

Responses of the list of issues raised by the Senior Assistant Legal Adviser (“List of Issues”) in the Second Bills Committee Meeting of the Domicile Bill

1. (a)

There has been no judicial consideration of “lawful presence” in the context of domicile. The term “lawful presence” appears in section 32(2)(a) of the Public Order Ordinance (Cap. 245) which deals with the offence of carrying of offensive weapons during curfew. Section 32(2)(a) provides that –

“A person shall not be convicted of an offence under this section if he proves to the satisfaction of the court that he carried or had in his possession the offensive weapon-

(a) solely for domestic or defensive purposes within enclosed premises which he was lawfully occupying or in which he was **lawfully present**; or ...”
(emphasis added)

The term “lawful presence” is not defined in Cap. 245 and is used in a different context from clause 6(3) of the Bill.

The Administration has already pointed out in paragraph 3 of its reply of 24 April 2007 (the “Reply”): “[section 2(4) of Cap 115] only concerns whether a person is ‘ordinarily resident’, not whether his presence in Hong Kong is lawful.” Nonetheless, it is, as mentioned in the Reply, arguable by analogy that if a person has unlawfully landed in Hong Kong or breached any conditions of stay imposed under Cap. 115 and is then imprisoned, his presence in Hong Kong during his imprisonment cannot be lawful for the specific purpose of acquiring a Hong Kong domicile under the Bill.

(b) and (c)

In paragraph 4 of the Reply, the Administration stated, “it must be emphasised that only the courts can definitively say whether time spent during imprisonment would be regarded as lawful presence under the Bill, unless there is an unequivocal provision to this effect.”

A court order of imprisoning an illegal immigrant, who has committed an offence in Hong Kong, is, of course, made according to the law. This does not necessarily turn the illegal presence of

the illegal immigrant or his imprisonment according to the court order into lawful presence for a specific purpose under a specific statute, i.e. for the purpose of obtaining a Hong Kong domicile under the Bill. The court will look at the spirit of clause 6 of the Bill in requiring a person's presence to be lawful as set out in the Law Reform Commission's Report on the Rules for determining domicile ("the Report") (para. 4.100):

"... not requiring the requisite presence to be lawful, ... could render the law confusing and uncertain. ... This would achieve certainty, and consistency with some other common law jurisdictions...."

We are unaware of what equitable principle that will be violated (as referred to in paragraph 1(b) of the List of Issues) in the case where a person is coerced to stay by imprisonment in any place is therefore regarded as unlawfully present in that place if he is unlawful present in that place prior to his imprisonment. Where an illegal immigrant is sentenced to prison for an immigration offence or any other offence, the effect is to deprive him of liberty "by a lawful order of the court", rather than giving him permission to stay in Hong Kong. It does not mean that the judge purports to change an illegal immigrant's immigration status when sentencing him.

(d) *Dicey and Morris* (14th ed, 2006, para. 6-059) states:

"A prisoner normally retains during imprisonment the domicile which he had at its commencement. Such a person, even if he can be considered to reside where he is imprisoned, is unlikely to intend to reside there permanently or indefinitely. If a prisoner does form such an intention, he acquires a domicile of choice there."

According to *Dicey and Morris*, it seems that a prisoner can form the required intention, even though he is "unlikely to intend to reside there permanently or indefinitely".

2. The phrase "legitimation of his wrongs" does not mean that the foreign prisoner in question is gaining some benefits by establishing lawful presence or obtaining a Hong Kong domicile. The phrase only means that the court will not, simply because he is imprisoned according to a court order, necessarily turn an illegal

immigrant's unlawful presence, into lawful presence for a specific purpose under a specific statute, i.e. for the purpose of clause 6 of the Bill.

3. In paragraph 3 of the List of Issues, "it would be **much** more often and **much** more likely that such questions may arise for the legal advisor to a **prisoner...**". (emphasis added)

It must be pointed out that the "prisoner" in question is not just any prisoner, but a person who "has **unlawfully landed in Hong Kong or has breached any conditions of stay** and is then **imprisoned for committing an offence**, and he **intends to make his home in Hong Kong during the imprisonment**", despite his knowledge "**that he will, after release, immediately be sent back to the place he comes from**" as highlighted in paragraph 4 of the Reply.

Relevant to Members' question on the domicile of a prisoner, is the New South Wales case of Solomon v Solomon (1912) 29WN(NSW) 68. There a man on his way to be deported committed an offence of rape and was imprisoned. The New South Wales Court held it had no jurisdiction to grant a divorce to his wife as the man, being forbidden by law to be in New South Wales, had not acquired a domicile there. There, the imprisonment of an individual liable to be deported did not seem to make his residence lawful.

4. The court will exercise its discretion under clause 6(3) only in "exceptional circumstances" where there would be injustice. The purpose of this sub-clause is to enable the court to relax the "lawful presence" requirement in deserving cases. It is difficult to foretell under what circumstances the court will invoke clause 6(3). Where the court does exercise its discretion in deviating from the "lawful presence" requirement, the person in question will be domiciled in Hong Kong.

In any event, Clause 3(2) is worded in the **negative**; it does **not** give any individual any **additional** domicile which the individual does not otherwise have.

Please also see the reply to paragraph 7 of the List of Issues below.

5. The reason for replacing the required act "residence" with "presence" for the purpose of acquiring a domicile of choice is because

the latter can best bring out the essence of the act required. Under the existing law, the required act "residence" means "very little more than physical presence".¹ It means physical presence as an inhabitant of the country concerned², and excludes those who are present "casually or as a traveller"³. The word "residence", however, gives the impression of connoting something more than physical presence. This is precisely what the South African Law Commission had in mind in recommending "presence":

*"Residence does not have the technical meaning ascribed thereto in other branches of the law: 'Residence here simply means lawful physical presence.' It could therefore be of short duration and one could say that mere presence is sufficient to comply with the factum requirement."*⁴

As this is not meant to change the substance of the law, the relevant existing common law would presumably still be of relevance. This, of course, depends on the court's ultimate determination.

Under the current law, the required intention for acquiring a domicile of choice is the intention to reside in the country concerned permanently or indefinitely. According to some older authorities, there must be an intention to reside permanently in a place before a person can acquire a new domicile.⁵ This means that even a vague possibility of moving to another place would prevent a person from acquiring a domicile. The reason for changing the required intention to "intending to make a home in the country concerned indefinitely" is because the concept of domicile is about a person's home. The proposal better captures the essence of the concept, can be more readily understood and is more straightforward to operate. In addition, the "indefinitely" criterion in the recommendation is more realistic.

As this change is meant to better capture the essence of the concept of domicile, the relevant existing common law would presumably still be of relevance, except the older cases on the "permanently" requirement. Once again, this depends on the court's determination.

¹ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-034.

² *IRC v Duchess of Portland* [1982] Ch 314, at 318-9.

³ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-034.

⁴ *Report on Domicile*, Project 60, March 1990, at para 3.43.

⁵ *Bell v Kennedy* (1868) LR 1 Sc & Div 307, 321 *per* Lord Westbury; at 314 *per* Lord Cairns; and *Douglas v Douglas* (1871) LR 12 Eq 617, at 645 *per* Wickens V-C; cited, with approval, by Lord Macnaghten in *Winans v Attorney-General* [1904] AC 287, at 291-2.

6. In saying “one of the factors to be considered by the Hong Kong Courts” in clause 7, the Administration does not suggest that there are additional factors to be considered. We only emphasise that a person is not necessarily prevented from obtaining a domicile in another jurisdiction simply because his presence there is unlawful.

Other issues

Clause 4

7. The general rule is that a person can only have one domicile.⁶ There have been suggestions that a person may have different domiciles for different purposes.⁷ A less controversial situation is where a person may, by virtue of a statutory provision for a particular purpose, be domiciled in a federal or composite state itself, as opposed to one of the particular jurisdictions within the state. For example, the Family Law Act 1975 in Australia provides that divorce proceedings may be instituted if either party to the marriage "is domiciled in Australia". For the purpose of divorce jurisdiction, a party to the marriage is domiciled in the state, Australia, but for other purposes, he is domiciled in one of the jurisdictions constituting Australia, such as Queensland or New South Wales. Similarly, the phrase "domiciled in the United Kingdom" also appears in a number of Acts in the United Kingdom.⁸ It is believed that English courts may hold that, for the purposes of such Acts, a person could be domiciled in the United Kingdom, as opposed to England or Scotland.⁹ According to *Dicey and Morris on Conflict of Laws*, this would be a welcome relaxation of the old idea that a person can only have one domicile for all purposes.¹⁰

As set out in para. 4.190 of the LRC Report, Hong Kong courts may be called upon to determine the domicile of people from diverse geographical backgrounds as in the above examples. This is

⁶ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-014. Udny v Udny (1869) LR 1 Sc & Div 441, at 448.

⁷ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-015. Att Gen v Rowe (1862) 1 H & C 31, at 45.

⁸ For example, sections 65(4) and 192(1) of the Income and Corporation Taxes Act 1988; and sections 18 and 48 of the Inheritance Tax Act 1984.

⁹ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-015.

¹⁰ *Dicey and Morris on the Conflict of Laws*, 14th Ed, Sweet and Maxwell, 2006 at para 6-015.

especially the case where section 56 of the Matrimonial Causes Ordinance (Cap. 179) recognises a foreign divorce or legal separation if either spouse was domiciled in that foreign country when instituting the proceedings there. Thus, it would be desirable for the Bill to allow a person to be domiciled in different jurisdictions for different purposes at the same time in a federal or composite state as illustrated in the above examples.

Clause 3(2) is worded in the **negative**; it does **not** give any individual any **additional** domicile which the individual does not otherwise have. Under clause 4(3) and (4), a child's domicile is dependent on a parent's domicile under certain circumstances. However, clause 4(3) and (4) is for determining a **child's** domicile. It should **not** be read as creating for a **parent** a new domicile. **Neither** clause 4(3) and (4) **nor** clause 3(2) has the effect of **giving** a parent an **additional** domicile other than that he or she already has.

Clause 6

8. A person's domicile can only be definitively determined by the court where parties to the proceedings can adduce evidence to prove their own assertions. Public authorities, not being parties to the proceedings, will not assume the role to prove or disprove other people's assertions.

While a person may assert to be domiciled in a particular jurisdiction without the court's determination and hence nobody can then adduce evidence to prove otherwise, his assertion is not conclusive as to where he is domiciled.

Clause 8

9. It was stated in paragraph 9 of the List of Issues that, "... his family and other connections are still with his former home. If he then becomes incapacitated in that foreign country, his domicile may well change back from that of the foreign country to that of his former home. ...". It seems that the assumption is that "his family and other connections are still with his former home", even though that person has moved to another jurisdiction with the intention of setting up his new home there. Under Clause 8 of the Bill, the court will look at all the

circumstances before deciding with which jurisdiction a disabled adult is most closely connected, apart from just where his family and friends are. It all depends on the facts, and it is difficult to foretell the court's determination without knowing the facts.

Upon restoration of his ability, the person in the example can acquire a domicile in any place by having his presence there and intending to make a home there indefinitely in accordance with clause 5.

10. In applying the closest connection test, the court would consider all the circumstances of the case, including whether a person's presence in the relevant jurisdiction is lawful or not.

11. Each of clauses 4(1), 8(1) and 10 lays down a closest connection test. Pursuant to the LRC Report's recommendation, the child's intention is one of the relevant circumstances for determining the country or territory with which a child is most closely connected, hence Clause 4(2). On the other hand, no specific guidance has been recommended for determining the country or territory with which an adult under disability, or an adult in a country comprising 2 or more territories, is most closely connected. Hence, no provision similar to clause 4(2) is made in relation to clause 8(1) and 10. Naturally, a court will take into account all relevant circumstances in deciding the country or territory of closest connection in cases of clauses 8(1) and 10.

Clause 10

12. Clause 10 would only apply where a person has not made up his mind as to where to have his home indefinitely in a federal or composite state (Clause 10(b)). If a person has intended to make his home in Hong Kong indefinitely, his frequent trips to the Mainland would not change his domicile. Clause 5, instead of clause 10, is applied for determining his domicile.

13. In applying the closest connection test, the court would consider all the circumstances of the case, including whether a person's presence in the relevant jurisdiction is lawful or not.

Clause 11

14. All disputes of facts under the Bill are to be proved on a balance of probabilities.

Clause 12 and 13

15. According to clause 13(1), a person's domicile on or after the commencement date of the Ordinance is to be determined as if the Ordinance had always been in force. In other words, the person's domicile will be determined in accordance with the new law, i.e. the Ordinance. In the example set out in paragraph 15 of the List of Issues, the "domicile that he had immediately before he becomes an adult" will be determined according to the new law because the Ordinance is treated as having been always in force

Suppose a particular person turns 18 on 1 January 2008 and the Domicile Ordinance (if enacted) commences on the same date. Suppose it is necessary to determine the domicile of the person on 1 January 2008. A person's domicile on the commencement date is by virtue of clause 13 to be determined "as if [the] Ordinance had always been in force". That means the determination of a person's domicile as at 1 January 2008 is to be based on the new rules as if the new rules had always been the law. In other words, old concepts like domicile of origin and domicile of dependency, are irrelevant to the determination of a person's domicile after the commencement date. Clause 5(1), forming part of the new rules, does refer to the domicile of the person immediately before the person becoming an adult (which is 31 December 2007 i.e., before the commencement date). However, the new rules having been already chosen at the outset the person's domicile immediately before becoming an adult will be determined as if the new rules had been in force, i.e. pursuant to the closest connection test under clause 4.

16. The phrase "as if this Ordinance had always been in force" makes it clear that in determining a person's domicile, the Ordinance is treated as having been in force even before its commencement, such as the example in paragraph 15.

As illustrated in the answer to paragraph 15, the determination of a post-commencement domicile may involve the determination of a pre-commencement domicile. The phrase "as if this

Ordinance had always been in force" clearly enables the new rules to apply in both determinations. If the phrase "in accordance with this Ordinance" is used instead, there may be the question as to whether in the example referred to in paragraph 15, one has to, as an intermediate step, apply the old rules for determining the domicile on 31 December 2007. (even though the new rules should be applied for determining domicile on 1 January 2008).

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