions of stay as an immigration officer or immigration assistant thinks fit, being conditions of stay authorised by the Director, either generally or in a particular case*.[49]

Removal after Refusal of Permission to Land

32. If refused permission to land the visitor may be removed on the direction of an immigration officer or a chief immigration assistant.[50] Removal is often done by directing the captain of the aircraft or ship which brought the visitor to remove him[51] but the Director may require the captain of any ship or aircraft to remove the visitor to a specified country[52]. A person may be detained pending removal but only for a maximum of 2 months beginning with the date on which he landed.[53] The power to remove after refusing permission to land is used very extensively. It appears that nearly 200 people are, on average, removed under this power every day.[54]

33. There are no published criteria which advise a traveller of the circumstances which may lead to permission to land being refused and, although there is technically a right of appeal against a decision refusing permission to land[55] there is no right of appeal against a removal order.[56] This means that, unless the visitor is detained pending removal and is told of the existence of the right of appeal[57] the right of appeal is useless (hence the description "technically") because the visitor will usually be removed very quickly and, as for the right of appeal, he can only exercise it (assuming that he becomes aware of its existence) after removal.

Section 11(10) Immigration Ordinance, Cap. 115

34. When a person who has been granted permission to land or remain in Hong Kong leaves Hong Kong that permission, if still in force on the date of departure, expires immediately after departure *s. 11(10) Immigration Ordinance*. This provision is of no real concern to the ordinary visitor but should be of concern to the resident immigrant who may have been granted permission to remain in Hong Kong for 12 months or more. Notwithstanding the grant of permission to remain in Hong Kong for an extended period of time the returning resident immigrant needs fresh permission to land in Hong Kong every time he returns to the territory after travelling abroad even though he may have a visa in his possession valid for 6 months or more.

35. The law appears to be that a person who does not have the right to abode can be refused permission to land without any reasons being given by the Director of Immigration.[58] The application of this legal principle in the case of a returning resident at the port of entry who may have lived in Hong Kong for many years seems harsh to the Monitor. Is he to have no explanation why permission to land is refused? It also affects the immigrant's legal rights because if leave to land is refused at the port of entry and a removal order is made under *s 18 Immigration Ordinance*, he has no right of objection to the Governor-in-Council[59] whereas if the immigrant lands and the Director of Immigration decides to revoke leave or refuse an extension there is a right of objection under *s. 53(1) Immigration Ordinance*. In these circumstances if the Director of Immigration has formed an adverse view of an immigrant there may be a temptation to refuse leave to enter and remove under *s. 18* rather than let the immigrant land. The Monitor therefore **recommends** that not merely should there be a **right of appeal** in all such cases but that **guidelines or rules** should spell out that in the territory or, having landed, be refused an extension of stay.

36. The Monitor **recommends** that criteria governing the circumstances in which permission to land may be refused be published and made available at consular establishments overseas where visitors may inspect them.[60] The Monitor also **recommends** that where a visitor is refused permission to enter that there be a

legal requirement that the visitor be informed of the right of objection. This could be done by serving on the visitor a notice refusing him leave to enter which has printed on it details of the right of appeal. (For reasons explained elsewhere in the Report the Monitor considers that the Governor-in-Council should not be the body which currently can hear these appeals.) The Monitor also **recommends** that provision should be made for some appellants to be granted limited leave to enter the territory for the purpose of prosecuting their appeals where substantial hardship would be caused by requiring them to prosecute an appeal from abroad.[61]

Removal after Permission to Land has been granted

37. A person may be removed from Hong Kong after he has landed under the provisions of *s. 19 Immigration Ordinance*. There are basically 2 classes of persons for the purpose of this section. Those who entered Hong Kong lawfully with permission and those who did not.

38. The Monitor believes that the existing arrangements for removal are unfair because they give the Director of Immigration and the Governor an unfettered and basically unreviewable discretion whether to make removal orders. The existing appeal procedures against removal orders relate only to the legality of the removal, i.e., whether certain factual pre-conditions to the making of an order exist. The Monitor **recommends** that the removal provisions be reviewed and revised with a view to providing safeguards for those who have landed in Hong Kong lawfully and whose removal is sought either because it is alleged that they are in breach of a condition of stay or because they are simply deemed "undesirable".

39. *S. 19(1)(a)* provides that the Governor may order the removal of an immigrant *if it appears to him that that person is an undesirable immigrant who has not been ordinarily resident in Hong Kong for 3 years or more*. There is no right of appeal against such an order. Although this provision does not appear to have been used much recently[62] the Monitor believes that there are insufficient safeguards against possible abuse because it is not a pre-condition to the exercise of the power that the immigrant have committed an offence or that he be in breach of any conditions of stay and there

is no right of appeal[63]. If this power is only used in exceptional cases where there are perhaps security connotations to the case then the provision should say so clearly.[64] If the power is used cases which do not involve security issues then it does not seem appropriate that the Governor should be the decision-maker and someone else should take over the task and his decisions should be subject to appeal. The Monitor therefore **recommends** that *s. 19(1)(a) Immigration Ordinance* be reviewed by the Administration in the light of these comments.

40. Under *s. 19(1)(b)(ii)* a person who has landed in Hong Kong unlawfully or is in breach of conditions of stay may be removed on the order of the Director of Immigration[65]. There is a right of appeal under *s. 53A(1)* to the Immigration Tribunal but that body can only allow an appeal if it appears that the Director had no legal authority to make the order in the first place.[66]

41. The Monitor believes that there is a big difference between the situations of people who land in Hong Kong unlawfully (usually by clandestine entry but sometimes by practising deception on immigration officers at the port of entry) and those who land in Hong Kong lawfully but later contravene a condition of stay. Persons in the first category have no claim on Hong Kong and by virtue of the nature their entry they are likely to live by crime in the territory. Persons in the second category live and work openly and may pay taxes. The contravention of a condition of stay may be a trifling one or there may be extenuating circumstances to explain it. The *Immigration Ordinance* and sentencing policy for offences under it reflects the difference. Persons who land without permission may be fined $10,000 and sent to prison for up to 3 years.[67] However, a person who breaches a condition of stay while equally is liable to a fine of $10,000, is only liable to maximum period of imprisonment of 2 years.[68]

42. Given that the underlying conduct said to warrant the making of a removal order in breach of condition cases is criminal the Monitor **recommends** that no removal order should be made by the Director of Immigration against a person who, after landing with permission, has breached a condition of stay without there being first a recommendation by a court after prosecution and conviction that a removal order should be made. As in deportation cases as

already proposed in this Review, there should be a right of appeal against a removal order in these circumstances.[69]

43. If it is thought impracticable or undesirable that there should first be a conviction and recommendation before removal the Monitor alternatively **recommends** that there be a right of appeal against an order for removal to the Immigration Tribunal. On such an appeal it would be necessary for the Director of Immigration to show that he had reasonable grounds for saying that an individual was in breach of conditions of stay or was an over-stayer. It seems wrong in principle that if the Director of Immigration forms the view that a person was in breach of conditions of stay (and hence had committed an offence under *s. 41 Immigration Ordinance)* he can choose not to prosecute in a court (where he would have to prove his case beyond reasonable doubt) but can still take an administrative decision to remove the immigrant without giving him the opportunity to contest the factual basis of the decision.[70]

44. The provisions of *s. 19(1)(b)(iia)* permit the Director to make a removal order against a person who has contravened *s. 42* of the Ordinance. The provisions of *s. 42* relate to possession and use of forged or altered travel documents (including identity cards). Again, an important distinction can be drawn between visitors using such documents to obtain entry and residents who contravene the section but who do not use a travel document to obtain entry. The Monitor considers that, since the underlying conduct is criminal and prosecutions are common, there is a case for treating such cases as if they were deportation cases, and that there should be a recommendation from a court before a removal order is made. The Monitor therefore **recommends** that consideration be given to revising *s. 19(1)(b)(iia)* so that the underlying conduct be grounds for deportation rather than removal, but that in any event there should be a **right of appeal** against a removal or deportation order made on the grounds of conduct said to constitute an offence under *s. 42*.

Immigration Policies made Public

45. If permission to land is granted then stay in Hong Kong is regulated by conditions of stay which may be imposed on entry

and which may be varied at any time thereafter: see *s. 11(2)* and *s. 11(5A) Immigration Ordinance*.

46. *Immigration Regulations* made under *s. 59 Immigration Ordinance* contain conditions of stay. Under *Regulation 2* there are five standard conditions of stay for five different classes of entrant. These are:

(i) Under *Regulation 2(1)*-Visitors. Visitors may not take up any employment, paid or unpaid; they may not join or establish any business and they may not become students at any school, university of other educational establishment.

(ii) Under *Regulation 2(2)*-Transit ship passengers. Transiting passengers may stay on condition that they leave with the ship on which they arrived.

(iii) Under *Regulation 2(3)*-Students. Students may stay in Hong Kong at specified schools, universities or other educational establishments as specified by the Director of Immigration and undertake courses approved by him. They may not take any employment (paid or unpaid) whilst studying or join any business.

(iv) Under *Regulation 2(4)*-Employment. Permission to land to take up employment or to start or join a business is subject to the condition that the employment or business is approved by the Director of Immigration.

(v) Under *Regulation 2(5)*-Contract Seamen. Contract seamen may land subject to the condition that they do not remain after the departure of a ship.

47. In all other cases the imposition of conditions is in the entire discretion of the Director of Immigration. In framing these conditions the Director of Immigration takes into account immigration policies as endorsed by the Governor-in-Council.[71]

48. The Monitor considers it unsatisfactory that on the one hand conditions of stay contained in the *Immigration Regulations* that

have the force of law[72] and may be scrutinised and amended by the Legislative Council[73] but that the Legislative Council has no say over the way in which very broad administrative discretions relating to entrants not falling within the 5 standard categories are exercised pursuant to policies devised by the Executive and not contained in any law.

49. The Monitor realises that it would be impracticable to make provision in delegated legislation for every possible immigration situation However, there seems no reason why rules (both directory and discretionary) which spell out in some detail typical conditions of entry and of stay should not be prepared by the Director of Immigration and tabled in the Legislative Council for its approval.

50. The purpose of such rules or guidelines would be to indicate how discretionary powers will normally be exercised and to guide any individual or tribunal which has power to hear appeals or reviews under the *Immigration Ordinance*.

51. The Monitor notes that under the UK *Immigration Act 1971* the Home Secretary makes rules under *s. 1(4)* about *the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode* [which] *shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom*. There were nearly 400 rules in the *Immigration Rules* which were laid before Parliament in May 1994.[74]

52. The *Immigration Rules* deal with very specific situations. There is only room here to give the following examples.

- *Rules 57-62:* these deal with leave to enter as a student, refusal of leave, extensions of stay and refusal of extension of stay.
- *Rules 76-78:* the position of spouses of students.

- *Rules 136-143:* requirements for leave to enter and refusal of leave in respect of representatives of overseas newspapers, news agencies and broadcasting organisations.
- *Rules 200-210:* requirements for leave to enter, refusal of leave and extensions and refusals of extensions in respect of persons seeking to enter as a businessman, self-employed person, investor, writer, composer or artist.
- *Rules 246-248:* requirements for leave to enter as a person exercising rights of access to a child.
- *Rules 263-270:* requirements for leave to enter, refusal of such leave and extensions as a retired person of independent means.
- *Rules 290-295*: requirements for leave to enter and refusal of leave and extensions in respect of fiance(e)s.

53. It is not the case that the Director of Immigration does not have rules or guidelines in respect of some or all of these categories. The Monitor asked for, and was given, answers to a number of questions which it posed in order to see what guidelines the Director had in respect of certain categories of visitors.[75] However these guidelines are not made publicly available. The Monitor's view is that given that immigration decisions are so important to the individuals directly affected and to others, such as family and employers, the policies which guide the exercise of the Director's powers and functions should be made public in the interests of openness and fairness. A person who is adversely affected by an immigration decision would be able to see straightaway whether he had been dealt with in accordance with the policy. It is not a satisfactory state of affairs that the person who tells you that you do not come within the policy is the same person who announces that policy to you for the first time. Unfortunately this is sometimes the situation in Hong Kong under present arrangements.

54. The Monitor believes that the rules used by the Immigration Department like this should have legal effect so that where they are directory, non compliance should result in an immigration decision being automatically overturned or varied on an appeal.[76] However, where rules are not directory, appellate tribunals (and the High Court on an application for judicial review) would be

able to have regard to them as rules of practice relevant to the exercise of a discretion in a particular case.

55. The Monitor therefore **recommends** that rules of practice be drawn up by the Director of Immigration in respect of the most important immigration decisions[77] and that the *Immigration Ordinance* be amended so that the rules of practice will have legal effect where they are directory in content.

56. The Monitor sees these rules being enforced by the Immigration Tribunal and/or any other adjudicating authority which could be established. Ultimately, decisions on the lawfulness of any decision taken under such rules would be the function of the High Court, exercising its supervisory jurisdiction over tribunals and decision-makers by way of judicial review.

57. As a consequence the Monitor **recommends** that the appeal provisions of *s. 53 Immigration Ordinance* which give a right of objection to the Governor-in-Council **be repealed** in their entirety. If, as stated by the Secretary for Security, deportation orders are *routine and relatively minor business* which should not be the concern of the Governor-in-Council at all,[78] then there is no logic in burdening the Governor-in-Council with the miscellany of objections under this provision which can relate to <u>any</u> decision made by any public officer under the ordinance. By comparison with the decision to deport, an appeal to the Governor-in-Council against a decision of the Director of Immigration refusing permission for a change of employer is utterly trivial.[79]

<u>Summary of Recommendations</u>

58. the Monitor's recommendations are that:

(a) The *Immigration Ordinance, Cap. 115* be amended to require the Governor-in-Council to lay before the Legislative Council a statement of the rules laid down for the Director of Immigration relating to the practice to be followed in the administration of the ordinance for regulation the entry into and stay in Hong Kong of persons who do not have the right of abode or the right to land without any conditions of stay being imposed upon them. Such rules to have the status of subsidiary legislation and

to be subject to approval by the Legislative Council under *s. 35 Interpretation and General Clauses Ordinance, Cap. 1.*

(b) That *s. 53 Immigration Ordinance, Cap. 115* governing rights of objection to the Governor-in-Council in respect of some immigration decisions be repealed in its entirety.

(c) That instead of *s. 53* there be a right of appeal to an independent adjudicator or tribunal (or both) in respect of all immigration decisions affecting entry into and stay in Hong Kong.

(d) That the power of the Governor to deport a person not having the right of abode in Hong Kong should be limited only to cases where deportation is necessary in the interests of the security of Hong Kong and there should be a appeal in such cases.

(e) In all other deportation cases the initial decision to deport on grounds of public good should be made by the Secretary for Security or a delegate and that there should be a right of appeal in respect of such decision.

(f) That consideration be given to the need to retain the Governor's present power under *s. 19(1)(a) Immigration Ordinance, Cap. 115* to order the removal of a person who has not been ordinarily resident in Hong Kong for more than 3 years on the grounds that he appears to be an "undesirable immigrant".

(g) In all cases where a removal order can be made there should be a right of appeal.

[1] See *section 2A Immigration Ordinance, Cap. 115*

[2] This class constitutes resident British citizens or resident UK belongers ("UK belonger" is an immigration term of art used to identify British subjects with Hong Kong connections and which were a special class under the *Immigration Ordinance* before 1.1.1983: see Appendix to *Immigration Ordinance*) who have lived in Hong Kong for more than 7 years and also includes people serving in the UK armed forces: see *sections 8 and 9 Immigration Ordinance.* Resident British citizens and resident UK belongers enjoy all the benefits of permanent residence except that of immunity from deportation. UK servicemen have the right to land in Hong Kong without the permission of the immigration authorities. The existence of these two groups as special categories in immigration legislation clearly cannot survive the change of sovereignty in 1997. The last group comprising the class is the crew of aircraft who enjoy the right to land simply by virtue of the fact that, given their duties, it is impracticable to require aircrew to comply with visa requirements.

[3] It is generally accepted that as a matter of international law states have no duty to admit aliens. The right to exclude aliens at will is sometimes said to be an incident of national sovereignty: see Musgrove v. Chun Teong Toy [1891] A.C. 272. States can limit the freedom to exclude aliens by international agreement and confer rights on aliens although for such rights to be legally enforceable domestic legislation implementing the agreement is necessary. An example of a treaty conferring rights on aliens is the *Sino-British Joint Declaration on the Question of Hong Kong* which gives the right of abode to people who are not Chinese nationals or Chinese citizens and who have resided in Hong Kong for more than 7 years and taken the territory as their home. The domestic legislation which implements the treaty is *Article 24* of *The Basic Law of the Hong Kong Special Administrative Region* which defines the permanent residents of the HKSAR having the right of abode and includes this class of non-nationals who may also have the right of abode elsewhere. European Community law also diminishes sovereignty in this area as a result of the *Treaty of Rome* and the *Maastricht Treaty* which requires European Union members to admit one another's nationals in certain circumstances.

[4] The Hong Kong Government's Annual Report *Hong Kong 1996*, Chapter 25 "Population and Immigration", p. 395.

[5] Source: Director of Immigration. Oral information pursuant to inquiry on 4 Sept. 1996. The Department estimated that about 5.5 million people in or outside are eligible to claim British National (Overseas) Passports or Certificates of Identity.

[6] See *Article 24* supra. Apart from non-Chinese long term residents there are five other classes of persons who are recognised as having the right of abode. On 10.8.96 the Preparatory Committee adopted an opinion on how *Article 24 Basic Law* is to be interpreted and implemented.

[7] The Hong Kong Government has stated that the lack of an agreement in the JLG on *how to align the Immigration Ordinance with the relevant provisions of the Basic Law* is a very important outstanding issue: see the HKG's Annual Report *Hong Kong 1996*, Chapter 4 "Implementation of the Sino-British Joint Declaration" at page 44.
The Monitor has noted that a number of newspaper articles and news items have dealt with such concerns in 1996. Specific reference is made to Tsang Yok-Sing's article in the SCMP dated 23.1.1996 entitled "An open mind on the right of abode"; Fung Wai-Kwong's article in the SCMP dated 8.4.1996 entitled "Residency rules may cause poll turmoil"; Ming Pao's report dated 13 April 1996 entitled "British Urges JLG to Deal with Right of Abode Issue", Yau Shing Wu's report in the Hong Kong Economic Times dated 13.4.1996 entitled "Non-Chinese's Right of Abode Retained", C.K. Lau's article in the SCMP dated 19.4.1996 entitled "Dilemma for returnees", the Apple Daily's report dated 19.4.96 entitled "Governor urges Solution to Abode Issue". The Director of the Hong Kong and Macau Affairs Office, Lu Ping, was obliged to address the problem in a major speech delivered by him on 12.4.1996. The text of the speech can be found in the SCMP (English) and in the Hong Kong Commercial Daily (Chinese), both dated 13 April 1996.

The National People Congress Standing Committee adopted *the Decision Concerning the Interpretation of the Implementation of the People's Republic of China Nationality Law in Hong Kong* on 23.5.1996. For comment on this Decision, see Yash Ghai, *Nationality and the Right of Abode* (1996) 26 HKLJ 155.

[8] Under our legal system a distinction is made between the enforcement of legal rights and the lawful exercise of an administrative discretion. The legal right of abode conferred by *s. 2A Immigration Ordinance* could be enforced by an order of the High Court compelling the Director of Immigration to admit a Hong Kong permanent resident if he was wrongly denied entry because the Director has no discretion to refuse entry. If, however, the person seeking entry did not have the right of abode his entry depends entirely on the Director of Immigration or one of his staff exercising a discretionary power to admit him. This is an administrative decision. The High Court does not involve itself in reviewing the merits of administrative decisions which are taken under the authority of a statute except in extreme cases where it can be shown that the decision was irrational (e.g. entry to Hong Kong was refused because the traveller was black and the immigration official believed that no black people should enter Hong Kong) or if it can be shown that the Director of Immigration had earlier circumscribed his administrative discretion by announcing how his discretion would be exercised in a particular way and someone relies upon that statement and acts to his detriment only to find that the Director has changed his mind and seeks to withhold from the individual the benefit which he had earlier promised. This happened in 1980 when an officer from the Immigration Department announced publicly that illegal immigrants would, if they surrendered, not be automatically repatriated but that their cases would be looked at individually. One illegal immigrant relied on this promise and registered with the Immigration Department but the Director of Immigration ordered his removal without giving him a hearing. The Privy Council ruled that the Director of Immigration had acted unlawfully because fairness required that he give the man's case the individual treatment promised: see A-G of Hong Kong v Ng Yuen Shiu [1983] 2 A.C. 629.

[9] Reference is made throughout to the *Immigration Ordinance, Cap. 115* as published in the Laws of Hong Kong, Issue 10.

[10] According to the *Far East Economic Review* dated 23.5.1996 there were some 311,000 Asian Migrant Workers in Hong Kong. (See article "Vital and Vulnerable").

[11] Singapore is a country where immigration policies are designed to advance economic policies. In the late 1980's Singapore, which has suffered from its own "brain drain" of skilled workers, targeted Hong Kong as a source of skilled labour and liberalised its immigration policies accordingly. About 10,000 individuals from Hong Kong were granted permanent residency rights: see *Labour Migration Workers in Singapore: Policies, Trends and Implications* by Pang Eng Fong pub. In "Regional Development Dialogue" Vol. 12 No. 3(1991). See also *Employing Foreign Workers* by W.R. Bohning (ILO 1996) for discussion of implications of economy-driven labour immigration policies in context of compliance with ILO obligations and standards. Forty-eight ILO conventions apply to Hong Kong: see *Appendix 5A: List of Agreed Multilateral Treaties* in Yearbook: *Hong Kong 1996.*

[12] In the *Twelfth Periodic Report of the United Kingdom with respect to Hong Kong under the International Convention on the Elimination of all Forms of Racial Discrimination* [UN Doc. CERD/C/226/Add.4 (1992)] paragraph 18 of the report mentions specifically the objections of labour groups to labour importation schemes introduced in order to "sustain economic growth and relieve local labour shortage".

[13] The Monitor appreciates that there already exists an Immigration Tribunal which hears certain appeals and that there is a general right of objection against immigration decisions to the Governor-in-Council. Its case is that, for the reasons contained in this Review, these are not adequate.

[14] See *Hong Kong Report 1996,* Chapter 25 "Population and Immigration" at page 395.

[15] A distinction must be drawn between treaties which cut down expressly on the right of countries to refuse entry to and expel aliens which are immigration decisions and treaties which generally benefit everyone, including persons not having the right of abode. A treaty such as *UN Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW)* confers legal rights of equal treatment on women even if they do not have the right of abode but the right to equality of treatment under the law does not mean that any immigration rights are conferred. If a woman needs the permission of the immigration authorities to remain in a country *UNCEDAW* does not change that situation.

[16] *Annex 1, Joint Declaration.*

[17] *Article 39 Basic Law* states:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

[18] In international law a reservation is made by a state to a treaty when it wishes to indicate that certain provisions which are identified in it do not bind it or are binding only in certain respects. For a fuller definition of the term see *Article 2 Vienna Convention*.

[19] The Monitor does not suggest that immigration policy is not a matter for the Governor-in-Council.

[20] Deportation is not to be confused with removal. Under the *Immigration Ordinance*, removal is the term used in most cases to describe the expulsion of persons who have entered Hong Kong unlawfully or who are in the territory in breach of conditions of stay. Deportation is the expulsion of persons who, whilst not having the right of abode in Hong Kong, have not landed unlawfully or are not necessarily in breach of any conditions of stay. A deportation order may forbid the return of the person deported at any time: see *s. 20(7) Immigration Ordinance*.

[21] The term "immigrant" is defined in *s.2 Immigration Ordinance* as *a person who is not a Hong Kong permanent resident*. However, resident British citizens and United Kingdom belongers are excepted from the operation of *s. 20.* If a deportation order is sought to be made against one of them then, unless there is a question affecting *the security of Hong Kong or [for] political reasons affecting the relations of Her Majesty's Government in the United Kingdom with another country*, there is a right to a hearing before a Deportation Tribunal headed by a High Court judge or District Judge: see *ss 22-23 Immigration Ordinance*. This protection extends to British citizens who are not resident British citizens in some circumstances: see *s. 20(3).*

[22] *S.53 Immigration Ordinance* creates a right of review in respect of some immigration decisions but *sub-section (6)* expressly excludes from the scope of the section any decision made by the Governor or Governor-in-Council.. This is consistent with the traditional view of the Governor and the Governor-in-Council being the supreme decision making body on immigration matters.

[23] See *s. 21 Immigration Ordinance.*

[24] Figures supplied by Director of Immigration to the Monitor in June 1996. Reference is made to both the Governor and Governor-in-Council because up until November 1993 all deportation decisions under *s.20 Immigration Ordinance* were made by the Governor-in-Council. The *Immigration (Amendment) Ordinance No. 82 of 1993* changed this arrangement. It is perhaps significant that the powers and duties of the Governor-in-Council are not capable of being delegated whereas the powers of the Governor are: see *s. 63(1) Interpretation and General Clauses Ordinance, Cap. 1.* This means

that deportation orders can be made by any named person or by any named office holder. It is understood that the Governor has in fact delegated this function to the Secretary for Security.

[25] If the Governor or the Governor-in-Council spent a minimum of 1 minute only considering whether to make an order then some 25 hours of executive government at the highest level was devoted to the task. (This calculation excludes time spent in considering cases where no order was made for which no figures are available).
It is well known that the Governor and Governor-in-Council are kept very busy dealing with questions of high policy and that there is therefore an impression that these decisions are dealt with perfunctorily. When the Secretary for Security moved the second reading of the amending bill on 27.10.1993 he described the amendment as relating to *routine and relatively minor business*. He also told Legco that 237 deportation orders had been made by the Governor in Council in 1991; 283 in 1992 and 250 in that year: see *Hong Kong Hansard Official Record of Proceedings 27.10.1993* at page 564. He also told Legco, by way of reassurance, that there was, in any event, a right of appeal against a decision to deport under *s. 53(1) Immigration Ordinance* to the Governor-in-Council from the Governor's decision. He was wrong about this. *S.53(6) Immigration Ordinance* states that there is no appeal from a decision of the Governor or the Governor-in-Council.

[26] Some of the decisions of the Director of Immigration may be appealed to the Immigration Tribunal which is established under *s. 59 Immigration Ordinance.* Its present functions are discussed elsewhere but it is to be noted that it has very limited powers and can only review administrative decisions made by the Director on grounds of legality. It cannot review the merits of any administrative decision. The Monitor takes the view that its terms of reference could easily be expanded although it would probably be necessary to recruit some legally qualified personnel to chair the tribunal. Appointments could be part-time.

[27] A restricted right of appeal would mean a review of the immigrant's case to see whether all legal and procedural requirements which are a condition precedent to the making of a deportation order exist. An unrestricted right of appeal would enable the immigrant to argue that because of personal circumstances or family connections the making of a deportation order is inappropriate or would have a disproportionately harsh effect on others.

[28] The Monitor's recommendation that important immigration decisions be made in the light of administrative rules approved by the Legislative Council is dealt with elsewhere in the Review. It is suggested that rules relating to deportation on the basis of a conviction would require the decision-maker to have special regard to compassionate circumstances and to take into account generally the immigrant's age, length of residence, strength of connections with Hong Kong, criminal record, domestic circumstances, personal history and employment record and any representations made on his behalf.

[29] A decision to deport based on the fact of a conviction is made under *s. 20(1)(a)*.

[30] In the United Kingdom there is no legal right of appeal in such cases but there is a purely administrative review of such cases. This non-statutory procedure (resembling positive vetting for civil servants) has been criticised and was thought to be unnecessary by the Committee on Immigration Appeals which, in 1967, recommended a legal right of appeal in such cases although it acknowledged that hearings might have to be held *in camera*.

[31] See *s.3(6) Immigration Act 1971.*

[32] See R v. Caird (1970) 54 Cr. App R. 499, CA and R v. Nazari [1980] 71 Cr App R. 87.

[33] The European Court of Human Rights has held that the decision of the United Kingdom to remove a German national to the USA where he would face capital charges violated *Article 3* of the *European Convention on Human Rights* (which is in the same terms as *Article 3 ICCPR)* because of the Applicant's exposure to what is commonly called "the death row phenomenon" extreme mental stress

occasioned by the appeal and stay procedures: see Soering v. United Kingdom (1989) 11 EHRR 439. In 1972 the United Kingdom settled a claim before the European Commission of Human Rights in which she claimed a violation of *Article 3* which had been brought by the widow of a Moroccan military officer who had fled to Gibraltar after a failed coup in that country. The Gibraltar authorities returned the officer to Morocco where he was summarily tried and executed, contrary to promises given to the Gibraltar authorities that he would be tried in a regular court. See Amekrane v. United Kingdom (Application 5961/1972)(1972) 44 Collected Decisions 101.

[34] A right of appeal against the choice of destination is a feature of the United Kingdom's see *s. 17 Immigration Act 1971*. Where the choice of destination may engage the United Kingdoms international obligations regarding its treatment of refugees there is a special form of appeal under *s. 8 Asylum and Appeals Act 1993.*

[35] The reservation is in the following terms: *The Government of the United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12(4) and of such other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories.*

[36] *S.9 Hong Kong Bill of Rights Ordinance, Cap. 383* states: "*As regards persons not having the right to enter and remain in Hong Kong this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."*

[37] Immigration detainees have successfully invoked habeas corpus in these circumstances: see Liew Kar Seng v. The Governor in Council [1989] 1 HKLR 607 (deportation case); In re Pham Van Ngo [1991] 1 HKLR 499 and Tan Te Lam v. Superintendent of Tai A Chau Detention Centre [1996] 2 W.L.R. 863 (Vietnamese migrants detained under immigration law with no prospects of return to Vietnam).

[38] This is the principle of *non-refoulement* which is found in *Article 33* of the *Convention*.

[39] The special arrangement is the multi-lateral international agreement entered into by the United Kingdom in 1989 which is commonly called the *Comprehensive Plan of Action or CPA* under which Hong Kong applies the *Convention* and *1951 Protocol* to Indo-Chinese asylum seekers. This agreement is meant to ensure that this class of asylum-seeker is treated consistently in countries of first asylum in the S.E. Asia region.

[40] These are at *Part IIIA Immigration Ordinance*. They were introduced in 1979 in order to deal with the influx of asylum seekers from Vietnam.

[41] See page 472E of the Law Report.

[42] The Director was asked whether he entertained claims for asylum from persons who were not former residents of Vietnam and, if he did, what criteria applied. His answer in a letter dated 18.6. 1996 was *The 1951 UN Convention/1967 Protocol do not apply in Hong Kong. There is no legal framework and existing powers are used on a case by case basis where it is appropriate to consider such cases.* As regards questions put by the Monitor about how this class of asylum seekers were treated and how many of them were they the Director replied to each question with the response *Not applicable*.

[43] China acceded to the *Convention* and *Protocol* in 1982. In the same year *Article 32* of the 1982 *PRC Constitution* Convention provided that *The People's Republic of China may grant asylum to foreigners who request it for political reasons*. For a summary of China's practice to asylum seekers see *The Status of Refugees in Asia* by Vitit Muntarbhorn (Clarendon Press, Oxford, 1992). The text of the 1982

PRC Constitution is found at pp. 122-149 of *Public Law and Human Rights* ed. Byrnes and Chan (1993).

[44] The UK *Asylum and Immigration Appeals Act 1993* in effect incorporates the *Convention* and *Protocol* in domestic by requiring special adjudicators to review on appeal immigration decisions made by the Home Office by applying these treaties in such a way as not to be contrary to the UK's obligations under them: see *s. 8.* The application of international agreements to Hong Kong is dealt with by *Article 152 Basic Law* which states *The application to the Hong Kong Special Administrative Region to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the Region*.

[45] "Land" means set foot in Hong Kong: see definition of "land" in *s. 2 Immigration Ordinance*. Passengers and the crew of ships may enter Hong Kong by sailing into territorial waters but they are not subject to immigration control regarding entry unless they seek to land in the territory. Asylum seekers who sail into Hong Kong waters and submit to immigration examination before landing with the permission of the authorities do not break any immigration laws. It is for this reason that it is probably wrong for the Director of Immigration to characterise some asylum seekers as "illegal immigrants": see Madam Vu Ngoc Dung v The Criminal & Law Enforcement Injuries Compensation Boards (1996 HCMP No. 550) (unrep.) where High Court quashed a decision of the Board for using "illegal immigrant" criterion of Director of Social Welfare for determining whether asylum seeker was eligible under the compensation scheme.

[46] The four classes of persons have already been identified and described: see page 1. They are (i) Hong Kong permanent residents; (ii) resident British citizens and resident United Kingdom belongers; (iii) servicemen and (iv) the members of crew of aircraft.

[47] A person contravening this provision is commonly termed an "illegal immigrant" or "II".

[48] Everyone who submits their passport or travel document for inspection at a port of entry submits to an examination under this provision.

[49] *S. 11(2) Immigration Ordinance.*

[50] *S. 18(1)(a) Immigration Ordinance.*

[51] *S. 24(1) Immigration Ordinance.*

[52] *S. 25(1) Immigration Ordinance.*

[53] *S. 32(1) Immigration Ordinance.*

[54] The Director of Immigration has told the Monitor that in the period 1993-1995, 138,684 persons were removed after having been refused permission to land. 4,049 of them were detained under *s. 32(10) Immigration Ordinance* for more than 48 hours pending removal.

[55] *S. 53(1) Immigration Ordinance*, which is discussed elsewhere, gives a right of objection against all immigration decisions except excluded decisions specified in *sub-section (8)*. A decision refusing permission to land is not excluded.

[56] Removal orders are excluded under *s. 53(8).*

[57] In a letter to the Monitor dated 18.6.1996 in answer to a specific query about *s. 53* and whether immigration officers were obliged to inform visitors and immigrants about their rights under this provisions the Director's representative said *There is no such obligation* [i.e. to inform] *under Immigration Ordinance. The right is however widely known to the public and Immigration officers give*

suitable advice to any person upon enquiry. The Monitor questions whether there is extensive public awareness of this right and doubts that visitors, not being members of the public in Hong Kong, are aware of it at all.

[58] See Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149. This is a case under the old UK immigration law which was based on the *Aliens Order 1953* which closely resembled the scheme of the *Immigration Ordinance, Cap. 115.* This case made it clear that an alien coming to the United Kingdom had no rights to be heard on the question of whether he should be given leave to enter or granted an extension of stay. See Lord Denning's speech at page 170C-171C where he notes that a special committee had recommended a *system of appeals against the exclusion of aliens* but that the Command Paper was not yet law.

[59] The provision of *s. 53(8)(b) Immigration Ordinance, Cap. 115* apply to exclude a right of objection.

[60] See for example the UK's *Immigration Rule 41* which sets out the requirements to be met by a person seeking leave to enter the UK as a visitor. Although most are common sense (visitor will not take up employment, visitor will have funds for cost of return journey, visitor will not have recourse to public funds etc.) the Monitor can see no objection in principle to the Hong Kong entry requirements being published.

[61] Where an immigrant has resided in Hong Kong and has left the territory and then returned and the immigration officer takes the view that the previous leave to enter was obtained by fraud or deception the consequences of immediate removal are particularly harsh if the immigration officer is shown to be mistaken.

[62] The Director of Immigration advises that no orders under this section were made in the period 1993-1995.

[63] *S. 53(6) Immigration Ordinance* states that there is no appeal from the immigration decisions of the Governor or Governor in Council.

[64] This is the position with British citizens and UK belongers under *s. 19(3) Immigration Ordinance* who can only be removed on the direction of the Governor under *sub-section 1(a)* if he certifies that security interests are involved.

[65] In the period 1993-1995 a total of 4635 removal orders were made under this provision and under *s. 19(1)(b)(iia)* which relates to removal on the grounds of possession or use of false or forged travel documents. Source: Director of Immigration. June 1996.

[66] The Immigration Tribunal can allow an appeal if the appellant is found to have the right of abode or if he is found to be a resident British citizen or UK belonger or if in fact he had the permission of the Director to remain in Hong Kong on the day when the removal order was made: see *s. 53A(1)(aa)-(b).* Most appeals heard by the Immigration Tribunal concern removal orders made against the children of illegal immigrant mother married to Hong Kong permanent residents who assert that the child was born in Hong Kong and has the right of abode by virtue of the father's status.

[67] *Section 38(1)(b).* The sentencing policy of the courts has been very inflexible when it comes to such cases. The standard sentence for this offence is an immediate prison sentence of 15-18 months.

[68] *S. 41 Immigration Ordinance.* Most offenders are dealt with by way of a fine.

[69] It seems logical to treat removal in these circumstances as if it were deportation and there seems to be no good reason why the *Immigration Ordinance* should not be amended so that committing any offence (not one which is punishable with over 2 years imprisonment) should be a ground for deportation. This is more consistent with the notion that removal relates only to a particular application

to enter Hong Kong made at a port of entry whereas deportation is founded on the notion of presence within the territory after the grant of permission to land.

[70] The Monitor notes that in the UK contravention of conditions of stay is a ground for deportation rather than removal: see *s. 3(5)(a) Immigration Act 1971.* An immigrant has a right of appeal in these circumstances.

[71] In a letter to the Monitor dated 16 June 1996 the Director stated that the Governor had not given any directions to him or his staff under *s. 51 Immigration Ordinance* which enables the Governor to direct public officers in respect of the exercise or performance of powers, functions and duties under the ordinance. He said however that immigration policies were normally endorsed by the Governor-in-Council and that he took account of those policies in exercising his discretionary powers.

[72] *Immigration Regulations* are a form of delegated legislation made by the Governor-in-Council under the authority of the *Immigration Ordinance*: see definition of "subsidiary legislation" in is. 3 *Interpretation and General Clauses Ordinance, Cap. 1.* Unless there is a challenge to subsidiary legislation on the grounds of inconsistency with the parent ordinance, courts treat subsidiary legislation as if it were an ordinance.

[73] Under *s. 34(2)* of the *Interpretation and General Clauses Ordinance, Cap. 1* the Legislative Council can amend delegated legislation.

[74] *Immigration Rules (HC 395) Date laid before Parliament 23 May 1994.* These rules are reproduced in *Macdonald's Immigration Law and Practice* (4th edn. 1995) edited by Macdonald and Blake.

[75] In a letter to the Monitor dated 16.6.1996 the Director set out his guidelines in respect of ordinary visitors, visitors seeking private medical treatment, students, spouses and children of students, visitors seeking work experience, persons seeking employment, spouses of employees, representatives of news organizations, missionaries and persons in religious orders, business men and fiance(e)s. The Director assured the Monitor that he has given no directions to his staff that would result in refusal of entry or limitation on stay on the grounds of a person's nationality, religious or political beliefs.

[76] Under *s. 19(1)(a)(i) Immigration Act 1971* on an appeal to an adjudicator the appeal must be allowed if the adjudicator considers *that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable.*

[77] It is unlikely that a set of rules of practice will be comprehensive. Decisions in relation to situations not covered by the rules would clearly fall to be dealt with on principles of general discretion.

[78] See speech to Legco previously cited at fn. 25.

[79] The Director advises the Monitor that in the period 1993-1995 there were 290 objections made against his decisions under *s. 53(1).* After notice of objection he reviewed his decision in 29 cases. Of the remaining 261 cases only 2 were reversed by the Governor-in-Council. The success rate of objectors before the Governor-in-Council was therefore less than 1% (.766% in fact). Assuming that the Governor-in-Council spent 3 minutes discussing each objection, some 13 hours of valuable Executive Council time was spent in dealing with reviews of minor administrative decisions. The success rate for objectors is an indication that the odds are stacked very heavily against them anyway.