

J. Y. Interpretation No.454 (May 22, 1998) *

ISSUE: Is the regulation which provides that an application for long-term residency and household registration submitted by a national residing outside of the Taiwan area and not being listed on the Taiwan household registry upon his/her entry into the Taiwan area may be denied, revoked or cancelled after being granted, and he/she may be deported after such denial or revocation of registration consistent with the people's freedoms of residence and migration that are protected by the Constitution?

RELEVANT LAWS:

Articles 10 and 23 of the Constitution (憲法第十條、第二十三條); Article 8 of the Household Registration Act (戶籍法第八條); Article 3, Paragraph 1, of the National Security Act (國家安全法第三條第一項); Articles 10, Paragraph 1, 11, 12 and 14 of the Act Governing Relations between People of the Taiwan Area and Mainland Area (臺灣地區與大陸地區人民關係條例第十條第一項、第十一條、第十二條、第十四條); Articles 11, 12 and 14 of the Act Governing Relations with Hong Kong and Macau (香港澳門關係條例第十一條、第十二條及第十四條); Guideline 1, 3 and 7 of Guidelines for the Nationals' Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country (國

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人入境短期停留長期居留及戶籍登記作業要點第一點、第三點、第七點)；

KEYWORDS:

freedom of residence (居住自由), freedom of movement (遷徙自由), household registry (戶籍), temporary entry (短期停留), long-term residency (長期居留), order to exit within a specified period (限期離境). **

HOLDING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have the freedom of residence and migration, is to protect the people's freedom to choose and change their residence and to travel, including the right to exit or enter the country. Any restriction to the aforesaid freedom or right of the people must conform to the degree of necessity stipulated in Article 23 of the Constitution, and must be stipulated by the law. The Ministry of the Interior Ordinance No.13557 proclaimed on April 20, 1994, which amended the "Guidelines for the Nationals' Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country," provides,

解釋文：憲法第十條規定人民有居住及遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括出境或入境之權利。對人民上述自由或權利加以限制，必須符合憲法第二十三條所定必要之程度，並以法律定之。中華民國八十三年四月二十日行政院台內字第一三五五七號函修正核定之「國人入境短期停留長期居留及戶籍登記作業要點」第七點規定（即原八十二年六月十八日行政院台內字第二〇〇七七號函修正核定之同作業要點第六點），關於在台灣地區無戶籍人民申請在台灣地區長期居留得不予許可、撤銷其許可、撤銷或註銷其戶籍，並限期離境之規定，係對人民居住及遷徙自由之重大限制，應有法律或法律明確授權之依據。除其中第一項第三款及第二項之相關規定，係

in Guideline 7 (originally Guideline 6 of Ordinance No.20077 of the said Ministry amended and proclaimed on June 18,1993), that the government may refuse to grant long-term residency permits, cancel such permits, or cancel or deregister household registration to nationals not listed on the household registry of Taiwan. These are major restraints on the people's freedom of residence and migration, and thus must be authorized by the law or by authorities legally empowered to do so. With the exception of the provisions in Paragraph 1, Subparagraph 3, and Paragraph 2 which are necessary for the enforcement of special laws such as the National Security Act, the remaining provisions and provisions in Paragraph 2 concerning household registry, and Paragraph 3 concerning deportation upon expiry of visa cannot be reconciled with the objectives of the said constitutional principle, and thus shall become void within one year from the date of this Interpretation. With regard to nationals residing in mainland China, Hong Kong and Macau who wish to apply for a residency permit and household registration in Taiwan,

為執行國家安全法等特別法所必要者外，其餘各款及第二項戶籍登記之相關規定、第三項關於限期離境之規定，均與前開憲法意旨不符，應自本解釋公布之日起，至遲於屆滿一年時失其效力。關於居住大陸及港澳地區未曾在台灣地區設籍之人民申請在台灣地區居留及設定戶籍，各該相關法律設有規定者，依其規定，併予指明。

they shall be governed by the relevant laws, if any.

REASONING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have the freedom of residence and migration, is to protect the people's freedom to select their residence, to change their residence and to travel, including the right to exit or enter the country. The degrees of restriction on the right of entry and residence for nationals listed on Taiwan's household registry, those residing overseas or residing in Hong Kong or Macau may differ reasonably, provided such restriction conforms to the principle of necessity stipulated in Article 23 of the Constitution, and is provided for by law or by rules prescribed by administrative bodies with the express authorization from legislative bodies. Article 8 of the Household Registration Act, amended and promulgated on July 17, 1973, states that: "household registration guidelines for nationals of the Republic of China who reside overseas shall be set by the Ministry of the Interior along with the Ministry of Foreign Affairs

解釋理由書：憲法第十條規定人民有居住及遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括出境或入境之權利。對人民入境居住之權利，固得視規範對象究為台灣地區有戶籍人民，僑居國外或居住港澳等地區之人民，及其所受限制之輕重而容許合理差異之規範，惟必須符合憲法第二十三條所定必要之程度，並以法律定之，或經立法機關明確授權由行政機關以命令定之。六十二年七月十七日修正公布之戶籍法第八條規定：「僑居國外之中華民國人民，其戶籍登記辦法，由內政部會同外交部及僑務委員會定之」（現已刪除），乃立法機關本於實際需要授權行政機關就戶籍登記之事項為補充規定。行政機關據此訂定之行政命令應遵守授權之目的及範圍，不得牴觸母法或對人民之權利增加法律所無之限制。惟內政部並未依據上開授權訂定辦法，送請立法院查照。八十二年六月十八日行政院台內字第二〇〇七七號函修正核定，同年六月二十六日實施之「國人入境短期停留長期居留及戶籍登記作業要點」第六點第一項規定：「得在台

and the Overseas Chinese Affairs Commission” (which is abolished as of this date). It is a supplementary provision to the household registration guidelines and has been introduced by administrative bodies with authorization granted by legislative bodies based on actual needs. Administrative orders prescribed by administrative bodies shall fall within the objective and scope of such authorization, and shall not place excessive restrictions on the people’s rights in violation of the empowering statute. However, the Ministry of the Interior had not furnished their guidelines, which prescription was authorized by the abovementioned Article, to the Legislative Yuan for approval. Guideline 6, Paragraph 1, of the Ministry of the Interior Ordinance No. 20077, amended and proclaimed on June 18, 1993, which was entitled “Guidelines for the Nationals’ Temporary Entry into, Long-term Residence in, and Listing on the Household Registry of the Country,” provides that: “Nationals who are eligible for long-term residency or filing application for household registration in the Taiwan region shall have their eligibility taken away,

灣地區長期居留或申請戶籍登記人民，有左列情形之一者，應不予許可，並撤銷其居留許可及限期離境。(一)有事實足認為有妨害國家安全或社會安定之重大嫌疑者。(二)曾有犯罪紀錄者。(三)未經許可而入境者。(四)以偽造、變造證件或冒用身分矇混申請或入境者。(五)有事實足認其為通謀而為虛偽之結婚或收養者。」同點第二項：「前項各款人民如已辦妥戶籍登記者，得予撤銷，並限期離境。」八十三年四月二十日行政院台內字第一三五五七號函修正核定，同年五月十三日實施之同作業要點第七點第一項規定：「在臺灣地區無戶籍人民申請在臺灣地區長期居留，有左列情形之一者，得不予許可：(一)有事實足認為有妨害國家安全或社會安定之重大嫌疑者。(二)曾有犯罪紀錄者。(三)未經許可入境者。(四)以偽造、變造證件或冒用身分申請或入境者。(五)曾協助他人非法入出境，或身分證件曾提供他人持以非法入出境者。(六)有事實足認其係通謀而為虛偽之結婚或收養者。(七)健康檢查不合格者。(八)曾從事與許可目的不符之活動或工作者。(九)曾逾期停留者。」同點第二項：「在臺灣地區無戶籍人民申請在臺灣地區戶籍登記，有前項第一款至第六款情

their residency permit cancelled and be ordered to exit the country within a specified time, if they fall under any of the following categories: (1) there is evidence suspecting that the person poses a threat to national security or social stability; (2) persons with criminal records; (3) unauthorized entrants; (4) persons who have applied for entry or entered using forged or altered documentation or fake identification; (5) there is evidence suspecting that the person participated in a fraudulent marriage or adoption scheme.” Paragraph 2 of the same Guideline provides: “In the event nationals falling under the aforementioned categories are registered on the household registry, such registration shall be cancelled and they shall be ordered to exit the country within a specified period.” The Ministry of Interior Ordinance No.13557, which was proclaimed on April 20, 1994, and became effective on May 13 of the same year, amended the said Guidelines and provided in Guideline 7, Paragraph 1, that: “Applications by Taiwanese nationals for long-term residency permits in the Taiwan region may be refused if any of the following applies:

形之一者，得不予許可。但依第六點第一項第二款至第五款申請者，不在此限。」同點第三項：「有第一項第一款至第七款及前項得不予許可情形之人民，其已許可者，由內政部警政署入出境管理局（以下簡稱境管局）撤銷其許可，已辦妥戶籍登記者，由境管局通知戶政機關撤銷或註銷其戶籍；已入營服役者，由境管局通知原徵集之役政機關，轉報國防部解除其徵集。並限期離境。」同點第四項：「第一項第八款及第九款情形，其不予許可長期居留期間自其出境之日起算為一年。」現行作業要點第七點第一項所稱「在台灣地區無戶籍人民」，依同作業要點第三點，係指(一)僑居國外或居住港澳地區未曾在台灣地區設有戶籍之人民。(二)取得我國國籍之人民而言。同作業要點第七點第一項第三款及第二項規定對於未經許可入境者，申請長期居留及戶籍登記，得不予許可，係為執行國家安全法第三條第一項之規定所必要，與台灣地區與大陸地區人民關係條例第十條第一項、香港澳門關係條例第十一條、第十二條規定意旨亦屬相符，與憲法尚無牴觸。又第七點第一項第一款、第二款、第四款至第九款之情形，均欠缺法律或法律授權之依據，即逕以命令限制人民居住

(1) there is evidence suspecting that the person poses a threat to national security or social stability; (2) persons with criminal records; (3) unauthorized entrants; (4) persons applying for entry or having entered using forged or altered documentation or fake identification, (5) persons who have assisted in the illegal entry of another or provided their identification documents to another for the purpose of illegal entry, (6) there is evidence suspecting that the person participated in a fraudulent marriage or adoption scheme, (7) persons who fail the health examination, (8) persons who have participated in activities or work contradictory to the permitted objectives, and/or (9) persons who have overstayed their visas.” Paragraph 2 of the same Guideline provides: “Applications by nationals, who are not listed on the household registry in the Taiwan region, for listing on the household registry may be refused if any of the foregoing Subparagraphs apply. However, applicants mentioned in Guideline 6, Paragraph 1, Subparagraphs 2 to 5 are not bound by this limitation.” Paragraph 3 of the said Guideline states: “Approvals

及遷徙之自由，同點第二項之戶籍登記相關規定及第三項關於限期離境之規定，除台灣地區與大陸地區人民關係條例第十四條、香港澳門關係條例第十四條設有強制出境之規定外，同作業要點上開規定對於在台灣地區無戶籍人民一概適用，亦屬欠缺法律之依據，與憲法保障人民居住遷徙自由之意旨不符，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。關於居住大陸及港澳地區未曾在台灣地區設籍之人民申請在台灣地區居留及設定戶籍，各該相關法律設有規定者，依其規定，併予指明。

granted to nationals to whom any of Subparagraphs 1 to 7 of Paragraph 1 and the aforementioned Paragraph apply shall be cancelled by the Bureau of Immigration of the Ministry of the Interior (the “Bureau”), and the Bureau shall deregister such nationals’ listing on the household registration. In the event such nationals have joined the armed forces, the Bureau shall notify the original conscription authorities and refer the matter to the Ministry of National Defense for cancellation of the conscription. The said nationals shall be ordered to leave the country within a specified period. Paragraph 4 of the same Guideline states: “The non-permissive long-term residency period referred to in Paragraph 1, Subparagraphs 8 and 9, is one year from the date of exit.” “Nationals not listed on the household registry of the Taiwan region” referred to in Guideline 7, Paragraph 1, of the current Guidelines means, according to Guideline 3 of the same Guidelines, (1) nationals residing overseas or in Hong Kong or Macau who have never had a household registry; or (2) people who have become citizens of the Republic of China. In the same Guide-

lines, Guideline 7, Paragraph 1, Subparagraph 3, and Paragraph 2 provide that applications for long-term residency and household registration by illegal entrants may be withheld. This is necessary for the execution of Article 3, Paragraph 1, of the National Security Act, and is congruent with the objectives of the provisions in Article 10, Paragraph 1, of the Act Governing Relations between People of the Taiwan Area and Mainland Area and Articles 11 and 12 of the Act Governing Relations with Hong Kong and Macau, and does not breach the Constitution. Further, Guideline 7, Paragraph 1, Subparagraphs 1, 2, and 4 to 9, lack the legal foundation and authority of a law; hence, they are merely orders restricting the people's freedom to residence and movement. The relevant provisions regarding household registration in Paragraph 2 of the said Guideline and the provisions concerning orders to exit within a specified period as stipulated in Paragraph 3, except for the deportation provision found in Article 14 of the Act Governing Relations between People of the Taiwan Area and Mainland Area and Article 14 of the Act Governing

Relations with Hong Kong and Macau, which purport to govern all nationals not listed on the Taiwan household registry, lack legal foundation and are in conflict with the constitutionally protected residence and movement rights of the people. The said provisions shall become void within one year from the date of this Interpretation. With regard to nationals residing in mainland China, Hong Kong and Macau who wish to apply for a residency permit and household registration in Taiwan, they shall be governed by the relevant laws, if any.

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。