

(7) Section 17G shall apply to this section as it applies to Part IVB.

[38A.01] Enactment history

This section was added pursuant to the Immigration (Amendment) Ordinance 1990 (75 of 1990) s 4, commencing 9 November 1990.

Subsection (2) was amended pursuant to LN 25 of 1996, commencing 10 January 1996, by substituting the words '\$350,000'.

Subsection (3) was amended pursuant to the Immigration (Amendment) Ordinance 1999 s 3 (6 of 1999), commencing 12 February 1999, by substituting the words 'this section' with the words 'subsection (2)'.

Subsections (4), (5), (6) and (7) were added pursuant to the Immigration (Amendment) Ordinance 1999 s 3 (6 of 1999), commencing 12 February 1999.

[38A.02] Strict liability

These provisions create offences of strict liability with a defence in respect of sub-s (2) for the construction site controller to prove that he took all practicable steps to prevent those prohibited from being on the site and a defence in respect of sub-s (4) for the construction site controller to prove that he took all practicable steps to prevent persons not lawfully employable from taking employment on the site. What was or was not practicable in respect of the conditions applicable to each particular site is a matter for the magistrate at trial to decide: see *Attorney General v China State Construction Engineering Corp* [1996] 1 HKC 53(CA).

For the test to determine whether an offence is one of strict liability; see *Attorney General v China State Construction Engineering Corp* (supra) at p 58, (*Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1 and *A-G v Fong Chin Yue* [1995] 1 HKC 21 applied).

[38A.03] Proof of status

The fact that a person is an illegal immigrant can now be proved by certificate under s 63A below. The fact that a person was not lawfully employable can be proved by certificate under sub-s (6).

[38A.04] All practicable steps to prevent

To give each word of the phrase its full meaning, the principle to be deduced from the authorities (*London County Council v Great Eastern Railway Co* [1906] 2 KB 312; *Re Affairs of Farquhar* [1943] 2 All ER 781; *Lee v Nursery Furnishings, Ltd* [1945] 1 All ER 387(CA); *Adsett v K & L Steelfounders & Engineers Ltd* [1953] 1 WLR 773(CA) (*Gregson v Hick Hargreaves & Co Ltd* [1955] 1 WLR 1252(CA) considered), was that the steps had to be feasible steps. This principle did not imply steps which were capable of being achieved regardless of expense, but meant steps which were capable of being carried out within known means or resources. The steps to be taken had to be 'possible and practicable' (*Knight v Demolition and Construction Co Ltd*

[1953] 2 All ER 508, [1953] 1 WLR 981 applied), not 'reasonably practicable'. The duty was not an absolute one, but it was higher than all reasonable steps or measures. Each case depends very much on its own facts. It is not possible for the court to give guidance on what actual steps would, generally, erect the defence: see *R v Shun Shing Construction & Engineering Co Ltd* [1993] 1 HKCLR 69.

[38A.05] Definitions

For 'owner', see s 2(1) above; and for 'person', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

39. Liability of captain of ship carrying persons seeking to land unlawfully

If a person on board a ship is seeking to land from the ship in contravention of section 38(1)(a), the captain of the ship shall be guilty of an offence and shall be liable—

- (a) on conviction on indictment, to a fine of \$600,000 and to imprisonment for 7 years; and
- (b) on summary conviction, to a fine of \$600,000 and to imprisonment for 3 years,

unless he proves that he did not know and had no reason to suspect that such person was seeking to land in contravention of section 38(1)(a).

[39.01] Enactment history

Paragraphs (a) and (b) were amended pursuant to LN 25 of 1996, commencing 10 January 1996, by substituting the words '\$600,000'.

[39.02] Consent to prosecute

A consent to the institution of proceedings may be required under the Crimes Ordinance (Cap 200) s 23C.

[39.03] Presumptions

If a person who may not land without the permission of an immigration officer is on board a ship proceeding through the waters of Hong Kong, he is deemed to be seeking to land in contravention of s 38(1)(a) above unless he proves that he falls within one of the four categories provided in s 62(2) below. The presumption under s 37K(2) above is not available to prove that a person is a captain of a ship in an offence under sub-s 37K(2).

[39.04] Proof of status

The status of a person as an illegal immigrant can be proved by a certificate under s 63A below.

[39.05] Forfeiture

Forfeiture of a ship used in a commission of an offence may be available

under this section: see ss 47, 48 and 49 below.

[39.06] Definitions

For 'captain', 'land', 'ship', see s 2(1) above; and for 'summary conviction', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

40. Aircraft passengers arriving without valid travel document

If a passenger who arrives in Hong Kong in an aircraft does not have a valid travel document, the owner of the aircraft and his agent shall be guilty of an offence and shall be liable on conviction to a fine at level 3.

[40.01] Enactment history

This section was amended by increasing the maximum fine to \$10,000, pursuant to the Immigration (Amendment) Ordinance 1993 (82 of 1993) s 11, commencing 26 November 1993. The section was further amended by substituting the words 'at level 3' pursuant to LN 25 of 1996, commencing 10 January 1996.

[40.02] A fine at level 3

A fine at level 3 is currently \$10,000: see the Criminal Procedure Ordinance (Cap 221) Sch 8.

[40.03] Definitions

For 'owner', 'passenger', 'travel document' and 'valid travel document', see s 2(1) above; for 'aircraft', see the Interpretation and General Clauses Ordinance (Cap 1) s 3; and for 'Hong Kong', see the Interpretation and General Clauses Ordinance (Cap 1) s 3 and Sch 8.

41. Breach of condition of stay

Any person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine of at level 5 and to imprisonment for 2 years.

[41.01] Enactment history

This section was amended pursuant to LN 25 of 1996, commencing 10 January 1996, by substituting the words 'at level 5'.

[41.02] Condition of stay

See s 11 above as to the grant of permission to land and to remain in Hong

Kong and the conditions of stay which can be imposed by the authority.

[41.03] In force

As to meaning, see [11.07] and [32.08] above.

[41.04] Unlawful employment

In a charge against a visitor for breach of a condition of stay by joining in the business of a company, as a director of that company, the prosecution must prove that the company in question is carrying on business and that the defendant has engaged in some activities relating thereto which are forbidden by virtue of the circumstances attached to his entry permit: see *R v Michael William G Taylor* [1976] HKLR 408.

Where a person has been given permission to be employed in particular employment, working for another employer without permission is a breach of the condition of stay: *R v Javier Deolito* (unreported, 16 January 1996; MA 1021/1995), [1996] HKCU 214. Also see *HKSAR v Tiongson Patricia Manalad* [2002] 1 HKLRD 681.

[41.05] Time limit

The time limit for the prosecution of this offence is 3 years from the date of the commission of such offence: see s 46(2) below.

[41.06] A fine at level 5

A fine at level 5 is currently \$50,000: see the Criminal Procedure Ordinance (Cap 221) Sch 8.

For sentencing principles for offences under this section: see *HKSAR v Li Chang Li* [2005] 1 HKLRD 864.

[41.07] Definitions

For 'contravene', see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

42. False statements, forgery of documents and use and possession of forged documents

- (1) Any person who makes or causes to be made—
- (a) to an immigration officer, immigration assistant or any other person lawfully acting under or in the execution of Part IB, II, III or IV of this Ordinance;
 - (b) in any document furnished to an immigration officer or immigration assistant pursuant to this Ordinance or a requirement made thereunder; or
 - (c) for the purpose of obtaining, whether for himself or any other person, any travel document, certificate of entitlement, entry permit, re-entry permit, certificate of

identity, document of identity, APEC business travel card, travel pass or Vietnamese refugee card, any statement or representation which he knows to be false or does not believe to be true shall be guilty of an offence.

(2) Any person who—

(a) (i) alters without lawful authority or forges; or
(ii) transfers to another without reasonable excuse, any travel document, certificate of entitlement, entry permit, re-entry permit, certificate of identity, document of identity, APEC business travel card, travel pass or Vietnamese refugee card or any document whatsoever issued, kept or made under or for the purposes of Part IB, II, III or IV of this Ordinance;

(b) uses for the purposes of Part IB, II, III or IV of this Ordinance any forged, false or unlawfully obtained or altered travel document, certificate of entitlement, entry permit, re-entry permit, certificate of identity, document of identity, APEC business travel card, travel pass, Vietnamese refugee card or other document;

(c) has in his possession—

(i) any forged, false or unlawfully obtained or altered travel document, certificate of entitlement, entry permit, re-entry permit, certificate of identity, document of identity, APEC business travel card, travel pass, or Vietnamese refugee card; or

(ii) any forged, false or unlawfully altered document whatsoever intended for use for the purposes of Part IB, II, III or IV of this Ordinance, shall be guilty of an offence.

(3) A travel document, certificate of entitlement, entry permit, re-entry permit, certificate of identity, document of identity, APEC business travel card, travel pass, or Vietnamese refugee card shall be deemed to be unlawfully obtained for the purposes of this section if any person made a false statement or representation for the purposes of or in connection with an application for the issue or renewal of the same.

(4) Any person who is guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to a fine of \$150,000 and to imprisonment for 14 years; and

(b) on summary conviction, to a fine at level 6 and to imprisonment for 2 years.

(5) In this section, “false” (假) means false in a material particular and “forged” (偽造) has the meaning assigned to that term by Part IX of the Crimes Ordinance (Cap 200).

[42.01] Enactment history

This section was amended pursuant to the Immigration (Amendment) (No 3) Ordinance 1997 (124 of 1997) s 5, deemed to be in force 1 July 1997.

Subsection (1) was amended pursuant to the Immigration (Amendment) Ordinance 1972 (57 of 1972) s 10, commencing 1 September 1972, by adding the words ‘, immigration assistant’ in sub-para (1)(a); and by substituting the words ‘an immigration officer or immigration assistant’ in sub-para (1)(b).

Subparagraphs (1)(c), (2)(b), (2)(c) and sub-s (3) were amended pursuant to the Immigration (Amendment) (No 2) Ordinance 1980 (62 of 1980) s 7, commencing 24 October 1980, by adding the words ‘re-entry permit, certificate of identity, document of identity or Vietnamese refugee card’. They were subsequently amended pursuant to the Immigration (Amendment) Ordinance 1999 (6 of 1999) s 4, commencing 12 February 1999, by adding the words ‘, APEC business travel card, travel pass’ after the words ‘document of identity’.

Subsection (2) was amended pursuant to the Immigration (Amendment) Ordinance 1986 (61 of 1986) s 3, commencing 31 October 1986, by substituting sub-para (1)(a).

Subsection (4) was amended pursuant to the Immigration (Amendment) (No 2) Ordinance 1980 (62 of 1980) s 7, commencing 24 October 1980, by increasing the fines in sub-s (4)(a) to \$50,000; and in sub-s (4)(b) to \$20,000.

Subparagraph (4)(a) was amended pursuant to the Immigration (Amendment) (No 3) Ordinance 1981 (66 of 1981) s 3, commencing 31 July 1981, by adding the words ‘14 years’.

Subparagraphs (4)(a) and (4)(b) were amended pursuant to LN 25 of 1996, commencing 10 January 1996, by substituting the words ‘\$150,000’ and ‘at level 6’ respectively.

Subsection (5) was amended pursuant to the Crimes (Amendment) Ordinance 1992 (49 of 1992) s 5, commencing 26 June 1992, by adding the words ‘and “forged” has the meaning assigned to that term by Part IX of the Crimes Ordinance (Cap 200)’.

[42.02] England

Cf the Aliens Order 1953 Art 25(3).

[42.03] Subsection (1)

Subparagraph (1)(a) does not apply to a set of circumstances in which

SCHEDULE 1

PERMANENT RESIDENTS OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

[sections 2(1) & 59A]

1. Interpretation

(1) In this Schedule, unless the context otherwise requires—

“Chinese citizen” (中國公民) means a person of Chinese nationality under the Nationality Law of the People’s Republic of China, as implemented in the Hong Kong Special Administrative Region pursuant to Article 18 of and Annex III to the Basic Law and interpreted in accordance with the Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region adopted at the 19th meeting of the Standing Committee of the National People’s Congress at the 8th National People’s Congress on 15 May 1996;

“new born infant” (初生嬰兒) means a child under the age of 12 months or a child who appears to the Director to be under the age of 12 months.

(2) The relationship of parent and child is taken to exist as follows—

- (a) of a parent and child, between a person and a child born to such person in or out of wedlock;
- (b) (Repealed)
- (c) of a parent and adopted child, between a parent and a child adopted only in Hong Kong under an order made by a Court in Hong Kong under the Adoption Ordinance (Cap 290).

(3) For an abandoned new born infant found within Hong Kong,—

- (a) a new born infant, who appears to the Director to be of Chinese descent, is taken, in the absence of evidence to the contrary, to be the legitimate child of a Chinese citizen who was a permanent resident of the Hong Kong Special Administrative Region at the time of birth of the child;
- (b) a new born infant, who appears to the Director to be not of Chinese descent, is taken, in the absence of evidence to the contrary, to be the legitimate child of a parent not of Chinese nationality who had the right of abode in Hong Kong under paragraph 2(d) at the time of birth of the child.

(4) For the purposes of calculating the continuous period of 7 years in which a person has ordinarily resided in Hong Kong, the period is reckoned to include a continuous period of 7 years—

- (a) for a person under paragraph 2(b), at any time before or after the establishment of the Hong Kong Special Administrative Region; and
 - (b) for a person under paragraph 2(d), before or after the establishment of the Hong Kong Special Administrative Region but immediately before the date when the person applies to the Director for the status of a permanent resident of the Hong Kong Special Administrative Region.
- (5) A person is settled in Hong Kong if—
- (a) he is ordinarily resident in Hong Kong; and
 - (b) he is not subject to any limit of stay in Hong Kong.

2. Permanent resident of the Hong Kong Special Administrative Region

A person who is within one of the following categories is a permanent resident of the Hong Kong Special Administrative Region—

- (a) A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region.
- (b) A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the Hong Kong Special Administrative Region.
- (c) A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b).
- (d) A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.
- (e) A person under 21 years of age born in Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region in category (d) before or after the establishment of the Hong Kong Special Administrative Region if at the time of his birth or at any later time before he attains 21 years of age, one of his parents has the right of abode in Hong Kong.
- (f) A person other than those residents in categories (a) to (e), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

3. Establishing permanent residence under paragraph 2(d)

- (1) For the purposes of paragraph 2(d), the person is required—
- (a) to furnish information that the Director reasonably requires to satisfy him that the person has taken Hong Kong as his place of permanent residence. The information may include the following—
 - (i) whether he has habitual residence in Hong Kong;
 - (ii) whether the principal members of his family (spouse and minor children) are in Hong Kong;
 - (iii) whether he has a reasonable means of income to support himself and his family;
 - (iv) whether he has paid his taxes in accordance with the law;
 - (b) to make a declaration in the form the Director stipulates that he has taken Hong Kong as his place of permanent residence; the declaration for a person under the age of 21 years must be made by one of his parents or by a legal guardian; and
 - (c) to be settled in Hong Kong at the time of the declaration.
- (2) A person claiming to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) does not have the status of a permanent resident in the Hong Kong Special Administrative Region until he has applied to the Director and the application has been approved by the Director.
- (3) For the purposes of paragraph 2(d), a person is taken to have entered Hong Kong on a valid travel document—
- (a) if he entered Hong Kong before 1 July 1997 with an expired travel document or with a travel document that was not a valid travel document but was permitted to remain by an immigration officer or an immigration assistant; or
 - (b) if he was born in Hong Kong and was permitted to remain in Hong Kong by an immigration officer or an immigration assistant.

4. Establishing permanent residence under paragraph 2(e)

- (1) For the purposes of paragraph 2(e), the person on attaining the age of 21 years ceases to be a permanent resident of the Hong Kong Special Administrative Region and may

apply to the Director for the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) at any time.

- (2) Section 2AAA applies in relation to a person who ceases to have the status of a permanent resident of the Hong Kong Special Administrative Region under this paragraph.

5. Establishing permanent residence under paragraph 2(f)

- (1) For the purposes of paragraph 2(f), the person is required—
- (a) to furnish information that the Director may reasonably require to determine whether that person had the right of abode only in Hong Kong immediately before the establishment of the Hong Kong Special Administrative Region; and
 - (b) to make a declaration that he had the right of abode only in Hong Kong immediately before the establishment of the Hong Kong Special Administrative Region; the declaration for a person under the age of 21 years must be made by one of his parents or by a legal guardian.
- (2) If the person claims that he had no right of abode in a place that the Director reasonably believes that he had, the onus of proving that he did not have the right of abode in the place lies on the person.
- (3) A person under 21 years of age born in Hong Kong on or after 1 July 1997 to a parent who is a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) at the time of the birth of the person is taken to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) if, but for this subparagraph, the person has no right of abode in any place including Hong Kong.
- (4) The person on attaining the age of 21 years ceases to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) and may apply to the Director for the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) at any time.
- (5) Section 2AAA applies in relation to a person who ceases to have the status of a permanent resident of the Hong Kong Special Administrative Region under this paragraph.

6. Transitional

- (1) A person who is not of Chinese nationality and who was a permanent resident of Hong Kong before 1 July 1997 is taken to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) and exempt from the requirements under paragraph 3 if—
- he was settled in Hong Kong immediately before 1 July 1997;
 - after he ceased to be settled in Hong Kong immediately before 1 July 1997 he returns to settle in Hong Kong within the period of 18 months commencing on 1 July 1997; or
 - after he ceased to be settled in Hong Kong immediately before 1 July 1997 he returns to settle in Hong Kong after the period of 18 months commencing on 1 July 1997 but only if he has not been absent from Hong Kong for a continuous period of not less than 36 months.
- (2) A person who is a Chinese citizen and was a Hong Kong permanent resident immediately before 1 July 1997 under this Ordinance as then in force shall, as from 1 July 1997, be a permanent resident of the Hong Kong Special Administrative Region as long as he remains a Chinese citizen.

7. Loss of the status as a permanent resident

A permanent resident of the Hong Kong Special Administrative Region loses the status of such resident only if—

- being a person falling within the category in paragraph 2(d) or (e) has been absent from Hong Kong for a continuous period of not less than 36 months since he ceased to have ordinarily resided in Hong Kong; or
- being a person falling within the category in paragraph 2(f), has been absent from Hong Kong for a continuous period of not less than 36 months after he obtained the right of abode in any place other than Hong Kong and has ceased to have ordinarily resided in Hong Kong.

[S1.01] Enactment history

This Schedule was substituted pursuant to the Immigration (Amendment) (No 2) Ordinance 1987 (31 of 1987), commencing 1 July 1987. This schedule was subsequently substituted pursuant to the Immigration (Amendment) (No 2) Ordinance 1997 (122 of 1997) s 5, commencing 1 July 1997.

The definition of the words 'Chinese citizen' in sub-para 1(1) was substituted

pursuant to the Adaptation of Laws (Nationality Related Matters) Ordinance 1998 (28 of 1998) s 2(2), deemed to be in force 1 July 1997.

Subparagraph 1(2) was amended pursuant to the Resolution of the Legislative Council by LN 192 of 1999 16 July 1999 by repealing sub-subparas (a) and (b) and substituting sub-subpara (a).

Subparagraph 2(a) was substituted pursuant to the Resolution of the Legislative Council by LN 192 of 1999 on 16 July 1999 by the words 'A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region.' It was again substituted pursuant to the Resolution of the Legislative Council by LN 84 of 2002 on 17 May 2002.

Subparagraph 2(c) was substituted pursuant to the Resolution of the Legislative Council by LN 192 of 1999 on 16 July 1999.

Subparagraphs 4(2) and 5(5) were amended pursuant to the Adaptation of Laws (Nationality Related Matters) Ordinance 1998 (28 of 1998) s 2(2) deemed to be in force 1 July 1997, by substituting the words '2AAA applies in relation' for the words '7A applies'.

Subparagraph 6(2) was substituted pursuant to the Adaptation of Laws (Nationality Related Matters) Ordinance 1998 (28 of 1998) s 2(2), deemed to be in force 1 July 1997.

The heading of para 7 was amended pursuant to the Adaptation of Laws (Nationality Related Matters) Ordinance 1998 (28 of 1998) s 2(2), deemed to be in force 1 July 1997, by substituting the words 'status as a permanent resident' for the words 'right of abode'.

Paragraph 7 was amended pursuant to the Adaptation of Laws (Nationality Related Matters) Ordinance 1998 (28 of 1998) s 2(2), deemed to be in force 1 July 1997, by substituting the words 'status of such resident' for the words 'right of abode in Hong Kong'.

[S1.02] Born out of wedlock

The Court of Final Appeal have held that on a proper construction of the Basic Law Art 24(2), the provision covers persons born in as well as out of wedlock. It held that para 1(2)(b) of the Schedule as originally enacted was unconstitutional to that extent and has accordingly been severed. The Court directed that the sub-subpara read '(b) of a father and child, between a man and a child born to him in wedlock or out of wedlock;': see *Ng Ka Ling & Ors v Director of Immigration* [1999] 1 HKLRD 315, [1999] 1 HKC 291(CFA). Subparagraph 1(2) was subsequently amended pursuant to the Resolution of the Legislative Council (see above).

[S1.03] Not subject to any limit of stay in Hong Kong

The Court of Final Appeal has left open, in respect of para 1(5) the question of whether or not it is constitutional to have a requirement for the Director of Immigration to exercise a discretion to lift any limit on the person's stay: see *Fateh Muhammad v Commissioner of Registration* [2001] 2 HKLR 659.