For information

LegCo Panel on Security

Calculation of Period of Imprisonment as Ordinary Residence

Purpose

This paper provides information on whether the period during which a person is serving a sentence in a penal institution in Hong Kong would be counted as ordinary residence in Hong Kong when determining the person's permanent resident status in Hong Kong.

Details

Relevant Legislation

2. Article 24(2) of the Basic Law (BL24(2)) defines those persons who are the permanent residents of the Hong Kong Special Administrative Region. Schedule 1 to the Immigration Ordinance (Cap. 115) implements the provisions of BL24(2). Paragraph 2 of Schedule 1 provides that a person who is within one of the specified categories is a permanent resident of Hong Kong. Ordinary residence is referred to in the following categories:

> "… (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.
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> … (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."

3. Section 2(4)(b) of the Immigration Ordinance provides that "a person shall not be treated as ordinarily resident in Hong Kong … during any period … of imprisonment or detention pursuant to the sentence or order of any court".

Relevant Court Decisions

4. The Court of Final Appeal (CFA) in *Fateh Muhammad v Commissioner of Registration and Registration of Persons Tribunal* [2001] 2 HKLRD 659 unanimously upheld the constitutionality of section 2(4)(b) of the Immigration Ordinance. The CFA found that being in prison or a training or detention centre in Hong Kong pursuant to a criminal conviction which has never been quashed and a sentence or order which has never been set aside does not constitute ordinary residence for the purpose of determining permanent resident status and right of abode.

5. The CFA left open whether one day's imprisonment would, on the basis of the *de minimis* principle, interrupt the continuity of ordinary residence for the purposes of BL24(2)(4) and section 2(4)(b) of the Immigration Ordinance.

6. In *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550, the CFA was asked to consider a two-week period as *de minimis*. The CFA unanimously held that it was not. Specifically, Mr Justice Riberio indicated that the exclusion of periods of imprisonment from the ordinary and natural meaning of the words "ordinary residence" in BL24(2)(4) did not depend on the duration of such periods being substantial or on their amounting to a substantial fraction of the seven year qualifying period. He indicated that whilst he would be prepared to accept that the *de minimis* principle may apply, for instance, where a person, in a fit of temper, has acted in contempt of court and is sent down to the cells for a few hours or even overnight for his temper to cool and his contempt to be purged, he would not be disposed to regard imprisonment of any greater substance as capable of engaging the *de minimis* principle. The Chief Justice and two other judges in the CFA concurred with his judgment.

Security Bureau
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