

These provisions apply to all detention centres designated under s 13H and the places of detention used under s 35(1). The power to transfer between detention centres can be exercised for the purposes of good management and in the interests of security: see *Re Tran Quoc Cuong* [1991] 2 HKLR 312, [1991] HKCU 434 (considering *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1990] 3 WLR 1210 and *Williams v Home Office (No 2)* [1981] 1 All ER 1211).

[35.04] Subsidiary legislation

The Immigration (Places of Detention) Order (Cap 115B) and the Immigration (Treatment of Detainees) Order (Cap 115E) have been made under the provisions of sub-s (1). See the Appendix below.

[35.05] Definitions

For 'immigration assistant' and 'immigration officer', see s 2(1) above; for 'court', 'Ordinance', 'police officer' and 'provided', see the Interpretation and General Clauses Ordinance (Cap 1), s 3; and for 'Governor', see the Interpretation and General Clauses Ordinance (Cap 1), Sch 8.

36. Recognizance as alternative to detention

- (1) An immigration officer and any police officer may require a person—
 - (a) who is detained under section 27, 32 or 34 or 37ZK; or (*Amended 48 of 1992 s. 11; 88 of 1997 s. 15; 23 of 2012 s. 6*)
 - (b) who, being liable to be detained under any of those sections, is not for the time being so detained,
 to enter into a recognizance in the prescribed form in such amount, and with such number of sureties and subject to such conditions as the immigration officer or police officer may reasonably require or impose; and where a person who is so detained enters into such a recognizance he may be released. (*Amended 23 of 2012 s. 6*)
- (1A) Without limiting subsection (1), the conditions of a recognizance imposed under that subsection may include a condition that the person must—
 - (a) report in person at the time and intervals, and at the office or police station, specified by the immigration officer or police officer;
 - (b) notify an immigration officer or police officer in writing of any change in the person's residential or

- correspondence address as soon as practicable after the change;
- (c) (if the person is a claimant as defined by section 37U(1)) attend interviews scheduled by an immigration officer under section 37ZB(1)(b).
(Added 23 of 2012 s. 6)
- (1B) An immigration officer or police officer may vary any condition of a recognizance imposed under subsection (1).
(Added 23 of 2012 s. 6)
- (2) A person may be detained under section 27, 32, 34 or 37ZK notwithstanding that he has entered into a recognizance pursuant to a requirement under subsection (1); and where such person is so detained otherwise than in consequence of or following a breach of the recognizance, the recognizance shall thereupon cease to have effect. (Amended 48 of 1992 s. 11; 88 of 1997 s. 15; 23 of 2012 s. 6)
- (3) If it appears to a magistrate on the application of the Director that any person may become liable to be detained under section 32(2), the magistrate may order that person to enter into a recognizance in the prescribed form in such amount and with such number of sureties as he thinks fit. (Added 52 of 1976 s. 3)
- (4) The magistrate may order any person who wilfully fails to comply with an order under subsection (3) to be imprisoned for 6 months. (Added 52 of 1976 s. 3)
- (5) A recognizance entered into pursuant to subsection (3) shall cease to have effect—
- (a) where the person who has entered into the recognizance has been detained under section 32(2);
 - (b) where the person who has entered into the recognizance has a removal order or deportation order made against him;
 - (c) where it is decided that a removal order will not be made in respect of him;
 - (d) upon the expiration of 6 months from the date on which the recognizance was entered into or upon the expiration of the period for which the recognizance has been extended under subsection (6),
whichever is the earlier. (Added 52 of 1976 s. 3)
- (6) A magistrate may, on application by the Director prior to the expiration of a recognizance entered into pursuant to subsection (3), extend the recognizance for such period not

exceeding 6 months as the magistrate thinks fit. (*Added 52 of 1976 s. 3*)

[36.01] Enactment history

This section was amended pursuant to the Immigration (Amendment) Ordinance 1992 (48 of 1992), s 11, commencing 4 June 1992, by deleting the words ‘28,’ from sub-ss (1)(a) and (2). This section was later amended pursuant to the Immigration (Amendment) Ordinance 1997 (88 of 1997), s 15, commencing 30 June 1997, by deleting the word ‘30,’ from sub-ss (1)(a) and (2).

Subsections (3), (4), (5) and (6) were added pursuant to the Immigration (Amendment) Ordinance 1976 (52 of 1976), s 3, commencing 9 July 1976.

[36.02] General note

The additions to this section in 1976 give the Director power to apply to the courts for a person who is potentially the subject of a removal order to be placed on recognisance during the period of investigation. The need for such additions arose from cases occurring which took longer than the maximum time allowed for detention under ss 26 and 32 above for the investigation to be completed and to obtain re-entry facilities.

[36.03] Recognisance not authority to stay

A recognisance does not constitute an authority by the Director to remain in Hong Kong within the meaning of s 38; in other words, a recognisance does not by itself protect a person from prosecution for offences under s 38. In the case of *non-refoulement* claimants, their protection from prosecution pending determination of their claims is provided in the form of the Director’s prosecution policy, see [38.09]: *Faval Shahid v Director of Immigration* [2010] 5 HKC 51, [2010] 4 HKLRD 12 (CA).

On the other hand, a recognisance in the case of a *non-refoulement* claimant contained information which the Director could use to keep track of the claimant, and was an important identity document comparable to an identity card. Offences for misuse of identity cards could be laid for similar misuse of recognisances, and the principles and policy considerations for identity card offences would be highly relevant: *HKSAR v Mohomed Rahoof Mohomed Sajahan* [2016] 4 HKC 477 (CFI).

[36.04] Effect of reasons that should not have been taken into consideration

If the reasons advanced on behalf of the Director of Immigration for refusal of recognisance are such that he ought not to have taken them into consideration, then his refusal is unlawful even though the detention of the applicant was lawful *ab initio*: see *Tolentino v Custodian of Victoria Immigration Centre* [1993] 1 HKC 19.

For the jurisdiction on the part of an immigration officer to require recognizance to be given, and the issue of the validity of recognisance that imposes invalid conditions: see *V v Director of Immigration* (unreported CACV 9/2006).

[36.05] Subsection (1): Prescribed form

As to the prescribed form of recognisance, see the Immigration Regulations (Cap 115A), reg 10 and Sch 1, Form 8 in the Appendix below.

[36.06] Subsection (3): Prescribed form

As to the prescribed form of recognisance, see the Immigration Regulations (Cap 115A), reg 10 and Sch 1, Form 8A in the Appendix below.

[36.07] Definitions

For 'deportation order', 'Director', 'immigration officer' and 'removal order', see s 2(1) above; and for 'magistrate', 'month', 'police officer' and 'prescribed', see the Interpretation and General Clauses Ordinance (Cap 1), s 3.

37. Recovery of cost of maintaining person detained under section 32(1)

If a person who is detained under section 32(1) pending his removal from Hong Kong under section 18 arrived in Hong Kong in a ship or aircraft, the Director of Immigration may require the owner of the ship or aircraft or his agent to pay to the Government the expense incurred by it in maintaining that person during his detention.

[37.01] General note

See also s 24(5) above as to expenses relating to a removal of a person under the provisions of s 24(1) above; and s 25(5), (5A) and (6) above as to expenses relating to a voyage from Hong Kong and the maintenance until departure of a person in respect of whom a removal order or a deportation order is in force.

[37.02] Definitions

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