

立法會
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Tel : 2869 9253
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From : Clerk to Bills Committee
To : Hon James TO Kun-sun (Chairman)
Dr Hon David CHU Yu-lin, JP
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon Andrew WONG Wang-fat, JP
Dr Hon Philip WONG Yu-hong
Hon Howard YOUNG, JP
Hon LAU Kong-wah
Hon Miriam LAU Kin-ye, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, JP
Hon Henry WU King-cheong, BBS, JP
Hon LEUNG Fu-wah, MH, JP
Hon Audrey EU Yuet-mee, SC, JP

Bills Committee on Immigration (Amendment) Bill 2001

Meeting on 30 September 2002

At the last meeting, a member requested for information on discussion on the phrase "ordinarily resident" by a previous Bills Committee.

2. I attach for members' reference the following extracts of documents from the Bills Committee on Legal Practitioners (Amendment) Bill 1999 which relate to its deliberations on a proposal to admit a person who satisfies certain residency requirement to be a barrister -

Appendix I - Extract from the Administration's response dated 10 March 2000 on the meaning of various expressions relating to residency requirement (the Annexures are not attached);

Appendix II - Extract from the minutes of meeting of the Bills Committee on 13 March 2000 on discussion of the Administration's response at Appendix I;

Appendix III - Extract from the Administration's response dated 29 March 2000 on case law relevant to "has resided in Hong Kong"; and

Appendix IV - Extract from the minutes of meeting of the Bills Committee on 31 March 2000 on discussion of the Administration's response at Appendix III.

(Mrs Percy MA)
Clerk to Bills Committee

Encl

c.c. Hon LEUNG Yiu-chung (Non-Bills Committee Member)
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Extract from the Administration's response dated 10 March 2000

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Question raised by the Bills Committee

On the Administration's letter dated 15 February 2000 relating to new section 27(2)(b) on admission of barristers, to advise

- (i) **the meaning or definition of the following:**
- **“permanent resident”,**
 - **“has resided in Hong Kong”,**
 - **“has been ordinarily resident in Hong Kong”,**
 - **“has been physically present in Hong Kong”, and**
- (ii) **whether the above expressions have been used in other laws relating to admission of professionals, apart from admission of solicitors under section 4 of the Legal Practitioners Ordinance.**

Response of the Administration

“Has resided in Hong Kong” for at least three consecutive months immediately before the date of application indicates continuous residence, i.e. without departing from Hong Kong, but without any indication that the residence is of a continuing or permanent nature. We have looked at the term in the context of the Adoption Ordinance and concluded in that context that even quite short absences of Hong Kong could break a period of continuous residence.

“Has been ordinarily resident in Hong Kong” is a term for which there is a common law interpretation derived from the House of Lords' decision in *R v. Secretary of State for Education Ex parte Shah*. The definition is set out in the Immigration Department's Right of Abode Booklet as follows-

“A person is ordinarily resident in Hong Kong if he remains in Hong Kong legally, voluntarily and for a settled purpose (such as for education, business, employment or residence etc.), whether of short or long duration.”

“Has been physically present in Hong Kong” – “physically” is clearly tautologous, a natural person can only be present “physically”. Mere presence is in both nationality and tax legislation and is usually only defined to make it clear whether days on which a person is present for only part of the day is to be included or excluded. The present section 4(1A)(d) suggests to me that only whole days are to be counted (“for at least 180 days”); for part days to count reference would be made to presence in Hong Kong “on at least 180 days”. The meaning of being “present in Hong Kong” is self-evident and necessarily connotes actual presence but without any quality attached to that presence.

- (i) The expression “permanent resident of the Hong Kong Special Administrative Region” is defined in Schedule 1 of the Immigration Ordinance (Cap.115) which is at Annex C.
- (ii) According to our research, no reference is made to the expressions of “physically present in Hong Kong” or “permanent resident” in relation to the admission of professionals. Tables of the relevant provisions in Ordinances having references to the expressions “ordinarily resident” and “resided” are at Annex D. The relevant provisions of the Ordinances with references to “ordinarily resident” and “resided” are at Annex E and F respectively.

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Extract from minutes of meeting on 13 March 2002

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References to "permanent resident"; "has resided in Hong Kong"; "has been ordinarily resident in Hong Kong"; and "has been physically present in Hong Kong"

20. DSG said that the expression "permanent resident of the Hong Kong Special Administrative Region" was defined in Schedule 1 to the Immigration Ordinance. The concept of permanent resident, however, did not come into play in the requirements for admission of barristers under the new section 27(2)(b) as proposed in clause 7.

21. DSG further advised that either one of the three requirements specified in the new section 27(2)(b) was sufficient for the purpose of fulfilling the residence requirement for admission as barristers. The requirements followed that for the admission of solicitors. He explained that "has resided in Hong Kong" for at least three consecutive months immediately before the date of application indicated continuous residence, i.e. without departing from Hong Kong, but without any indication that the residence was of a continuing or permanent nature. The Administration was of the view that even quite short absences from Hong Kong could break a period of continuous residence. "Has been ordinarily resident in Hong Kong", on the other hand, was a term for which there was a common law interpretation. The definition was set out in the Immigration Department's Right of Abode Booklet as follows -

"A person is ordinarily resident in Hong Kong if he remains in Hong Kong legally, voluntarily and for a settled purpose (such as for education, business, employment or residence etc.), whether of short or long duration."

22. Mr Albert HO asked what was the difference between "reside" and "physically present".

23. In response, DSG said that whereas "reside" referred to a particular purpose of stay, "physically present" connoted actual presence without attaching any quality to that presence. He drew members' attention to the extracts from the relevant provisions in the Ordinances having references to "ordinarily resident" and "reside" or "residing" (Annex E and F of LC Paper No. CB(2)1354/99-00(01)) relating to admission and registration of professionals. Some examples were -

Section 20(2) of Architects Registration Ordinance

"For the purposes of subsection (1)(c), if a registered architect has failed to reside in Hong Kong for a period of 2 years or more, the Board shall not consider him to be ordinarily resident in Hong Kong."

Section 19(2) of Engineers Registration Ordinance

"For the purposes of subsection (1)(c), if a registered professional engineer has failed to reside in Hong Kong for a period of 2 years or more, the Board shall not consider him to be ordinarily resident in Hong Kong."

Section 19(2) of Housing Managers Registration Ordinance

"For the purposes of section (1)(c), if it appears to the Board that a registered professional housing manager has been absent from Hong Kong for a continuous period of 2 years or more, the Board need not consider him to be ordinarily resident in Hong Kong."

24. DSG pointed out that there was no general statutory definition of "reside" in the Ordinances. He undertook to conduct a research to see if there was case law relevant to clarifying the meaning of the expression "has reside in Hong Kong".

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Extract from the Administration's response dated 29 March 2000

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(d) Case law relevant to “has resided in Hong Kong”

The authorities are helpfully summarised in Reed (Inspector of Taxes) v Clark [1986] Ch 1, per Nicholls J. The following case law cited by Nicholls J is noted below –

- It is now well settled that where a person resides is essentially a question of fact and degree: Inland Revenue Commissioners v Lysaght [1928] AC 234.
- “During the year of assessment ... this gentleman was not residing in this country at all. I do not think that that fact taken by itself would be by any means conclusive, because if he had been travelling, or had been a mariner and had been absent the whole of the year, I do not think that would have prevented him from having a residence in this country”: Turnbull v Foster (1904) 6 T.C. 206, 210, per Lord Moncrieff.
- “Residing” has no special or technical meaning but bears its natural and ordinary meaning as a word in common use in the English language, see Viscount Cave LC in Levene v Inland Revenue Commissioners [1928] AC 217 –

“The word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as meaning ‘to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place’. [Subject to any statutory modification, this definition] may be accepted as an accurate indication of the meaning of the word ‘reside’.”

In the Administration’s view, with specific regard to the meaning of “has resided in Hong Kong”, it is worth noting that, in the passage from Levene cited above, Viscount Cave LC added that –

“In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.”

Accordingly, while each case is dependent on its own facts, it appears that absences on travel or business would not necessarily deprive an applicant of the status of having “resided in Hong Kong”.

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Extract from minutes of meeting on 31 March 2002

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Meaning of "has resided in Hong Kong" in proposed section 27(2)

21. Members noted the case law relevant to the expression "has resided in Hong Kong" as quoted in the Administration's letter. In short, the interpretation was that while each case was dependent on its own facts, it appeared that absences on travel or business would not necessarily deprive an applicant of the status of having "resided in Hong Kong".

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