

**For information
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LEGCO PANEL ON WELFARE SERVICES

Subcommittee to study issues relating to the Comprehensive Social Security Assistance and Social Security Allowance Schemes

Compliance of the seven-year residence requirements for Comprehensive Social Security Assistance and Social Security Allowance with the Basic Law

Purpose

This paper provides additional information regarding the legality of the revised residence requirement for Comprehensive Social Security Assistance (CSSA) and Social Security Allowance (SSA), (together referred to in this paper as “social security benefits”) as requested by Members at the meeting of the Sub-committee held on 2 February 2004. It follows on from Paper No. CB(2) 1063/03-04(01) which addressed the right to social welfare under the Basic Law and set out the justification for the new requirement by reference to the report of the Task Force on Population Policy which was released on 26 February 2003.

Members' Concern

2. Members requested an explanation of how the change in policy, including the new residence requirement for social security benefits, complied with Article 36 and 39 of the Basic Law.

The Administration's Position

3. The Administration has been advised by the Department of Justice that the imposition of the new residence requirement as one of the eligibility criteria for social security benefits is in conformity with the human rights provisions of the Basic Law.

The Basic Law

4. Article 36 of the Basic Law provides:

“ Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law.”

5. Article 39 of the Basic Law provides:

“ 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.”

6. Article 145 of the Basic Law further provides:

“ On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.”

The Right to Social Welfare under the Basic Law

7. Article 36 guarantees that Hong Kong residents shall have the right to “social welfare” “in accordance with law”. It does not, of itself, guarantee any particular type or level of social welfare protection. Nor is it considered to require

that all social welfare benefits or services are provided by law or protected by law. The function of the expression “in accordance with law” in Article 36 is to define or qualify the right to social welfare.

8. In order to ascertain what particular welfare benefits or services are guaranteed by Article 36, one must therefore see what welfare benefits or services are “in accordance with law”. This approach follows the interpretation by the Court of Appeal of Article 26 of the Basic Law, which contains the phrase “shall have the right to [a fundamental right] in accordance with law”¹. The right under Article 36 has to be considered in the light of the statutory provisions and of other articles of the Basic Law which relate to the provision of social welfare benefits.

9. Although some social welfare services and benefits are provided or regulated under statutory provisions, there is no legislation which provides a statutory right to social security benefits. Instead, those benefits are, and have been, provided by administrative measures and policies on the basis of the previous social welfare system.

10. As there is no statute law which makes provision for social security benefits, it may be argued that the benefits are not provided by law and are therefore not “in accordance with law”. On that basis, the social security benefits would not be subject to the protection of Article 36, and the revised residence requirement could not be a restriction on a protected right. The requirement would therefore be consistent with Article 36.

11. However, the CFA has indicated on a number of occasions that a generous interpretation is to be applied in interpreting the scope of rights in Chapter III of the Basic Law. Adopting such an approach, the expression “in accordance with law” could be understood to mean that the benefits did not need to be provided by statute as long as they had some basis in domestic law, or were consistent with law. The effect of such an interpretation would be that the right to social welfare guaranteed by Article 36 would apply to a wider range of benefits.

12. There is no doubt that the social security benefits have a basis in domestic law, and can be claimed consistently with the law. Article 145 provides

¹ See Chan Wah & Another v Hang Hau Rural Committee and Others 1 HKLRD 411 (CA) 2000 at page 437. As stated in the judgment of Chan CJHK (as he then was) in Chan Wah, the right under Article 26 of the Basic Law to take part in elections “in accordance with law” is interpreted as meaning that the right guaranteed by that Article is subject to its being “provided by law”. In that case, the governing criteria imposed by law were contained in Article 21(a) and (b) of the HKBOR and the electoral arrangements had to comply with such requirements as set out in Article 21(a) and (b), being a statutory provision in force in Hong Kong.

that the government “on the basis of the previous social welfare system”, shall “on its own formulate policies on the development and improvement of this system in the light of the economic conditions and social needs”. Since the social security benefits are provided in accordance with the system required by Article 145², they may be regarded as being “in accordance with law”.

13. The effect of such an interpretation is that Article 36 guarantees the right to social security benefits provided on the basis of the previous system, as developed and improved by the HKSARG in the light of the economic conditions and social needs.

14. If the social security benefits, provided under the administrative scheme, are “in accordance with law”, variations in those benefits that are consistent with Article 145 and other Basic Law and statutory provisions must also be regarded as “in accordance with law”. The revised residence requirement would therefore be consistent with Article 36 even where this interpretation is adopted.

Restrictions on rights and freedoms

15. Turning to Article 39 of the Basic Law, the question is whether a revised residence requirement, made under the administrative scheme for social security benefits, -

- (1) amounts to a “restriction” on the “rights and freedoms” enjoyed by Hong Kong residents; and, if so,
- (2) whether the restriction is “prescribed by law”.

16. It must be borne in mind that changes in the residence requirement were part and parcel of the previous system³. If there is a right under Article 36, and Hong Kong residents have enjoyed “rights”, to social security benefits on the basis of the previous system (see paragraphs 12 and 13 above), that a variation of the benefits made in accordance with the previous system is not a restriction on that right. After

² See *AECS v CE* [1998] 1 HKLRD 615. The CFI construed the phrase “in accordance with legal procedures” in BL48(7) (which empowers the CE to “appoint or remove holders of public office in accordance with legal procedures”) in the light of BL103 (which maintains the previous public service system). The CFI comes to the conclusion (at p.662J) that the expression “in accordance with legal procedures” should mean in accordance with such procedures as are lawfully established to maintain Hong Kong’s previous system of recruitment and discipline for the public service.)

³ The residence criterion under the previous system was first established in 1948 as ten years and reduced in 1959 to five years and subsequently to one year in 1971.

the variation, there remains the same right to social security benefits on the basis of the previous system.

17. Even if (for the sake of argument) it is assumed that there is such a restriction, a variation that is “in accordance with law” (see paragraph 14 above) may, in this context, be considered to be “prescribed by law” for the purposes of Article 39. The context is considered important since we are not here concerned with a civil or political right (such as freedom of expression), nor with an interference with such a right. As is explained in paragraphs 19 and 20 below, the jurisprudence relating to restrictions on civil and political rights may not be applicable to variations in the levels of social welfare benefits that are made available. Moreover, it is significant to note that the phrases “prescribed by law” (in BL39(2)) and “in accordance with law” (in BL36) are expressed in a similar way in the corresponding Chinese texts, i.e. “依法規定” (BL39(2)) and “依法” (BL36). (The corresponding Chinese term for “in accordance with law” in BL 105(1) is also “依法”.) Arguably the phrase “prescribed by law” may, in the light of the English translation in BL36, be translated as “provided in accordance with law”.

18. If, following the argument in paragraph 10 above, social security benefits are not protected under Article 36 (because they are not in accordance with law), it can additionally be argued that Hong Kong residents have not enjoyed “rights” to them, for the purposes of Article 39.

International Guarantees

19. The right to social welfare is not a right guaranteed under the International Covenant on Civil and Political Rights (ICCPR). The right to social security is guaranteed under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

“The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.”

In contrast to the ICCPR, which is implemented in the Hong Kong SAR by the Hong Kong Bill of Rights Ordinance, ICESCR is not applied comprehensively by domestic legislation. Care must be taken, in drawing from the jurisprudence in respect of ICCPR rights and equivalent international jurisprudence, that proper account is taken of the significant differences in the meaning of terms used in limitation clauses under

ICESCR⁴. When dealing with ICESCR type rights, the test for what limitations may be lawfully applied should be ascertained by reference to ICESCR.

20. The question whether the revised residence requirement is consistent with the ICESCR as applied to Hong Kong only arises, as a matter of domestic law, if that requirement is a restriction on rights and freedoms enjoyed by Hong Kong residents. For the reasons given in paragraphs 16 and 18 above, this is not considered to be the case.

21. In any case, as has previously been explained, the new requirement is consistent with the requirements of ICESCR. This issue is explained and discussed in a separate paper.

**Health, Welfare and Food Bureau/ Department of Justice
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⁴ See Nowak p.208-2 and Permissible Limitation on Rights Alexander Charles Kiss, in Henkin, The International Bill of Rights, p.291-292 and 0.304-305.